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THOMPSON *v.* STATE.

Opinion delivered April 23, 1928.

Shaver, Shaver & Williams, for appellant.

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

MEHAFFY, J. The appellant was indicted by the grand jury of Little River County. The first count in

the indictment charges him with burglary and the second count charges him with grand larceny. He was convicted of burglary, and his punishment fixed at two years in the penitentiary. He was acquitted of the crime of grand larceny.

The appellant filed motion in arrest of judgment, which was overruled, exceptions saved, and he also filed a motion for a new trial, which was overruled, and exceptions saved; and he prosecutes this appeal to reverse said judgment.

George Byers testified that he lives at Wilton, in Little River County, and runs a store and restaurant. That his store was burglarized between the first and fifteenth of September, 1927; about $15 in money was taken from the cash drawer. He saw the money in the cash drawer last, before he left the house, about 7 o'clock in the morning, that being the morning that the store was burglarized. Hessie Lyons was in the store when he last saw the money. She had come in to buy some articles, and, going out, made mention of the money. She was in there about 15 or 20 minutes. Witness left the store, locking it, and went over to a lady's house, and was gone about one hour. When he got back there was no money in the store. The store is in a building about 50 feet long, and there is a door at each end, and one in the west corner. In the west corner is a little vestibule, about 8 feet square, covered over, and a hole in the top, about 24 inches. The hole was covered over, all but one edge, with plank. Witness did not notice about the hole until after the sheriff brought David back. The doors were locked.

On cross-examination he testified that the hole was about five feet above the floor. That he went to the store about 6 o'clock that morning, and when he left the store there was about $15 in the cash drawer. There was a $5 bill, and $10 more in silver. Does not remember whether he left it in there all night or not, but knows it was there in the morning. The Lyons woman was

around behind the counter, waiting on herself. After she left that morning witness went to see a lady about an hour. Her name was Louis. Witness is 73 or 75 years old. He is not sure about how much he had there, but he was gone about an hour, and when he came back he did not have any money in the cash drawer. The doors were locked like witness left them, and the hole was just like it was when he left. It was about 7 o'clock in the morning when the Lyons woman was in the store, and old man Lihu was sitting on the store steps when witness came back. Witness called officers that morning, and they arrested David Still and defendant. Witness was convicted in Little River County and sent to the penitentiary for one year for making mash.

On redirect examination witness stated that there was a rock that stayed in the vestibule, and had been there so long that it had made a sign where it had been. It had been turned up over there, and was lying on its end, and, after it had been placed on its end, it would have been possible for a man of the defendant's height to reach the hole. The rock had been moved. Witness does not remember the amount of the money, but knows it was over $10. He had never been convicted of anything except making mash. Did not see W. L. Hughes, weighing about 175 pounds, trying to crawl through this hole, and could not get through it. The money was gone, and that was the only hole witness could find. The store is in a hall, on a public road.

Hessie Lyons testified that she lived in Wilton, and is acquainted with George Byers, who runs a little store. That she was in his store about 6 o'clock the morning that it is alleged the store was burglarized. George Byers was in the store. He told witness to wait on herself, which she did. She saw the money in there, but did not know how much. Saw a bill and some silver, but did not know whether it was a $1 bill or a $20 bill. The drawer was open as witness went by, and Byers was in there while witness was. He was right by the cash

drawer. Witness did not see David Still that morning when she was there, nor Lemous Thompson.

David Still testified that he lives at Wilton, and is acquainted with George Byers. Knows where the store is located, and knows the defendant. Remembers the time the store was alleged to have been burglarized, and that morning, about 7 o'clock, he saw the defendant. Saw him coming out of the hall. Witness was coming around from the barber shop, and got about middle ways of the hall, and heard somebody call him. He looked back, and thought it was old man Byers. When he got to the side door he saw Lemous coming out of the hall. He was slipping down the side of the wall from the top there. Some planks were lying across the loft. About half of him was out of the hole when witness saw him. He didn't say anything to witness then. Witness told him, "There comes Mr. Byers, coming across the road," and he slipped in the corner. Witness went back to Mr. Cook's in about ten minutes, and about five or ten minutes later Lemous came to the house. He beat witness over there. Witness did not have any conversation with him after he got to the house, but at the store somebody called him, and it was Lemous.

The vestibule is four feet from the corner. You go into the vestibule from the outside, and the hole is in the top of it. Lemous and witness make ties together. They were fixing to go to work together that morning. Both of them were arrested. Witness had known George Byers all of his life. He testified that he did not tell Bob Gantt that he did not see Lemous Thompson coming out of the hole in the building. Lemous and witness had been making ties together about two weeks, but had worked together before that time. They lived close together, and ran around together. Does not know how big the hole is in the building, but knows it is there, and saw defendant coming out of it. The first person witness told about this was his father and Mr. Sanderson, two days after he had been arrested. He was kept in jail

four days. Witness did not have any money on him when arrested, and Lemous had a dime. The arrest was about 40 minutes after the burglary. Witness told Mr. Gantt that he saw Lemous coming out of the hole.

Francis Young testified that he knew Lemous Thompson. Remembers the day the store was said to be burglarized. Lives across the street, and from his home you cannot see the vestibule, and he did not see Lemous Thompson coming out of there that morning. Saw him coming from that way. He was leaving the corner, going north, coming from the south. The door is in the west part. That was about 7 o'clock, or a little after. Witness lives northeast of the hall, and he saw Lemous coming from the south from the hall. Saw Henry Lihu that morning, sitting on the steps, about 7 o'clock. Saw Lemous Thompson about 7 o'clock, and saw Mr. Byers about 7 o'clock.

Nancy Cook testified that she lived in Wilton, just across the street from George Byers. Knows the defendant; he came to her house the day the store was said to have been entered. It was about 7 o'clock in the morning. He stayed about 25 or 30 minutes, and then went on home. David Still and Lemous Thompson came to witness' house together. They stayed about 25 or 30 minutes, and were not there when arrested.

J. G. Sanderson testified that he was sheriff of Little River County; called to make an investigation when it was alleged George Byers' store had been burglarized. He examined the place on the side entrance to the building. The entrance was about as wide as from the railing to the wall. It was ceiled overhead, just plank placed across overhead, and that closed up the vestibule from the store. The ends of two or three planks were pushed loose or pushed aside. Does not know the size of the hole, but has had some experience with openings in the walls where people have gone through, and it is his opinion that a man the size of the defendant could have gone through that hole. The opening was about as high as the top of the window, and vestibule is planked over

the top. After getting through the hole they can drop into the store. The ends of a plank or two were loose. The planks are about 1x6. If two of them were loose, one could go through them. There were indications that the rock had been moved from one place over to the hole. The highest end was up. Standing on that, a man the size of the defendant could have reached the hole.

Lemous Thompson, the defendant, testified that he knew Byers, and that he never broke into the store. Knows David Still, and remembers the time the store is alleged to have been burglarized. Lives just below David Still's house with his father. He was making ties for Lee Duckett, and was working with David Still. The morning of the burglary defendant got up about 5:30 and went over to David Still's house, and Still and witness were going around the front of the store, and an old gentleman was out there and asked where Mr. Byers was. The old gentleman's name was Lihu. Witness and Still went over to Cook's house. Witness was arrested that morning. He and defendant were standing by old man Byers' hall. They had been together all morning. They were brought down and put in jail together, and bound over to the grand jury together. Witness had a dime when he was arrested. He did not talk to witness in jail, and has had nothing to do with him since this trouble. Defendant did not go into the vestibule of the store and crawl in the building and get $10 or $15 out of the cash drawer. It was not quite 7 o'oclock when Still and witness started across the hall. Witness had breakfast at home. His father was at home when he got there. He went over to Still's house. David Still went back of the hall somewhere, and defendant stood out there and talked to the old man. They then went over to Nancy Cook's house. Witness testified that he did not break into the store, and did not call David Still. Did not get any money out of the store, but was fined for shooting craps before this. He did not have any money to hide at Nancy Cook's house, and didn't use any of

that money to pay his fine. He worked and paid his fine. Before the burglary occurred he had paid his fine. His fine was $24.15, and he paid $15.15, and they put him in jail for the other $10, and he paid it. He did not get any of this money out of the store. It was paid before then. Did not leave Cook's house to go home, but went over to the hall. Was at Nancy Cook's house when Byers called David over there, and then they called the defendant. David was asked, in his presence, if he knew anything about the burglary, and he told him that he didn't know anything about it. He did not tell him that he saw defendant coming out of the hole. Mr. Sanderson asked if they came up there, and he said he didn't know anything about it.

Bob Gantt testified that he knows the defendant; is constable at Wilton; knows David Still, and remembers the time when the store was burglarized. David Still was riding with him in a wagon one morning after the burglary, and told witness that he did not see Lemous Thompson coming out of the building, or coming out of the hole in that building the morning the store was burglarized. He also told witness that he did not see him coming in the store or coming out. Witness asked Still how much money he got out of there, and he said they did not get any. Witness asked him if Lemous got enough to pay his fine, and he said no. He said that neither of them got any money. Witness then said they had better be rustling some money to pay their fines or they would have to go to jail. Still said that he did not go in there, and he knew Lemous did not.

Robert Thompson testified that he is the father of defendant. That he is working on the right-of-way. He remembers the morning that the store was robbed, and that his boy was home all night and had breakfast at home that morning. He ate his breakfast, took his dinner-bucket and put it on the table, and witness saw him going in David Still's house. That is about 30 or 40 steps from where witness lives. That was about 7 o'clock.

Witness has never talked to David Still about this since the boys were arrested.

Henry Lihu testified that he lives at Wilton; knows Mr. Byers, and knows Thompson and Still. He knows David's father, and remembers the time when the store was supposed to have been robbed. He was in there one night, and heard Mr. Byers and David's father talking. Did not know at that time that both David and Lemous were bound over to the grand jury.

Jim Sanderson, recalled, testified that he went to Wilton the morning the store is alleged to have been robbed, and arrested David Still and Lemous Thompson. David Still denied knowing anything about seeing anybody come or go in the building.

David Still, recalled, testified that he denied to Mr. Sanderson, when they were arrested, that he knew anything about the supposed burglary, but he later told him, in the presence of Mr. Finley, that he did know who was coming out of there.

Appellant insists, first, that the indictment in this case is drawn under § 2435 of Crawford & Moses' Digest, which section applies to the crimes of burglary and grand larceny where the two crimes are committed together. He insists that this section has never been repealed, and that it was necessary to charge that the crime was committed in the night time.

Section 2435 was the act providing for the punishment of burglary and grand larceny when committed together, as amended in December, 1874. Until act No. 67 of the Acts of 1921 was passed, burglary was committed only when the building was entered in the night time, but the statute now reads: "The crime of burglary shall be defined as follows: 'Burglary is the unlawful entering a house, tenement, railway car or other building, boat, vessel or water-craft, with the intent to commit a felony.' " Section 2, act 67, 1921.

When one enters a building of the character described, with the intent to commit a felony, he com-

mits the crime of burglary, whether the entry was in the night time or not.

Section 3, act 67, provides: "Whoever shall be convicted of burglary shall be imprisoned in the penitentiary for a period of not less than two nor more than seven years."

Section 3016 of Crawford & Moses' Digest provides, among other things, that the offenses of burglary and grand larceny may be charged in one indictment. And this statute was passed a long while after § 2435 was enacted.

Section 2435 simply provided that, when one committed burglary, that is, entered the house with the intent to commit a felony, and then and there committed a felony, he should be guilty of burglary and also of the felony that he committed. That part of the section which mentions the entry "in the night time" is in conflict with the subsequent statutes defining burglary, and is repealed by necessary implication. Burglary is committed now by entering a house or building, the kind described in the statute, with the intent to commit a felony. And the time of the unlawful entry is immaterial.

The charge in this indictment of burglary is a sufficient charge under our statute, and the question of whether one could be convicted of both burglary and grand larceny is immaterial in this particular case, because the defendant was acquitted of the charge of grand larceny.

Again, the statute referred to by appellant provides that, if the entry is with the intent to commit a felony or larceny, one is guilty of burglary. Under the present statute the word "larceny" is omitted, and if one enters the building with the intent to commit any felony he is guilty of burglary. But the entry must be with the intent to commit some felony. It is charged in this indictment that he entered with the intent to commit grand larceny, which is, under the statute, a felony. But, under § 3016 of Crawford & Moses' Digest, the offense of burglary and grand larceny may be charged in the same indictment.

The requisites of a good indictment are: "The indictment must be direct and certain as regards: First, the party charged; second, the offense charged; third, the county in which the offense was committed; fourth, the particular circumstances of the offense charged, where they are necessary to constitute a complete offense." C. & M. Digest, § 3012.

The indictment in the present case meets the requirements of the statute, and therefore is a good indictment, charging burglary as it is now defined, and also charging grand larceny in the same indictment. The first count in the indictment does not charge that defendant did steal, take and carry away $15 in money, but it charges that he unlawfully entered with the felonious intent to steal, take and carry away.

It is next insisted by appellant that the verdicts are inconsistent, and that the court erred in rendering judgments thereon. The verdicts are not inconsistent, for the reason that one might enter a building with the intent to commit a felony, and the crime of burglary would be complete, although he might not commit any felony. He might enter for the purpose of stealing money and be unable to find the money, or might fail to commit the felony intended for any other reason. Still, if he entered with the intention of committing grand larceny or any felony, the crime of burglary would be complete. He could therefore be guilty of burglary and not be guilty of grand larceny or of any other felony. The crime of burglary is complete when he enters the building with the intent to commit a felony, and it is wholly immaterial whether he actually commits the felony.

The appellant is in error in stating that the grand larceny, set out in count one of the indictment, is identical with the description in count two. The difference is that in count one it is alleged that he entered the building with the intent to commit larceny. The reading of the indictment is, "with felonious intent to commit a known felony, to-wit, grand larceny, unlawfully, willfully and feloniously to steal, take and carry away," etc. And

the charge in the second count is that he unlawfully, willfully and feloniously did steal, take and carry away.

Appellant calls attention to the case of *Starchman* v. *State,* 62 Ark. 542, 36 S. W. 940. In that case the court said: "But, having made allegations descriptive of the property and of the offense, there must, in order to convict, be some proof tending to support them." The court goes on to say in that case that the evidence to support the allegation that the breaking and entering took place in the night time was very weak. So the proof may be weak in this case in showing that the intention was to steal money. It was only necessary to charge that appellant entered the house with the intent to commit a felony. But the question of whether he entered to steal the money or personal property of the owner of a store was a question of fact to be submitted to the jury.

Appellant calls attention also to the case of *Value* v. *State,* 84 Ark. 286, 105 S. W. 361, 13 Ann. Cas. 308. In that case it is held that it was unnecessary to set forth the particular description of the money. But, having alleged the kind of money, it was necessary to prove it.

The next case referred to by appellant is that of *Carleton* v. *State,* 129 Ark. 363, 196 S. W. 124, and it holds that, when a particular kind of intoxicating spirits is alleged, it becomes descriptive of the offense and must be proved.

It is not necessary, as contended by appellant, that the State show, not only that the defendant entered the building, but that he did steal, take and carry away $15 gold, silver and paper money, before he could be convicted of burglary. The State did not charge, in the first count in the indictment, that he did steal, but it simply charged that he entered for the purpose or with the intent to steal. The charge of burglary met the requirements of the statute, and it was not necessary to prove that he stole or that he committed larceny, but necessary only to show that he entered with the intent to commit a felony.

Appellant next insists that instruction No. 3 was erroneous, and should not have been given. It is as follows: "Before you can convict the defendant of burglary, you must find from the evidence, beyond a reasonable doubt, that the defendant entered a house or building, as alleged in the indictment, with the intent to commit larceny of personal property of a greater value than $10."

The jury could not have been misled by this. All the personal property mentioned was the money. There was no contention that anything else had been stolen or that there was any intention to steal anything but the money. The proof shows that, when the owner of the store left, the money, about $15, was in the store, and when he returned it was gone. The crime of burglary is committed when one enters the building with the intent to commit a felony, and it was only necessary to charge that, and to state that he entered to commit a felony, to-wit, grand larceny. And whether it was necessary for the proof to show that the felony intended to be committed was to steal the money is immaterial in this case, because there was no evidence and no suggestion that there was any intention to steal anything but the $15, and the jury therefore could not have speculated about what he entered for. The proof showed that appellant entered the building, and it also showed that the money was gone, and they were therefore justified, possibly not in reaching the conclusion that appellant stole the money, but certainly in reaching the conclusion that he entered with the intention of stealing it.

Defendant complains that the court erred in its refusal to give its instruction number 11, requested by him. This instruction was fully covered, but this instruction, requested by appellant himself, states that the State must prove that he broke into and entered the house with the intent and for the purpose of stealing property of George Byers to the amount of more than $10. So it appears that both parties, the State and the appellant, took the same view of this matter, that is, that

the instruction which told the jury that the State must prove that he entered with the intention of stealing personal property of the value of more than $10 was a correct statement of the law to the jury. Evidently they thought it was correct, because it would not be grand larceny unless the value was more than $10. It would make no difference whether it was money or other personal property.

The instructions as a whole fully and fairly stated the law to the jury, and the evidence is sufficient to justify the verdict. The case is therefore affirmed.

BAKER *v.* STATE.

Opinion delivered April 23, 1928.

G. C. Carter and *Dave Partain,* for appellant.

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

McHaney, J. This is a petition for a writ of certiorari to the Franklin Circuit Court, Ozark District, praying that the judgment of conviction against appellant upon a charge of contempt be certified up to this court and quashed. Copy of the proceedings in the circuit court has been filed with the petition.

Appellant had been charged with and convicted of unlawfully possessing liquor, for which he had paid a fine. He was taken before the grand jury to be examined regarding his knowledge of violations of the liquor laws, and was there asked the following questions: "1. State to whom the liquor belonged which was found in your store, and for which you paid a fine for possessing. 2. State who brought the liquor into your store." Appellant refused to answer such questions, and was taken before the court, and admonished by the court that he should answer same. He was thereupon taken before the grand jury again, but was advised by his attorney that he did not have to answer them, because in violation of his constitutional rights. He refused to answer the questions to the grand jury the second time, for the reason that he had been advised by his counsel that he was not required to do so, in that his answers would tend to incriminate himself. He was then again taken before the court, and admonished by the court that he would be required to answer the questions. Whereupon he told the court that he was acting under the advice of his counsel, and that he would decline to answer such questions. The court then ordered him incarcerated in the jail until he agreed to go before the grand jury and answer such questions. He was placed in jail, where he remained five days, and, on the morning before the grand jury adjourned, he was again brought into court by the sheriff, where the court propounded the same questions to appellant, and he was again advised in open court by his counsel not to answer said questions. The attorney notified the court that he had so advised him, whereupon the court sentenced him to seven months

imprisonment in the Franklin County jail, and entered a judgment to this effect.

We are asked to quash this judgment on the ground that the court was without authority, under the law, to require the defendant to answer such questions so propounded to him; but that, if he be mistaken in this fact, still the appellant is not guilty of contempt of court, in that he did not intend to be, but was acting solely upon the advice of counsel in refusing to answer such questions, whose advice he thought to be correct, and upon which he thought he could rely.

Section 6178, C. & M. Digest, reads as follows: "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."

In *State* v. *Roberts,* 148 Ark. 328, 230 S. W. 15, we said:

"Under our statutes the grand jury has general inquisitorial powers, without being confined to any particular matters submitted for investigation, and, according to the allegations of the complaint (indictment) in this case, the grand jury was pursuing such investigations in propounding the inquiry to the defendant. The question propounded might or might not have elicited information incriminating the defendant himself. But he could not refuse to answer on that ground, for the reason that the statute protects him from the use of his own testimony in the prosecution of a charge against himself."

The above language was cited with approval in *Warren* v. *State,* 153 Ark. 497, 241 S. W. 15, and referring to the statute now under consideration, 6178, this court said:

"Under the above statute, the appellant could not refuse to answer questions concerning the violation of the liquor law during the year 1921, giving as his reason

for such refusal that the answers to the questions propounded to him would show that he himself had violated the liquor law during that year. The statute above quoted gives him complete immunity from prosecution for any offenses in violation of the liquor law which his own testimony might disclose."

It will be noted that the language of the above section is "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." In this respect it differs from § 3122 of the Digest, where it is provided that, if two or more persons are jointly or otherwise concerned in the commission of any crime or misdemeanor, either may be sworn and required to testify thereto, "but the testimony given by such witness shall in no instance be used against him in any criminal prosecution for the same offense."

Section 8 of article 2 of the Constitution provides: "Nor shall any person be compelled in a criminal case to be a witness against himself"; but, as is plainly manifest from the language of the section of the Digest now under consideration, appellant's rights were not invaded under this clause of the Constitution, as he was not being compelled to be a witness against himself. He was being examined before the grand jury concerning his knowledge of liquor law violations generally, and the mere fact that, in the course of such inquiry, he might give testimony which might, but for the statute, form the basis of an indictment against him, still his answers might disclose the guilt of others, and the grand jury was well within its rights in asking the questions, and the court was correct in requiring him to answer them. *Lockett* v. *State*, 145 Ark. 415, 224 S. W. 952. See also *Poindexter* v. *State*, 109 Ark. 179, 159 S. W. 197, 46 L. R. A. (N. S.) 517. But any disclosures made by the witness or discoveries by the grand jury cannot be used against him on any charge growing out of or by reason of such testimony.

Having properly convicted appellant on the charge of contempt of court, there still remains the question of punishment to be determined. As we have already stated, the court sentenced him to seven months in jail. We cannot tell from the transcript the exact date his punishment began, but it was some time in February. In the Poindexter case, *supra,* this court said: "We are of the opinion that justice will be done and the dignity and authority of the court vindicated when the fine imposed is paid, without the jail sentence, of which petitioner should be relieved." In the Lockett case, *supra,* the lower court found Lockett to be guilty of contempt, and fined him $1,000 and sentenced him to jail for six months. This court cut the fine down to $250 and the jail sentence to thirty days, because of some mitigating circumstances that appeared to this court to justify it. We think there are some here. Appellant refused to answer the questions involved because he was advised by counsel learned in the law that he was not required to do so. His counsel honestly so advised him. The fact that he was mistaken in this advice, and that appellant relied on this erroneous advice, is a sufficient mitigating circumstance to justify us in reducing the punishment, and a sentence of 60 days, under the circumstances, would have been amply sufficient to uphold the dignity and respect of the court.

The sentence against him will therefore be modified in this respect by reducing the punishment to sixty days from the date of his incarceration in jail. Otherwise the judgment is affirmed.

SMITH TRADING COMPANY *v.* PARKER.

Opinion delivered April 23, 1928.

White & White, for appellant.

Cochran & Arnett, for appellee.

McHaney, J. Appellee brought this action against appellant to recover $134.75, balance due on a note secured by chattel mortgage on five bales of cotton given him by one Simmons. It appears that two bales of the cotton covered by the mortgage were sold to appellant, and three bales were sold to one Crenshaw. Separate suits were brought against both purchasers, consolidated, and recovery had against appellant in the sum of $67, and a similar verdict and judgment against Crenshaw.

This appeal challenges the sufficiency of the evidence to sustain the verdict and judgment and instructions Nos. 1 and 2 given by the court. It is not disputed that appellee had a mortgage on the five bales of cotton in question, and it is not disputed that appellant purchased two bales of this cotton at a time when this mortgage was of record. It further appears that the appellee foreclosed his mortgage against Simmons on the remainder of the personal property covered by the mortgage, and applied the proceeds of the sale thereof to the payment of the $500 note which it secured, leaving a balance of $134 due thereon. It is contended by appellant, however, that Simmons gave appellee a mortgage for $200 on certain real estate in satisfaction of the balance due on this $500. Appellee admits that he took a $200 second mortgage on real estate, but that it was not in satisfaction of his indebtedness to him, but merely as additional collateral for the loan already in existence. Appellant also contends that appellee had given Simmons permission to sell the cotton. These questions were wholly within the province of the jury, and were sub-

mitted to it by the court under the instructions complained of.

A careful examination of the testimony convinces us that the case was properly submitted to the jury under the two instructions complained of, and that there was a question for the jury. We have examined the instructions, and find them to be correct statements of the law. Moreover, according to appellant's abstract and brief, it made no objection to either instruction. Counsel for appellant has apparently raised objections to the instructions for the first time in the motion for a new trial, in this language: "That the court erred and committed separate and several errors in giving each instruction of its own motion."

No objections having been made to the instructions when given, and no exceptions saved, the above general assignment of error cannot be relied upon for a reversal of the case. We find no error, and the judgment is affirmed.

LOUISIANA & NORTHWEST RAILROAD COMPANY *v.* MCMORELLA.

Opinion delivered April 23, 1928.

Henry Stevens, for appellant.

McKay & Smith, for appellee.

SMITH, J. E. R. Bernstein, as receiver of the Louisiana & Northwest Railroad Company, brought this suit in ejectment to recover the possession of the south half of the northeast quarter and the southeast quarter of the southwest quarter of section 21, township 19 south, range 20 west, from Miss Bettie McMorella, and alleged title to the lands sued for under a deed from her to the plaintiff as receiver, dated February 15, 1921.

The defendant filed an answer, in which she admitted that, in conjunction with G. W. Hunter, she had executed a deed dated February 15, 1921, to the plaintiff, as receiver, which described the lands sued for, but she alleged that this deed had been executed as a result of a mutual mistake in so far as the deed included the lands above described, as it was the purpose and intention of the parties, in the execution of this instrument, for the grantors therein to convey to the receiver of the railroad company only such lands as the grantors had title to as trustees for the use of the railroad company, and that the lands above described were not railroad lands, but were the individual lands of defendant, and had been included in the deed by mutual mistake. Other pleadings

were filed by the parties which amplified and denied these allegations.

Later the defendant filed an amendment to her answer, in which she alleged that, in 1922, she purchased the lands sued for at a sale for the 1921 taxes, and received tax deeds therefor after the expiration of the period of redemption. In a reply to this amended answer, the tax sale was alleged to be invalid for various reasons assigned, and the invalidity of the tax sale appears to be conceded.

Something of the history of the relationship between the defendant and the railroad company is set out in the opinion in the case of *Louisiana & N. W. R. R. Co.* v. *McMorella,* 170 Ark. 921, 282 S. W. 6; and it was shown in the record now before us that the defendant had been employed as manager for a colony of Bulgarians which the railroad company had established, and, in this connection, both defendant and G. W. Hunter, her co-grantor in the deed upon which this suit is based, had acquired title, in their respective names, to certain lands which they, in fact, held as trustees for the use of the railroad company. G. W. Hunter had been appointed receiver by the United States District Court at Shreveport, Louisiana, of the railroad company, and, after serving in that capacity for some time, had been succeeded by the plaintiff, E. R. Bernstein. This receivership was later settled and the receiver was discharged, and thereafter the railroad company continued the prosecution of this suit in its own name for its own use and benefit.

The title to the lands here in litigation was derived originally from one W. D. Wingfield, who made contracts to convey lands to various members of the Bulgarian colony. One of these contracts was to convey the lands here in litigation to George Petcoff, who entered into the possession of the lands and made certain improvements thereon, but did not complete his payments.

On June 10, 1917, Wingfield executed a deed to G. W. Hunter, which was apparently a conveyance to Hunter individually, but the testimony shows that the convey-

ance was in fact to Hunter as trustee. This deed described the lands here sued for and other lands, all of which were, no doubt, intended to be used in connection with the development of the Bulgarian colony. But this deed expressly recited the existence of an outstanding undischarged agreement on the part of Wingfield to convey the lands here in litigation to George Petcoff upon the payment of certain notes, which were there particularly described, executed by Petcoff to Wingfield's order. Similar contracts to convey other lands described in this deed were also there referred to, and the deed contained this paragraph:

"I have entered into contracts of sale for this land with the above-named parties with the terms of which said George W. Hunter is familiar; and this conveyance and warranty of title are subject to the claims of the said several parties; and, for and in consideration of this conveyance and the transfer of notes hereinbefore made, George W. Hunter agrees to carry out my contracts of sale of said lands with the above named parties when they pay off and satisfy the above mentioned claims which I am today transferring to said Hunter."

Defendant testified that, for value, she acquired Petcoff's interest under his contract with Wingfield, referred to in the deed from Wingfield to Hunter, and, as an evidence of that fact, exhibited a deed, which had been duly recorded, from Petcoff and wife to her, dated March 12, 1919. She also testified that she discharged the payments due by Petcoff under his contract with Wingfield, which entitled her to a deed from Hunter, and, as an evidence of that fact, she exhibited a deed, duly recorded, from Hunter to her, dated March 14, 1919.

Defendant paid the taxes in her own name for the years 1918, 1919 and 1920, but failed to pay the taxes for the year 1921, and purchased the lands at the sale for the taxes of that year in 1922, and in 1924 received the clerk's tax deeds hereinbefore referred to.

The deeds from Wingfield to Hunter, and from Petcoff to defendant, and from Hunter to defendant, above

referred to, apparently placed the legal title to the lands in defendant, and she was the apparent holder of the legal title thereto when, on February 15, 1921, she and Hunter executed the deed upon which this suit is based to Bernstein as receiver.

Defendant testified that she was not familiar with any of the lands by their legal descriptions, and knew each tract by the name of the Bulgarian who occupied it, and in this manner knew the lands in litigation as the Petcoff lands, but did not otherwise know their description. Her relation with the colony had terminated, and she knew that the receiver was making a final settlement in the Federal court of his administration of the railroad company's affairs, and her purpose in executing the deed to the receiver was to divest herself of all interest in any of the colony lands. Other lands were included in this deed in addition to the lands here in litigation. This deed contained the following recitals:

"The aforesaid lands were purchased by the said George W. Hunter in his capacity as receiver of the Louisiana & Northwest Railroad Company and with the funds of the said receivership, and the same were transferred by him to the said Miss Elizabeth McMorella for the purpose of conducting a colony thereon in connection with and for the benefit of the said Louisiana & Northwest Railroad Company. In acquiring and transferring said lands, as hereinabove set forth, the said George W. Hunter and the said Miss Elizabeth McMorella acted as agents and representatives of the said Louisiana & Northwest Railroad Company, and it was understood and agreed between them that the title to said lands would be held in trust by each and both of them for the aforesaid receivership. The said George W. Hunter and the said Miss Elizabeth McMorella declare that they have no right, title or interest, personally and individually, in and to said lands, and that, by reason of the facts aforesaid and on account of the resignation of the said George W. Hunter as receiver of the said Louisiana & Northwest Railroad Company, and the appointment of the said

Ernest R. Bernstein as receiver aforesaid, they do hereby bargain, sell, transfer, convey and deliver the aforesaid lands to the said Ernest R. Bernstein, receiver."

Defendant testified that she did not understand that she was conveying any lands owned by her individually, and she executed the deed under the misapprehension that the recitals above quoted were true, and that she was conveying only the trust or colony lands. She remained in the possession of the lands sued for, and continued to clear and improve them.

The court held, on the final submission of the cause, that the deed from Hunter and defendant to Bernstein erroneously included the lands here in litigation, and reformed the deed so as to exclude those lands, and quieted the title of the defendant thereto as against the plaintiff railroad company.

Several questions are argued in the able briefs of respective counsel which we find unnecessary to consider or decide; but we think the testimony, in its entirety, supports the finding and decree of the court below.

It is conceded that, before relief by way of the reformation of the deed can be granted, the testimony must show clearly and conclusively that a mutual mistake was made in the execution of the deed; and we think the testimony measures up to this standard. There appears to be no question that defendant had acquired and that she held the legal title to the lands at the time she joined Hunter in the execution of the deed to the receiver, and it appears equally clear that she intended to convey to the receiver only the trust or colony lands. Indeed, it is not contended that she intended to convey any other. It is insisted, however, that the lands here in litigation were, in fact, colony lands or railroad lands, and had become such under a deed from defendant to G. W. Hunter, executed May 12, 1919, and that the consideration for the conveyance from defendant to Hunter, receiver, was the discharge in part of a note for $28,000 which she had executed to the order of G. W. Hunter as receiver. It is also insisted that Bernstein, as successor of Hunter as

receiver, reported these lands as a part of the assets which he turned over to the railroad company upon the discharge of the receivership, and received credit therefor, and that defendant is estopped to question the title of the railroad company thereto.

In support of these contentions the deposition of Robert A. Hunter is relied upon. This witness became the attorney for Bernstein after the latter had been appointed as receiver in succession to G. W. Hunter. In a most candid statement this witness detailed the circumstances under which he prepared for execution the deed from G. W. Hunter and defendant to Bernstein as receiver. He stated that he found in the files "uncertified copies purporting to be copies of deed executed" by defendant to Hunter. There was, however, no proof of the execution of any such deed. Assuming, as he naturally did, that the lands there described were colony or railroad lands, and desiring to have conveyed to Bernstein, as receiver, all these lands, the lands described in the uncertified copy of the deed were included in the deed which he prepared. This testimony is not sufficient to prove the existence and execution of a deed from defendant to G. W. Hunter.

In response to one of the interrogatories, Robert A. Hunter made an exhibit to his deposition a copy of a note from defendant to G. W. Hunter for $28,000 which was found in the files. Indorsed on the back of the copy of the $28,000 note were credits aggregating $36,991.87, and among these credits was the item: "Petcoff land, $3,809.22." No witness, however, furnished any explanation as to how or when defendant had been given credit for this item, or as to why payments of approximately $37,000 had been made on a $28,000 note.

We conclude therefore that the testimony did not show that defendant had received the value of the lands by a credit therefor given her on the note which she had executed to the order of G. W. Hunter as receiver. Miss McMorella testified that she had not seen this copy of the note with the credits thereon prior to the time the same

was exhibited to her when her deposition was taken, and that she had not at any time been given credit in a settlement of her accounts with the railroad company for the value of the Petcoff lands.

It is insisted that, as the testimony shows that the railroad company was reorganized, and its stock acquired by new stockholders, who purchased the stock upon the assumption that the lands in litigation were a part of the assets of the railroad company, defendant is now estopped from asserting that the railroad company does not own the lands. In answer to this contention it may be said, first, that defendant was not a party to the suit wherein the receivership was pending, and she testified that she knew nothing about any reports which G. W. Hunter, as receiver, had filed; and secondly, it appears that the receivership of Bernstein was pending when this suit was begun, for Bernstein, as receiver, was the party plaintiff. Purchasers of the railroad stock, upon the discharge of Bernstein as receiver, must therefore have known that the title to the lands was in litigation and that the railroad's ownership of the lands was dependent upon the outcome of that litigation.

It is insisted that the relief prayed should not have been granted, for the reason that G. W. Hunter was not made a party to the suit. We think, however, that he was not an essential party to the suit. The testimony, in its entirety, shows that he had no interest in the lands here involved, and that he was a party to the deed in which it was conveyed for the purpose only of conveying other lands therein described in which he did have an interest. Granting or refusing the relief prayed in the cross-complaint could not affect any interest claimed by him, as he had no interest.

It is finally insisted that the claim of title to the lands under the tax deeds is inconsistent with the claim of defendant to the original title to the lands, and that the amended answer setting up these tax deeds should be treated as a substituted answer. But we think this was not the purpose or the effect of the amended answer. It

was filed as an amended answer, and not as a substituted answer. Defendant had paid the taxes for 1918, 1919 and 1920 in her own name, and this litigation was begun by filing the original complaint January 24, 1922. Defendant did not pay the taxes falling due that year, but allowed the lands to sell, and became the purchaser at the sale in June, 1922, thereafter. If she then owned the lands, her purchase at the sale was a mere redemption (*Roberts* v. *Miller,* 173 Ark. 38, 29 S. W. 814; *Inman* v. *Quirey,* 128 Ark. 605, 194 S. W. 858); but certainly this purchase did not divest her of any title which she otherwise had, or prevent her from asserting that title when sued for the possession of the lands.

We conclude therefore that the court below was warranted in finding that the deed upon which this suit is based was executed as the result of a mutual mistake, and that its reformation to the extent of excluding the lands sued for was properly ordered, and that decree is affirmed.

FOSTER-THOMPSON LUMBER COMPANY *v.* BRIGHAM.

Opinion delivered April 23, 1928.

McKay & Smith, for appellant.

Wade Kitchens, for appellee.

KIRBY, J., (after stating the facts). Appellant urges that the decree should be reversed, not being supported by the evidence, and this contention must be sustained.

The undisputed testimony shows the clause, "$50 per year for extension until cut," was not in the draft of the timber deed to Drake and Harper, under which Brigham claims, when prepared for execution, and one of the grantees testified he wrote it in at the direction of the grantor, Atkins, before it was signed by him. Atkins denied, however, that there was any such agreement, and that the deed when executed by him contained said clause. It was a material change in the terms of the instrument, and, the alteration appearing on the face of it, the burden of explaining such alteration was on the party claiming under the instrument. This burden could not be discharged by the testimony alone of one of the members of the partnership grantee, that the alteration was interlined by him at the suggestion of the grantor before signature, when the grantor denied not only that any such agreement was made but also stated that the instrument did not contain the interlined clause when it was executed by him. Neither the scrivener who prepared the deed for execution nor the officer who took the acknowledgment thereto testified in the case. The grantor, immediately upon the expiration of the time allowed for removal of the timber in the original deed, made a new conveyance of it to the appellant company, such action being consistent with his statement that the alteration in the deed was unauthorized by him, and the preponderance of the testimony did not support the claim of a tender having been made of the amount necessary to extend the term for another year for removal of the timber, as provided in the interlined alteration.

The chancellor's findings to the contrary are clearly against the preponderance of the testimony, and the decree will be reversed, and the cause remanded with directions to make permanent the temporary injunction granted. It is so ordered.

MANSFIELD LUMBER COMPANY *v.* GRAVETTE.

Opinion delivered April 30, 1928.

Dobbs & Young, for appellant.

Rice & Dickson, for appellee.

HART, C. J., (after stating the facts). It is earnestly insisted by counsel for appellant that Mrs. A. L. Beason had an equitable interest in the lots described in the complaint, and that it had a lien for materials furnished by it, under the provisions of § 6906 *et seq.* of Crawford & Moses' Digest. We cannot agree with counsel in this contention. It is true that Miss Gravette executed a deed to Mrs. Beason to the lots in question, but the deed was placed in escrow with the First National Bank of Gravette, to be turned over to the grantee in the deed when the payments of purchase money were made; but, in case the payments of the purchase money were not made as expressed in the deed, the deed was to be returned to the grantor, and become inoperative. When a deed is delivered merely as an escrow to take effect upon the performance of some condition by the grantee in the future, no title passes until the condition has been

performed. *Bondurant* v. *Enis,* 152 Ark. 372, 238 S. W. 48; and *Ford* v. *Moody,* 169 Ark. 649, 276 S. W. 595.

A deed to real estate deposited with a third person, to be delivered to the grantee on the payment of notes executed by the grantee in consideration of the conveyance, operates as an escrow; and the conveyance thereof by the grantee, or sale under execution against him prior to the delivery of the deed, is inoperative. *Ober, Attawater & Co.* v. *Pendleton,* 30 Ark. 61.

It is claimed, however, by counsel for appellant that parol evidence cannot be introduced to show that the deed was on the condition above expressed. Parol evidence tending to show that it was understood that the deed was to be redelivered to the grantor upon the nonperformance of the condition by the grantee does not violate the rule that parol evidence cannot be introduced to defeat the deed. The parol evidence does not have the effect of ingrafting a condition on the deed, but merely shows that the deed was never to become operative unless the purchase price was paid. It was placed in the hands of a third party, subject to recall by the grantor if the purchase price was not paid according to the tenor or effect of the deed. The grantee never finished paying for the lots. It is true that the grantee made an initial payment, but, according to the testimony of the grantor, the accrued rentals and the damage to the property while in possession of the grantee amounted to more than the initial payment. However, if we are correct in holding that the deed was placed in escrow upon the condition that it did not become operative until the balance of the purchase price was paid, the grantee acquired no interest of any kind in the property, because she did not pay any of the balance of the purchase price, and her rights under the contract became forfeited for failure to make such payments. It is true that the grantee was in possession of the lots at the time the improvements were made, but the general rule is that there must be some element of title besides mere possession to bring the materialman within the provisions of our statute.

It is true that a contract in writing was entered into between the parties on the 28th day of February, 1926, and that its terms were changed when the deed was executed and placed in escrow on March 9, 1926; but it is well settled in this State that parties to a written contract may, subsequent to its execution, modify it by a parol agreement. *Cook* v. *Cane,* 163 Ark. 407, 260 S. W. 49. And, since a written contract may be changed or modified by a subsequent parol agreement, it was entirely competent for the parties to agree verbally to a modified or substituted performance. *Malley* v. *Quinn,* 132 Minn. 254, 156 N. W. 263.

It follows that the decree must be affirmed.

MAYS *v.* RITCHIE GROCER COMPANY.

Opinion delivered April 30, 1928.

T. W. Hardy and *J. P. Machen,* for appellant.

T. J. Gaughan, J. T. Sifford, J. E. Gaughan and *E. E. Godwin,* for appellee.

HART, C. J., (after stating the facts). The main ground relied upon for a reversal of the judgment is that the court erred in giving an instruction asked by the defendant, which reads as follows:

"You are instructed that the fact that defendant's driver permitted the motor truck to continue to run while he was delivering packages or merchandise in the store cannot be considered by you as an element of negligence that will entitle plaintiff to recover damages from the defendant."

Under § 7425 of Crawford & Moses' Digest it is made unlawful to leave a motor vehicle without an attendant, upon any public highway, without shutting off entirely the motor, engines or engine. The section provides that any person violating this provision shall be fined in any sum not exceeding $25.

We are of the opinion that the court erred in giving the instruction above set forth. The general rule in this State is that, in an action for personal injuries, while the failure of a defendant to perform a duty imposed upon him by statute is evidence of negligence on his part, nevertheless such negligent conduct, in the absence of evidence showing it to have been the proximate cause of the injury complained of, furnishes no legal ground of complaint. *Bain* v. *Fort Smith Light & Traction Co.,* 116 Ark. 125, 172 S. W. 843, L. R. A. 1915B, 1021; *Ward* v. *Fort Smith Light & Traction Co.,* 123 Ark. 548, 185 S. W. 1085; and *Temple* v. *Walker,* 127 Ark. 279, 192 S. W. 200.

It is also the general rule in this State that, in order to warrant a finding that negligence is the proximate cause of an injury, it must appear that the injury was the actual and probable consequence of the negligence,

and that it ought to have been foreseen in the light of the attending circumstances. *Meeks* v. *Graysonia, Nashville & Ashdown Rd. Co.,* 168 Ark. 966, 272 S. W. 360.

This court has also held that, to warrant a finding that negligence was the proximate cause of the injury, it is not necessary that the particular injury complained of should have been foreseen. If the act or omission is one which the party ought, in the exercise of ordinary care, to have anticipated as likely to result in the injury of others, it is liable for an injury proximately resulting therefrom, though it might not have foreseen the particular injury which did occur. *Standard Pipe Line Co., Inc.,* v. *Dillon,* 174 Ark. 708, 296 S. W. 52. In that case it was also held that whether defendant's negligence was the proximate cause of the injury sued for is ordinarily a question to be determined by the jury.

In the application of these well-settled principles of law, we think that the court erred in telling the jury as a matter of law that the fact that the defendant's driver permitted the engine of the motor truck to run while he was delivering groceries could not be considered as an element of negligence entitling the plaintiff to recover damages from the defendant. This was one of the facts in the case which the jury had a right to consider, along with the other facts and circumstances in the case, in determining the negligence or non-negligence of the defendant. The instruction as given tended to confuse and mislead the jury by withdrawing from their consideration a material fact in the case. Under the evidence introduced, the jury had a right to consider the fact that the defendant's driver left the engine of his motor truck running while he was delivering groceries, in determining whether the defendant was guilty of negligence in starting the motor truck without finding that the child was in front of it. We do not mean to say that the leaving of the engine of the motor truck running in violation of the statute constituted negligence *per se,* under the circumstances, but this was a fact to be considered by the jury along with the other facts and circumstances in determining whether the conduct of the

defendant's driver in not seeing the child before starting the truck was negligent.

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

WHITENER *v.* PURIFOY.

Opinion delivered April 30, 1928.

J. T. Richardson, for appellant.

John L. McClellan, for appellee.

SMITH, J. Appellee obtained a decree in the court below enforcing a mechanic's lien against a building owned by appellant and the acre of land upon which the building stands. For the reversal of this decree it is insisted that the lien claimant did not, within ninety days after the building material had been furnished, file with the circuit clerk, as required by § 6922, C. & M. Digest, "a just and true account of the demand due or owing to him, * * * and containing a correct description of the property to be charged with said lien, verified by affidavit."

The affidavit was dated and filed December 28, 1925, and the account, which was verified, showed that one brick-trowel had been furnished under date of 10-1-15, and that six sheets iron roofing had been furnished under date of 10-20-25. Plaintiff had previously furnished a bill for material under a date more than ninety days prior to the date of the affidavit, but the two items abovementioned were furnished within the ninety days, and, as these items were a part of the material furnished, the affidavit filed sufficed to bring the entire demand within the provisions of the statute, as it has been many times held that the affidavit is filed within the time required by law if it is filed within ninety days of the date of the last item on the account.

In the case of *Ferguson Lbr. Co.* v. *Scriber,* 162 Ark. 349, 258 S. W. 353, all the items of the account had been furnished more than ninety days before the filing of the statutory affidavit, except some cement, which was furnished to put around a leaking flue. We held that, as the cement had been furnished within the ninety days, the affidavit was filed in apt time. In so holding we said: "The statute contemplates that the items will bear different dates; in other words, that there will be items of debit and credit, and the requirement of the statute is that, within ninety days of the date of the last item debited, the account shall be filed" (Citing cases).

The affidavit described the house into which the materials went as being in the southwest quarter of the northwest quarter section 3, township 8 south, range 15 west, and the southeast quarter of the northeast quarter section 4, township 8 south, range 15 west, in Dallas County, Arkansas, and the identical description was employed in the original complaint, but, before the final submission of the cause, the complaint was amended to describe, by metes and bounds, the acre of land upon which the house was located and against which the lien was claimed.

The two 40-acre tracts of lands described in the affidavit and the original complaint, although in different sections, are adjacent, and together comprise defend-

ant's farm. The amendment to the complaint shows the location of the house on the southwest quarter of the northwest quarter section 3, township 8 south, range 15 west, but, as there is only one dwelling-house on the land, there can be no uncertainty as to the house upon which the lien is claimed.

Appellant cites and relies upon the case of *Arkmo Lbr. Co.* v. *Cantrell,* 159 Ark. 445, 252 S. W. 901, as sustaining his contention that the affidavit is not sufficiently definite in its description of the property to be charged with the lien to comply with the statute defining the practice for the enforcement of the lien. In that case materials had been furnished which had been used in the repair of several of a large number of houses on a plantation consisting of 1,380 acres, and the affidavit mentioned the 1,380-acre tract as a description of the property to be charged with said lien, and it was the opinion of the majority that the description employed was too indefinite. However, the writer of that opinion was of the contrary opinion, and quoted the statement of the law appearing in 27 Cyc. 159 as expressing his view and as sustaining the lien claimant's contention. The statement of the law quoted in that opinion from 27 Cyc. 159 reappears as § 266 of the chapter on Mechanics' Liens in 40 C. J. 222, in substantially the same language, which is as follows:

"As a general rule, the fact that the claim or statement described more land than subject to the lien does not defeat the lien as to the land properly subject thereto, if there is no fraudulent intent and no one is injured thereby. Some courts hold that, where the tract on which the improvement is erected is of greater area than the statute allows to be subjected to the lien, a claim or statement describing the entire tract, without specifically describing a portion thereof which is of the permitted area, is sufficient, as in such case it is for the court to decide what portion of the land is to be subjected to the lien; but other courts hold that, under such circum-

stances, the claim or statement must describe the portion of the tract upon which the lien is to be enforced."

In the note to the text quoted, where numerous cases are cited as supporting what is said to be the majority rule, the Arkmo Lumber Company case, *supra,* is cited as among the minority following the requirement of a definite description as a prerequisite to the adjudication of a lien. The majority, however, did not disapprove the rule as stated in 27 Cyc., but were of the opinion that the description there employed was so indefinite and uncertain, under the facts there stated, as not to come within the rule there announced. Speaking for the majority in the Arkmo Lumber Company case the writer there said:

"The majority does not mean to say that either the acre of land on which the lien is sought, or the building thereon, must necessarily be described in any particular form. All that is essential is that the acre of land or the building be designated in such language as will afford information concerning the situation of the property to be charged with the lien. Of course, if the building be described so as to properly designate its location, this is sufficient, for the statute itself fixes the quantity of land to be charged."

The leading case holding that the affidavit for the lien must correctly and accurately describe the particular land upon which the lien is claimed is that of *Ransom* v. *Sheehan,* 78 Mo. 668, which case was cited, among others, in our Arkmo Lumber Company case *supra.* It was there held by the Supreme Court of Missouri that the affidavit for the lien was insufficient in that case, because it was "impractical, if not impossible, to determine from it the acre of ground to be impressed with the intended lien." But it was said in the case of *Powers & Boyd Cornice, etc., Co.* v. *Muir,* 146 Mo. App. 36, 123 S. W. 490, that this case has practically lost its force as a controlling decision by the criticisms to which it was subjected by later decisions of the Supreme Court of Missouri and by other courts which had refused to follow it, and, as was there said, "* * * the life of the Ransom-Sheehan case is practically

destroyed, and what Judge Bond (in 172 Mo. 588, 73 S. W. 137) calls the 'point in decision' is so limited as hardly likely to apply to any other case—certainly not to the case at bar."

In the case of *Ferguson Lbr. Co.* v. *Scriber, supra,* the attempt to describe with exact certainty the portion of a block in a city upon which a barn was located, in the repair of which the plaintiff's materials had been used, resulted in the description in the affidavit of a portion of the block which was in fact vacant, but we held the affidavit to be sufficient, notwithstanding that fact, and in so holding we said:

"The description of the land here employed was inaccurate, but it was not misleading. Its defect was that, in attempting to describe the land with exact but unnecessary particularity, a mistake was made, but no one could be, or was, misled by it. The barn was a large structure, and was the only building on the lot, and no one could have believed that the materialman was claiming a lien on the part of the lot only on which there was no building of any kind into the construction of which his material had gone, and was claiming no lien on the land on which the building itself stood."

So here we think no one could be misled as to the building upon which the lien was claimed, and before the trial the complaint was so amended by furnishing the exact description that a decree could be and was rendered against the acre of land upon which the building stood.

We conclude therefore that the affidavit was sufficient, and, as it was made within the time required by the statute, the decree of the court below must be affirmed, and it is so ordered.

COLLINS *v.* MCCLENDON.

Opinion delivered April 30, 1928.

[redacted]

Sam M. Levine, for appellant.

E. W. Brockman, for appellee.

SMITH, J. Under the authority of *Wood* v. *Miller,* 154 Ark. 318, 242 S. W. 573, appellee brought this suit to oust appellant from the office of mayor of the town of Gould, in Lincoln County. According to the returns of the election officers, appellant received 34 votes and appellee 32 for that office. It was alleged that certain illegal votes had been cast for appellant, and that certain legal votes, which would have been cast for appellee, were excluded by the officers of the election, but, as it also appeared that appellant was, at the time of the election, the duly qualified and acting member of the House of Representatives from Lincoln County, the court did not consider and determine whether illegal votes had been cast or legal votes had been excluded. The court found the fact to be that knowledge on the part of the electors of the town that appellant was a member of the Legislature was general, and, upon this finding, the court declared the law to be that "the votes cast for the ineligible candidate are thrown away, not to be counted at all, and leaves the man who received the next highest number of votes as the elected candidate to the office," and upon this declaration of law appellee was declared to have been elected, although he received a less number of votes than his opponent.

There is very respectable authority to support the declaration of law made by the court below. Indeed, it is asserted by counsel for appellee that the weight of authority accords with the view announced by the court.

We have not felt called upon, however, to determine that question, as this court has committed itself to a different rule.

In the case of *Swepston* v. *Barton,* 39 Ark. 549, it was contended that Barton was elected sheriff, although Swepston had received the larger number of votes for that office, for the reason that Swepston was ineligible to hold the office of sheriff, in that he had defaulted in the settlement of his accounts in another office. After stating the English rule to be that, if the disqualification of a candidate is notorious, votes cast for him will be deemed to have been purposely thrown away, and the candidate having the next highest number of votes will be elected, the court proceeded to say that, by the weight of authority, the American rule was to the contrary, and that, when a vote for an ineligible candidate is not declared void by statute, the votes he receives, if they are a majority or plurality, will be effectual to prevent the opposing candidate being chosen, and the election must be considered as having failed. It was there said:

"The real issue in this cause was, which candidate received a majority of the legal votes cast? If Barton did not obtain such a majority, but his competitor was ineligible, it by no means follows that he, as the next in the poll, should receive the office. 'The votes are not less legal votes because given to a person in whose behalf they cannot be counted.' *Saunders* v. *Haynes,* 13 Cal. 145. If Swepston was a defaulter, the Governor, if that fact had been properly brought to his notice, might have lawfully refused to sign his commission. (*Haylor* v. *Governor,* 1 Ark. 21). And he may still be ousted upon *quo warranto,* for ineligibility relates to the capacity of holding, as well as being elected to an office (*Carson* v. *McPhetridge,* 15 Ind. 327). But it is not a matter which is involved in the present contest, for, if true, it does not show Barton's election."

While appellant was ineligible, under § 10, article 5, of the Constitution, as construed in the case of *Wood* v. *Miller, supra,* to be elected mayor, we have no statute

which declares the vote for an ineligible candidate to be void, and, this being true, a majority or a plurality of votes cast for an ineligible candidate operates to prevent the opposing candidate from being chosen, in which event the election must be considered as having failed.

The court in the case of *Swepston* v. *Barton, supra,* quoted with approval the conclusion of the Supreme Court of California in the case there cited. The reason for that conclusion, as stated in the opinion, was as follows:

"An election is the deliberate choice of a majority or plurality of the electoral body. This is evidenced by the votes of the electors. But if a majority of those voting, by mistake of law or fact, happen to cast their votes upon an ineligible candidate, it by no means follows that the next to him on the poll should receive the office. If this be so, a candidate might be elected who received only a small portion of the votes, and who never could have been elected at all but for this mistake. The votes are not less legal votes because given to a person in whose behalf they cannot be counted; and the person who is the next to him on the list of candidates does not receive a plurality of votes because his competitor was ineligible. The votes cast for the latter, it is true, cannot be counted for him; but that is no reason why they should, in effect, be counted for the former, who, possibly, could never have received them. It is fairer, more just, and more consistent with the theory of our institutions, to hold the votes so cast as merely ineffectual for the purpose of an election, than to give them the effect of disappointing the popular will, and electing to office a man whose pretensions the people had designed to reject."

We attempt no review of the conflicting authorities on this question, as we think the case of *Swepston* v. *Barton, supra,* is conclusive of it in this State.

It follows therefore that the judgment of the court below must be reversed, and the cause remanded with directions to hear appellee's contest on its merits for the purpose of determining whether appellee did, in fact, receive a majority of the legal votes.

BEICHSLICH *v.* BEICHSLICH.

Opinion delivered April 30, 1928.

Robert L. Rogers, for appellant.

Carmichael & Hendricks, for appellee.

SMITH, J. Flora Beichslich, in her own right and as next friend of her two infant children, brought a suit in the Pulaski Chancery Court in which she alleged that she was the widow of August Beichslich, who departed this life September 15, 1924, and was survived by the infant children in whose behalf she sued. For her cause of action she alleged that, about three and one-half years before instituting the suit, the defendant, Sophie Beichslich, gave to her son, plaintiff's husband, a ten-acre tract of land, and that, pursuant to this gift, the donee entered upon the land, caused it to be surveyed and to be laid off by plowing around it, and later built thereon a residence at his own cost of between $800 and $900. That, after the erection of the residence, her husband lived there with his family until his death. It was further alleged that, by inadvertence and oversight, no deed was ever made from the defendant, Sophie Beichslich, to her son August, but that he acquired title under the gift and his possession of the land thereunder, and owned the land at the time of his death, and that the children of her husband inherited the title thereto upon the death of their

father, subject to her homestead and dower rights, and that the land was the homestead of her infant children. Judgment against the defendant was prayed, divesting the title out of defendant and vesting it in the plaintiffs.

An answer was filed, in which it was alleged that defendant gave her son August permission to erect a residence on the land, with the right to occupy it for his natural life, or so long as he wished. Defendant denied that she gave the fee title to her son, but alleged that she had given him a life estate, or the right to occupy the land as long as he wished to do so.

The testimony is in irreconcilable conflict. The widow herself testified that defendant gave the land to her son, and that he and the witness built the residence with their own money, except some small loans made to the donee by his mother; that her husband expended between $400 and $500 of his own money in the erection of the residence, and that $110 of witness' money was employed for the same purpose. Witness exhibited various receipted bills for material used in the construction of the building, which her husband had paid, and carpenters and other laborers testified that they had done work on the building for which they had been paid by August Beichslich. The value of the building was about $800 or $900.

Defendant owned a small tract of land, consisting of 35½ acres, through which a railroad ran, cutting off a portion of the land containing 5.61 acres from the remainder, and a plat of a survey, made April 13, 1922, was introduced, showing a survey of ten acres of the main body of the land, and it was on this ten acres that August Beichslich built his house. It was shown that the land was so plowed soon after the survey as to mark the boundaries thereof. A witness named Smith testified that he asked August Beichslich, after the erection of the building was begun, if his mother had given him a deed, and Beichslich answered, "No, not yet, but she will." And a brother of the plaintiff gave testimony

of similar purport. Objection was made to the admission of this testimony.

In the case of *Waldroop* v. *Ruddell,* 96 Ark. 171, 131 S. W. 670, it was said that, "while it has been held that declarations of a decedent going to show the character and extent of his possession are competent, declarations as to title are not competent, for the reason that they are self-serving declarations. *Seawell* v. *Young,* 77 Ark. 309, 91 S. W. 544; *Jeffrey* v. *Jeffrey,* 87 Ark. 496, 113 S. W. 27." See also *Parks* v. *Thomas,* 138 Ark. 70, 210 S. W. 141, where a number of cases on the subject are cited; and *Beattie* v. *McKinney,* 160 Ark. 81, 254 S. W. 338.

We are of the opinion therefore that the testimony of the witness Smith and that of plaintiff's brother is without probative value in so far as it relates to the title which the decedent claimed, and there is no controversy about the character and extent of his possession, as he was in the exclusive possession of the ten acres in litigation. The question is, by what title did the deceased hold? And the self-serving declarations of the deceased occupant may not be proved to establish that fact.

Mrs. Cochran, a sister of the plaintiff, testified that defendant told witness that she had given her son the ten acres, and was going to make him a deed to that land.

The testimony on behalf of defendant was to the effect that she was a widow, sixty-six years old, and that she was dependent on her thirty-five-acre farm for her living, and that she had three other children besides her son August. That August was a bootlegger; but his widow testified that he had not made any money out of that business, but that he made money raising and selling hogs. Defendant desired her son to live near her, and, as an inducement, offered to give him the ten acres for his life, or so long as he wished to live there, and offered also to assist him in building a house thereon. Prior to this gift August Beichslich had lived on the five-acre portion of the tract, in a building to which all the witnesses referred as a "shack." August Beichslich bought

one of the buildings at Camp Pike, for which he paid $100, and dismantled it, and the material from that building went into the construction of the residence. Most of the other money used in the building was furnished by defendant, who was shown to have had in bank at all times a deposit exceeding the cost of the building, and, in addition, she had $390 in a bag at her home, which had belonged to her husband. Defendant testified that she gave her son the money to pay the bills for labor and materials; that at times she gave him money and at other times she gave him checks. She did not produce the checks, as she testified that they were lost or destroyed. Defendant also testified that she never gave or promised to give her son anything more than a life estate in the land.

Defendant was corroborated by the testimony of her sons, A. H. and Ernest Beichslich, her son-in-law, Raymond Wright, and her daughter, Mrs. Wright, and her daughter-in-law, Mrs. A. H. Beichslich. The testimony of these witnesses is to the effect that the defendant, Mrs. Sophie Beichslich, had given to her son August only a life estate in the ten acres, and it was so understood by all the members of the family. These witnesses also testified that the erection of the building progressed intermittently, and that, when August had spent the money given him by his mother, the work would be discontinued until she gave him more.

A Mrs. Larch, a neighbor, appears to be one of the few disinterested witnesses in the case whose testimony is material. She testified that she asked August, after one of the periods of suspension of the work, why he did not finish his house, and August answered that he had nothing to finish it with. Witness said to him, "You know your mamma will let you have the money to finish the house," and August answered that he knew she would, but he had been to her for money so often that he was ashamed to ask for any more.

At the time of August Beichslich's death, in September, 1924, he was residing in the residence on the ten-acre

tract, and his wife continued to live there with her two children until February, 1925, when she left. She testified that she received a notice from defendant to vacate, and that she vacated the house in response to this notice, and brought this suit February 28, 1925. Defendant denied that she had given any such notice. A local attorney was called as a witness to explain the confusion about the notice, and he testified that he had been employed by a client, who he supposed to be the defendant, but had never seen before, to write the notice preparatory to bringing suit to eject plaintiff. His client did not again report to him, and no suit was brought. The attorney identified the plaintiff herself as the person who had employed him to prepare the letter which he addressed to plaintiff demanding the surrender of the land. Plaintiff denied that she had seen the attorney before the trial, but his identification of her as the person procuring him to write the letter was positive. This is a circumstance which cannot be ignored in testing the good faith and credibility of the witnesses. The date of this letter was February 26, 1925, and soon thereafter plaintiff vacated the property, and on March 7, 1925, she married her present husband.

The court below granted the relief prayed, but declared a lien in defendant's favor for the amount of certain advances made by her to her son in the construction of the building.

The testimony, which we have carefully considered, leaves us in grave doubt whether defendant ever gave her son this land in fee, and we are therefore constrained to reverse the decree of the court below.

In the case of *Beattie* v. *McKinney,* 160 Ark. 81, 254 S. W. 338, which was a controversy between a brother, who was in possession of a tract of land which he claimed had been given him by his mother, and his sister, who was the only other heir of their mother, it was said:

"The next question is whether G. A. C. Beattie acquired title by a parol gift from his mother. We have set out the substance of the testimony of respective par-

ties on that issue, and it appears to be of about equal weight. Counsel for appellant say that, the testimony being of about equal weight, the defendants should prevail, as the burden of proof is on the plaintiff. But the burden of proof is not upon the plaintiff to show there was no gift to G. A. C. Beattie by his mother. This was an affirmative defense, and the burden of establishing it was upon the party who pleaded it, and this burden could not be discharged by a mere preponderance of the evidence. The existence of a parol gift of land is one of those things which cannot be established by a bare preponderance of the evidence. It is required that such a gift be established by evidence that is clear and satisfactory, and the evidence in this case does not meet that requirement. *Meigs* v. *Morris,* 63 Ark. 100, 37 S. W. 302; *Young* v. *Crawford,* 82 Ark. 33, 100 S. W. 87."

What was there said is applicable here. The testimony does not measure up to the standard required in the case cited, and the decree of the court below will be reversed and remanded, with directions to dismiss the complaint. It is so ordered.

SIMMS *v.* ROLFE.

Opinion delivered April 30, 1928.

C. W. Norton, for appellant.
Marvin v. *Norfleet,* for appellee.

HUMPHREYS, J. The sole question presented by this appeal is whether Susie Chew acquired title to all that part of the northeast quarter of section 8 lying west of the St. Francis River, in township 5 north of range 4 east, in the county of St. Francis, containing 40 acres, more or less, by quitclaim deed from S. H. Mann, for a consideration of $150, of date March 28, 1918, who had purchased same at a levee tax sale on December 5, 1914, for delinquent levee taxes. The forty-acre tract in question was owned by William Simms, the first husband of Susie Chew, when he died in the year 1901. She subsequently married a man by the name of Griggs, and they, with appellants herein, minor children of William Simms, deceased, were in possession of and cultivated said forty-acre tract when same was sold for delinquent levee taxes. The tract was assessed in the name of Lulu Griggs, the mother of appellants, and in the levee tax foreclosure as "W of R NE¼, Sec. 8, Tp. 5 north, range 4 east." After the death of Griggs, the mother of appellants married Ben Chew, who joined her in a deed of trust to S. S. Hargraves, as trustee for Ralph Turley, doing business as Turley & Company, embracing this forty-acre tract and other lands and personal property, securing an indebtedness of $2,797.51, evidenced by five notes, which they owed Turley & Company. They defaulted in the payment of $2,223.61 of the indebtedness. The notes and deed of trust were assigned to E. A. Rolfe on the 3d day of September, 1926, and on the next day he and the trustee named in the deed of trust instituted this suit to foreclose said deed of trust in the chancery court of St. Francis County and subject the forty acres in question, along with the other property described in the mortgage, to the payment of the balance due upon said indebtedness. Some of the appellants were in possession of the forty-acre tract in question, so they were made parties to the foreclosure, on allegation that they were claiming some interest in the land. They interposed the defense that their mother, Susie Chew, acquired no title to the land under the delinquent levee sale, because same

was assessed, forfeited and sold under an insufficient description, and because she was in possession thereof and cultivating same at the time of the forfeiture and sale. The cause was submitted upon the pleadings and testimony, resulting in a decree upholding the validity of the sale for levee taxes, and a foreclosure and order of sale of the forty-acre tract in question, along with the other property described in the deed of trust, to satisfy the indebtedness.

We agree with appellants that the sale for levee taxes was void as against this forty-acre tract of land for the lack of a legal description, and that their mother did not acquire title thereto under quitclaim deed from S. H. Mann, who had bought same at the void tax sale. The letter "R" or "r" is the proper abbreviation for range within the meaning of government surveys when used with reference thereto. When used otherwise in an attempted description of land, it means nothing. We so ruled in the case of *Brinkley* v. *Halliburton,* 135 Ark. 592, 204 S. W. 213, and in so doing stated that proof *aliunde* could not be used to cure or perfect the following void description in the tax deed: "N. of R. R. frl. SW¼ T. 6 N. R. 7 E," because the letters "R. R." furnished no key or suggestion through which the land might be located. The letter "R" or "r" in the description before us could as well refer to ridge or road as river, or to any natural or artificial monument, where such letters were used in spelling the monument in mind. The description is void on its face, just as the description was in the tax deed involved in the case of *Brinkley* v. *Halliburton, supra.*

It is unnecessary, in this view of the case, to discuss the other ground upon which the tax title is assailed.

On account of the error in upholding the validity of the levee tax sale the decree is reversed, and the cause is remanded with directions to cancel the trust deed as to the forty-acre tract in question.

GREER *v.* DAVIS.

Opinion delivered April 30, 1928.

W. E. Beloate, for appellant.

Smith & Blackford, for appellee.

MEHAFFY, J. The appellees borrowed $1,000 from the appellant on September 15, 1926, and executed four promissory notes in the sum of $250 each, due and payable one every three months, beginning December 15, 1926, with interest at 10 per cent. per annum from date until paid. To secure the payment of said indebtedness, appellees executed to the appellant a mortgage conveying lot 6, in block 8, in the original town of Hoxie, Arkansas, and also stock of dry goods and groceries located on lot 2, in block 19, in the original town of Hoxie, Arkansas. The plaintiffs also had fire insurance on their house, with a mortgage clause in favor of appellant as

his interest might appear, the insurance policy being for $2,000.

When appellees signed the note and mortgage for $1,000, appellant gave them a check for $950, retaining $50, but charging 10 per cent. on the $1,000. The evidence on the part of the appellees showed that the $50 was given as a bonus in addition to the 10 per cent. interest on the $1,000, and that when the property of appellees was destroyed by fire and the insurance collected, appellant insisted on the payment of the $1,000 and interest.

The testimony on the part of the appellant is to the effect that he agreed to lend $1,000, and that when he went to make out the check appellee said $950 was all he needed at that time, and appellant thereupon told him he would give him a check for $950 and retain $50, as appellee did not need it at that time, and appellant told him that, if agreeable, appellant would defer the payment of it until he could make some collections. That he himself could use the $50 to good advantage, but that when the appellee wanted it he could have it.

It would serve no purpose to set out the testimony in full, the appellees' testimony tending to show that the $50 was a bonus and the appellant's testimony tending to show that he did not intend to charge him more than 10 per cent. interest.

The chancellor found the contract to be usurious, and entered a decree in favor of the appellees, and appellant prosecutes this appeal.

The Constitution provides: "All contracts for a greater rate of interest than 10 per cent. per annum shall be void as to principal and interest. And the General Assembly shall prohibit the same by law; when no rate of interest is agreed upon, the rate shall be 6 per cent. per annum." Art. 19, § 13, Constitution of the State of Arkansas.

Section 7362 of Crawford & Moses' Digest is a copy of the article of the Constitution above set out. Section 7363 provides:

"All bonds, bills, notes, assurances, conveyances, and all other contracts or securities whatever, whereupon or whereby there shall be reserved, taken or secured, or agreed to be taken or reserved, any greater sum or greater value for the loan or forbearance of any money, goods, things in action, or any other valuable thing, than is prescribed in this act, shall be void."

And § 7364 provides, among other things, that liens created or arising out of a deed of trust to secure the payment of a usurious contract shall be void.

Appellant's first contention is that the chancellor erred in overruling the demurrer to the complaint. The complaint alleges, among other things, that, at the time of the execution of the notes and mortgage, the appellant, Greer, executed four notes for $250 each, and that the appellee loaned plaintiffs only $950, retaining $50 as additional interest to the said ten per cent. per annum provided in said notes and mortgage, whereby the said notes, mortgage and the interest of the said Greer in the same and the said check and voucher were void because of the usurious interest charged for the loan of said money.

We think the complaint sufficiently alleged that this was a contract whereby Greer reserved, took or secured a greater sum or greater value for the loan or forbearance of money than is prescribed by law. And it sufficiently stated a cause of action charging usury.

It is next contended by appellant that the chancellor erred in permitting in evidence the testimony of Silphey Davis, the wife of D. E. Davis. She was one of the makers of the note and of the mortgage, and of course had a right to testify in her own behalf. Some of the testimony of Mrs. Davis was incompetent, but the presumption is that the chancellor considered only the competent testimony.

"But chancery cases are tried upon appeal *de novo*. It is presumed that the chancellor heard the case only upon evidence that was competent and relevant to the issues made. Upon appeal in chancery cases, errors

which relate to rulings upon the introduction of evidence will not be passed upon; but, in the trial of such chancery cases upon appeal, any evidence that was improperly excluded below will be considered, and evidence that was improperly received will be disregarded, and the case will be decided here solely upon competent evidence." *Cox* v. *Smith,* 99 Ark. 218, 138 S. W. 978; *Niagara Fire Ins. Co.* v. *Boon,* 76 Ark. 153, 88 S. W. 915; *Latham* v. *First National Bank of Fort Smith,* 92 Ark. 315, 122 S. W. 992.

Appellant's next contention is that the chancellor erred in permitting the introduction in evidence of the answer of appellant *per se.* We do not agree with the contention of the appellant. The answer was properly admitted in evidence.

"It is not necessary to the competency of the answer as against the party pleading it that it be sworn to by him. It is a declaration, and competent as an admission, whether verified or not. * * * The competency of an answer as evidence does not depend upon its being a valid and subsisting pleading. It is competent as a declaration of the party against interest, although it has never been filed, or where it has been withdrawn or superseded by an amended answer." Encyclopedia of Evidence, vol. 1, 449.

Pleadings in a cause sworn to are not only competent in evidence but are said to be judicial admissions and a waiver of proof on all matters outside these lines of dispute.

"Such intrinsic pleadings, being upon their face direct and plain assertions made for a serious purpose, would naturally be supposed to be available as admissions; and the inquiry plausibly arises, why should they not be? Viewed in the light of the principles of the present subject, there can be but two conceivable objections; one is the objection that they were not made by the party himself, nor by any one authorized to speak for him; the other is that they are conventional or hypothetical only, and not intended to be taken as sincere or

absolute assertions." Wigmore on Evidence, vol. 2, 539.

This same author says, on page 548 of the same volume:

"When a pleading is amended or withdrawn, the superseded portion disappears from the record as a judicial admission limiting the issues and putting certain facts beyond dispute. Nevertheless, it exists as an utterance once seriously made by the party."

"But it does appear in the petition of Mrs. Walton to the Jefferson Probate Court for dower in the estate of Solomon Walton, deceased, that she (Mrs. Whitley) was dead when it was filed, and it was filed before the land belonging to Walton's estate was sold by his administratrix. The petition was verified by Mrs. Walton, and was admissible as evidence in this action in the nature of an admission that Mrs. Whitley was dead at the time it was filed in court, subject to rebuttal and explanation." *Gibson* v. *Herriott,* 55 Ark. 85, 17 S. W. 589, 29 Am. St. Rep. 17.

"It is insisted that appellee is bound by his statement contained in an answer filed by him in another action between the same parties, to the effect that appellant agreed to furnish him a house to live in for 'twelve months from and after January 1, 1908.' Appellee's answer in that case was competent evidence in this case as an admission, but it is not conclusive, and is subject to explanation. It was considered by the jury along with the other testimony in determining the terms of the contract." *Valley Planting Co.* v. *Wise,* 99 Ark. 1, 123 S. W. 768, 26 L. R. A. (N. S.) 403.

Declarations of parties to suits, whether written or oral, whether made in court or out of court, may be introduced as declarations or admissions against interest.

It is next contended that the evidence is insufficient to support the finding of usury. We think that the evidence sustaining the chancellor's finding is clear and convincing, and the decree is therefore affirmed.

JACKSON COUNTY GIN COMPANY *v.* MCQUISTION.

Opinion delivered April 30, 1928.

[redacted]

Pickens & Ridley, for appellant.

Appellee pro se.

MEHAFFY, J. The appellee began suit in the justice of the peace court in Jackson County, Arkansas, on a contract, alleging that the appellant had agreed to sell him 50 bales of cotton, and that appellant had breached the contract and damaged him in the sum of $118.15. The case was tried in justice court, and appealed to the circuit court, where it was tried, and the jury returned a verdict for the appellee for $118.15. Appellant filed its motion for a new trial, which was overruled, exceptions saved, and it prosecutes this appeal to reverse said judgment.

The plaintiff testified that he made a contract with the defendant to buy 50 bales of cotton, and that the following is a confirmation of the contract:

"CONFIRMATION OF SALE

Sign and return at once.

"Newport, Ark., 10-30-26.

"R. P. McQuistion,

"Newport, Arkansas.

"For account of H. C. McGown & Co.

"We hereby confirm the sale of 50 bales of merchantable cotton to you at 12.26 cents per pound, basis ....., delivery to be made within ten days, and weights guaranteed to be correct upon delivery to you at the compress at Newport. Compress weights to govern.

"Jackson County Gin Co.

"By James.

"Description of cotton: St. low 1 1-16—125 off; 150 off; St. good ord. 8c; good ord. 7½c; low mid. 101 16-300 off; low mid. 1, 350 off."

Indorsed on back in pencil: "Market day be bought."

Plaintiff further testified that the basis for middling on the day of the contract was 12.26; that the defendant delivered 33 bales within ten days under this contract. Plaintiff had sold the cotton to H. C. McGown & Company and delivered to them 33 bales, but could not get any more to deliver of the color and quality at that time

of year. It had been raining, and the cotton had reduced in grade and color.

Appellee had been in the cotton business 22 years. The defendant tendered him 17 bales of cotton in January, 1927, and there were 4 bales that were up, and the rest of it was too low. Witness sent the cotton to Memphis to H. C. McGown & Company, and the Memphis firm declined to accept the cotton. It was off color, and had shale in it, some snaps, and roughly picked. A blue color made a difference in price of one cent a pound. Witness had Tom Hutson to class the cotton.

There was conflict in the testimony as to whether the cotton was the grade specified in the contract, and it would serve no useful purpose to set out the entire testimony. The testimony of appellant tended to show that the cotton sent to appellee was the kind specified in the contract.

The appellant requested the court to instruct a verdict in its favor, which the court refused, and the court thereupon instructed the jury as follows:

"Instruction No. 1. This is an action by the plaintiff, R. P. McQuistion, against the Jackson County Gin Company, in which McQuistion seeks to recover the sum of $118.15, which he alleges he is entitled to, due to the failure of the defendant to comply with a certain contract whereby they had agreed to sell and deliver to him fifty bales of cotton. The first question, gentlemen, for you to determine is whether or not the cotton, the seventeen bales of cotton tendered by the Jackson County Gin Company, complied with the class and grades called for in the contract which has been introduced as evidence in the case.

"Instruction No. 2. The burden is on the plaintiff, McQuistion, to show by a preponderance of the testimony that the defendant, Jackson County Gin Company, failed to deliver and tender to him seventeen bales of cotton of the grades and color called for in the contract of purchase.

"Instruction No. 3. Now, if you believe from a preponderance of the testimony that the defendant, Jackson County Gin Company, failed to tender and deliver to the plaintiff, R. P. McQuistion, seventeen bales of cotton of the grade standard called for in the contract of purchase entered into with the plaintiff on the date mentioned in the contract, then your verdict should be for the plaintiff for the amount sued for, or $118.15; and, unless you so believe, your verdict should be for the defendant."

Instruction No. 4 was an instruction to the jury about the credibility of witnesses and weight to be given to their testimony, and instruction No. 5 directed them as to the form of their verdict.

None of the instructions were objected to by appellant except No. 3.

Appellant's first contention is that the verdict of the jury was not responsive to the law given by the court and the evidence introduced in the case. It is insisted that the suit was upon a written contract for the sale of 50 bales of cotton, and Tom Hutson, who classified it, classified it as strict good ordinary and good ordinary cotton. And appellant insists that there was nothing said in the written contract about color, and for that reason the contract could not have been construed to mean that the cotton should be white, unless the same had been specified in the contract; that the cotton was up to the grade and standard specified in the written contract; and it is argued that that contract could not be changed by the introduction of oral testimony, and that it was error to admit testimony as to the color of the cotton, or to admit any oral testimony about the cotton.

Even if the contract was entered into as alleged, and appellant breached the contract, it would of course be liable in damages for a breach of the contract. And there seems to be no serious controversy about the amount of damages. The appellee testified that he bought the cotton himself and sold it to the Memphis concern, and that he was damaged $118.15. If appellant is correct, and the testimony as to the color and grade of cotton was inadmis-

sible, a verdict should have been directed for appellant. It is a matter of common knowledge that the price of cotton is affected by its color, and that cotton that has been colored or stained or damaged in that way will not sell for the same price that white cotton would. And, while it is a general rule that parol evidence is not admissible to vary or contradict the terms of a written contract, it is admissible to show the intention of the parties, and the terms of a written contract are not contradicted or varied by showing the real intention of the parties. *Davis* v. *Reynolds,* 154 Ark. 101, 241 S. W. 379.

The parol testimony introduced in this case does not violate the rule making parol evidence inadmissible to vary or contradict the terms of a written contract. The contract in this case provided for a certain grade of cotton. The testimony on the part of the appellee shows that the cotton offered did not measure up to this grade, and that, when cotton was sold as this cotton was, it was understood between buyer and seller that it should be of certain quality, and that both parties understood this contract to mean that the cotton should not be off color, and that this was the intention of the parties. While parol evidence is not admissible to vary the terms of a written contract, it is admissible to show what the parties intended to express by the language adopted.

"Parol evidence is admissible to show a general and uniform custom or usage in the trade or business to which a contract relates, at the place where it was made or is to be performed, in those cases where the instrument is silent, or the terms and language employed are of doubtful import, or where such evidence is essential in order to give effect to the writing. * * * Where a word or phrase has, by reason of a custom or usage, a particular or technical meaning in a particular neighborhood or locality, and is used in an instrument made at that place or in that locality, the meaning of such word or term may be shown by parol evidence. And to authorize the admission of such evidence it is not necessary that the custom or usage should have existed for any considerable length

of time, it being sufficient if known to the parties at the time they entered into the contract." Enc. of Ev., vol. 9, 360.

It is true that, where a contract is in writing, clear and unambiguous upon its face, and purports to contain the complete agreement of the parties, parol evidence is not admissible to show that the actual or secret intent of the parties was different from that expressed in the writing. Parol evidence cannot be introduced to vary or contradict the written contract. But this rule, like all other rules, has exceptions.

"The general rule that parol evidence is not admissible to contradict or vary the terms of a written contract is neither invariable nor inflexible, but adapts itself to the manifold and shifting exigencies of human affairs. * * * The law takes into consideration the fact that most agreements are drawn up by unskilled persons, ignorant of the legal rules of construction, who very frequently do not embody the entire agreement, or else express it vaguely or ambiguously; and the fact that, even where agreements are drawn up by legal experts, the same faults and defects are attributable, sometimes from insufficient instructions from the client, sometimes from error of the counsel himself. A great deal of judicial leniency should be and is extended to uninstructed persons, where experience has demonstrated that some of the wisest lawyers who have ever lived have not known enough law to draw their own wills. * * * The body of the exceptional law that has thus sprung up is much larger than that of the corroborative law." Browne on Parol Evidence, 2.

The original contract in this case was oral, and what the parties now refer to as the contract was a confirmation of the oral contract, and is incomplete, and evidently does not undertake to set out the complete contract. It would hardly be contended that it would be a compliance with the contract to send blue cotton or cotton that was damaged in any other way, although the contract itself says nothing whatever about color.

It is insisted that the court erred in permitting the plaintiff to introduce in evidence Exhibit E. Exhibit E was a receipt given the appellee by H. V. McGown & Company, showing the amount of money paid by the appellee on account of the breach of his contract. This receipt was not admissible in evidence, but it could not have been prejudicial, because the undisputed testimony showed that the appellee paid the Memphis concern the amount for which the receipt was given.

Appellant next contends that the court erred in refusing to instruct the jury to return a verdict for appellant. The testimony was conflicting, and it was not error to refuse this instruction. The court properly instructed the jury that they must determine from the evidence whether or not the 17 bales of cotton complied with the class and grades called for in the contract, and that the burden was on the appellee to show by a preponderance of the testimony that the appellant failed to deliver and tender to him 17 bales of cotton of the grades and color called for in the contract.

The weight of the testimony and credibility of witnesses were questions for the jury, and their finding is conclusive here, there being substantial evidence to support the verdict.

We find no prejudicial error, and the case is therefore affirmed.

THANE *v.* MERCHANTS' & FARMERS' BANK OF DUMAS.

Opinion delivered February 20, 1928.

[redacted]

E. E. Hopson and *Coleman & Riddick,* for appellant.
Palmer Danaher and *Mike Danaher,* for appellee.

KIRBY, J., (after stating the facts). It being conceded, as well as shown by the undisputed testimony, that the stock of the appellee bank owned by appellant was turned over to the bank and sold and the proceeds thereof

deposited in the bank, to which appellant was in no wise indebted, the burden of proof was upon the bank to show that it was not indebted to or liable for the payment to the appellant, the owner of the stock, for the amount realized from the sale thereof and received by the bank.

The testimony discloses that there was no intention on the part of appellant to make a gift or donation of his stock or its proceeds to the directors of the bank or to the bank itself, and that the transaction did not constitute a gift or donation to either the directors or the bank, as the chancellor correctly held.

While there is no conflict in the testimony as to what was actually done so far as the stock being turned over to the Bank Commissioner, the sale thereof for the par value, and the deposit in the bank of the proceeds realized therefrom, are concerned, the evidence is in sharp conflict as to the intention of the parties in concluding the transaction.

The other directors apparently had in mind the intention not to attempt to rehabilitate the bank or restore its reserve so long as appellant, to whom some of them were unfriendly, was connected therewith in an official capacity. They refused to assist appellant in borrowing any money to restore the reserve, well knowing that he had exhausted his credit and resources in procuring funds to keep the other banks, which he had organized and been connected with, in operation. They insisted that he surrender his stock to the bank, and told the Commissioner, and through him the appellant, that, unless it was done, they would make no effort to keep the bank open and in operation, and that it would be closed by the Commissioner, as he had notified them would be done. They also knew that the appellant had refused to turn over his stock to the Commissioner or the bank as a gift or donation, or to consider the proposal of one of the directors, made at the Dumas meeting, that he might be allowed fifty per cent. of the value of the stock upon compliance with this request or demand of the directors.

Appellant states he never had any intention of making a gift or donation of his stock or its proceeds to either the bank or the other directors, and that, in surrendering it for sale that the proceeds might be used in restoring the reserve for the continued operation of the bank, he made no such gift or donation, and that the bank was liable for the repayment to him of the value of the proceeds of his stock deposited therein.

The directors contend, on the other hand, that but for their understanding that the stock was surrendered to be sold and the proceeds deposited in the profit and loss account for the bank's benefit, without any liability on its part for the repayment of the value thereof to appellant, the owner of the stock, all of which was known to appellant, they would not have sold or purchased it and continued the operation of the bank, and that appellant is estopped by his conduct about the transaction to claim any liability against the bank for payment of the proceeds realized from the sale of his stock.

There is sharp conflict in the testimony about the intention of the parties, but, as already said, the burden of proof was upon appellee, having received the proceeds of the sale of appellant's stock in its bank, to show that it was done under such conditions as relieved it from liability therefor, or to return the amount thereof to appellant. It cannot be said that it has discharged such burden. After the negotiations had proceeded to the point of delivery of the stock to the Bank Commissioner, upon agreement to be sold at not less than par and the proceeds deposited in the bank, increasing the reserve to the legal requirement, one of the directors insisted that the agreement be reduced to writing, which was done by the Bank Commissioner, and signed by the appellant.

The other directors claimed that the Bank Commissioner was their agent, or represented them as well as the bank, in his negotiations with the appellant for the delivery of the stock, and the transfer thereof was written by him at their request, and signed and executed by the appellant in their presence. This writing, under the

usual rule, should be construed most strongly against the party by whom it was prepared, and, in any event, it must be held to contain the agreement of the parties about the transfer.

The claim of the officers of the bank and the bank itself that the proceeds of the stock sold should be deposited in the bank in the profit and loss account, without liability for its repayment, is certainly not supported by the written memorandum or assignment, which appears to be complete and free from ambiguity, and the parol testimony should not have been heard to engraft a condition upon such a writing not expressed therein. In any event the finding of the chancellor that the agreement was made by appellant to allow the proceeds of the sale of his stock to be deposited to the profit and loss account, without liability on its part to the owner of the stock, and that the conduct of appellant in making the transfer of the stock under the conditions was such as to mislead the appellee bank and its officers and estop appellant from claiming any of the proceeds from the sale of his stock deposited in the bank, is contrary to the preponderance of the testimony.

Appellant's continued refusal to agree to any terms by which his stock was to be used as a gift or donation to the bank or its directors, his statement that no such agreement was made, and the written memorandum or assignment of the stock in accordance with the agreement, shows a preponderance of the testimony in appellant's favor, in our opinion.

The chancellor erred in holding otherwise, and the decree is reversed, and the cause remanded with directions to enter a decree for appellant in accordance with this opinion.

MEHAFFY, J., (on rehearing). The facts are stated in the original opinion, which was handed down February 20, 1928. A majority of the court has reached the conclusion that a rehearing should be granted and that the decree of the chancellor should be affirmed.

The appellant, Mr. Thane, was president of the Farmers' & Merchants' Bank of Dumas, and the Bank Commissioner, after an appraisal of the assets, determined that the bank had losses considerably in excess of their surplus and undivided profits account and a large number of slow and doubtful papers. And on the 6th day of March the directors of the bank stated to the Bank Commissioner that they were unable or unwilling to finance the bank. Mr. Thane, the appellant, owned a large amount of stock, $17,000. A number of directors and other witnesses stated that, if Mr. Thane would turn over his stock to them, they would pay par for it and place the proceeds of the sale of the stock in the bank to the profit and loss account. Or, if Mr. Thane did not wish to do this, that they would turn over their stock to him if he would finance the bank. They were endeavoring to make some arrangements to finance the bank because, as they stated, they did not want another bank failure in Dumas. And if Mr. Thane would turn over his stock to them they would finance the bank, or, if he would finance it, they would turn over their stock to him.

It is true, as stated in the original opinion, that the appellant was not indebted to the bank, but, if the bank were insolvent and some arrangements were not made, according to the testimony of some of the witnesses, the condition of the bank was such that it would not pay more than 25 per cent. of its debts, and the stockholders would not only have nothing of value in their stock, but would be called upon to pay an assessment of 100 per cent. No one, of course, regarded the stock as having value.

Mr. Thane himself testified that he attended a meeting of the board of directors, and learned the condition of the bank from the statement submitted by Mr. Byrne, and stated that the directors could get whatever money they wanted on a joint note of all the directors, which he proposed to sign with them. This proposition was submitted to each of them individually and personally, and all of them declined to sign the note with him. They then said if appellant would give them his stock they

could get all the money they needed, and he declined to do this. He further testified with reference to the board of directors: "They wanted me to give them my stock. They said if I would give them my stock they could raise the money that they needed—that the bank would need—and I declined to give them my stock."

Mr. Thane testified that he afterwards had a meeting at Little Rock, first with Mr. McKee, and he told Mr. McKee he would not give up his stock. He said that the directors were demanding either money or his stock, and Mr. McKee told him, so he testified, that he was satisfied the directors meant what they said; that, if Mr. Thane would not find them some money or give them his stock, they would close the bank, and Mr. McKee was very anxious to avoid anything like that. Also Mr. McKee told appellant that he was satisfied that there was a feeling at Dumas among the directors that appellant should disconnect himself or sever himself from the bank. Appellant then testified as follows:

"So, after discussing—talking the matter over in a general way, I concluded that I would let them have the stock, because, if I found the money, which I think I could have done, the only—the question at once occurred to me, if I help them out with money this time, when will the next demand—when will a similar demand be made upon me? So I made up my mind to let them have the stock and sever my connection with the bank."

After the conference between Mr. McKee and appellant, according to appellant's testimony, they went out and met the other parties, and Mr. McKee told them that he had got the stock, and some one insisted that it be reduced to writing, and the following is a copy of the writing:

"Little Rock, Ark., 2/15/1922.

"I hereby turn over to Chas. McKee, Bank Commissioner, 680 shares of stock of the Merchants' & Farmers' Bank of Dumas, to be delivered to new and old stockholders, on the payment by them of the par value of said stock into the Merchants' & Farmers' Bank of Dumas.

"H. Thane."

It is true, as stated in the original opinion, that appellant stated he never had any intention of making a gift or donation of his stock or its proceeds, either to the bank or to the directors, but the undisputed proof is, when they held their meeting at Dermott, that they demanded his stock, and Mr. McKee told him the directors meant what they said, and, unless he gave them his stock, the bank would close. Of course he knew that if it did his stock was not only worthless, but he would probably have to pay an assessment on his stock. The directors were demanding this, or that they would turn over their stock, give it to Mr. Thane, if he would finance it. There had never been any offer or suggestion that, whether Mr. Thane gave up his stock or the directors gave up theirs, there would be any amount paid. Mr. Thane says that one of the directors told him at one time that, if he would give his stock, they might be able some time thereafter to work it out and pay him 50 per cent. But, at the meeting of the board of directors and at all other times, it was understood by all that the directors were proposing to give their stock, not sell it, but give it to Mr. Thane if he would finance the bank, or, if he did not do that but would give his stock to them, not to the bank, they would finance it. This stock, after being turned over to Mr. McKee, was sold, most of it to persons who were not stockholders at the time, and they paid par for it, and this money was put into the bank to the profit and loss account.

The undisputed proof shows that, unless one or the other of these methods had been adopted, the bank would have failed, and the delivery of his stock with the understanding that he was to get par for it would have left the bank in as bad condition as it was. The stock would have been a liability. And certainly no one could believe from the testimony in this case that the stock was worth par at that time. In fact, according to the testimony, it was worthless unless the bank received assistance immediately, or, as Mr. McKee told Mr. Thane, unless he either took the directors' stock and financed the bank or turned

his stock over to them and let them finance it, the bank would have to close, and if it closed it would have been able to pay but 25 per cent. on its debts, and every stockholder would have been assessed 100 per cent. on the stock he owned.

These persons that purchased approximately $14,000 or $15,000 of the stock turned over to the Bank Commissioner paid par for it. They purchased it with the understanding that $17,000 went into the bank as a part of its assets, to the profit and loss account. If they take that out, these persons who paid par for stock that was worthless if the bank failed would now lose all they paid after putting up the money, and Mr. Thane would get par for his stock. Certainly no one understood that Mr. Thane was to get any pay for his stock except Mr. Thane, and, even if he understood it, he would, as the chancellor held, be estopped.

When we consider the testimony of Mr. Thane when he said, "They wanted me to give them my stock. They said if I would give them my stock they could raise the money that they needed, that the bank would need, and I declined to give them my stock," it appears that, at the first meeting, the directors wanted Mr. Thane to give the bank his stock. Nothing was said about paying for it; and then when he came to Little Rock and had a private conversation with Mr. McKee, the Bank Commissioner, and Mr. McKee and Mr. Thane came out together, where the other directors and other persons interested were, and Mr. McKee stated to them that he had got Mr. Thane's stock, and it must be remembered that this was after he had told Mr. Thane that the directors meant what they said—he would either have to give his stock or take the other directors' stock and finance the bank or it would be closed—we are forced to the conclusion that the directors and other persons who purchased the stock understood that there was to be no payment for the stock, but it was to go into the bank to the profit and loss account, and the persons who purchased it did it with that understanding. So, whether Mr. Thane intended it or not,

we think he is estopped, as held by the chancellor, and cannot now claim pay for his stock, the proceeds of which went into the bank. The decision of the chancellor should be upheld, unless it is against the preponderance of the evidence.

We think the decree is supported by the preponderance of the evidence, and the petition for rehearing is granted and the decree of the chancellor is affirmed.

HART, C.J., and KIRBY, J., dissent.

PATE *v.* BRYAN.

Opinion delivered February 27, 1928.

Saxon, Wade & Warren, for appellant.

Powell, Smead & Knox, for appellee.

KIRBY, J. Appellant, Pate, brought this suit in the chancery court, Second Division, against J. W. Bryan, alleging that defendant was indebted to him in the sum of $1,549.38 on account for materials furnished defendant, in the sum of $622, and on account of a lien fixed on plaintiff's property by reason of purchases made by defendant while constructing a certain house for plaintiff, in the sum of $927.83.

Plaintiff executed a bond at the institution of the suit, and named in his complaint as garnishees the First National Bank of El Dorado, Farmers' & Merchants' Bank of Bearden, and Gus Keating of El Dorado, and writs were issued on the 8th day of July, 1926, and served on the First National Bank of El Dorado, on Gus Keating on the 9th day of July, 1926, and on the Farmers' & Merchants' Bank of Bearden on the 12th day of July, 1926.

Bryan answered on July 29, 1926, denying any indebtedness to plaintiff, and, by cross-complaint, sought to recover $2,600 which he alleged plaintiff owed him.

Plaintiff alleged in his complaint that, in the construction of the house for him, defendant had purchased material from J. P. Wright, which was used in the building, for which he owed $927.83, and for which Wright had filed a lien against plaintiff's property.

Defendant answered, admitting the purchase of material from Wright, that it had not been paid for, and prayed that Wright be made a party defendant, which was done.

Wright, on December 3, 1926, filed an answer to defendant's cross-complaint, alleging the sale of the material to defendant, used in construction of plaintiff's house, that he had filed a materialman's lien therefor, as prescribed by law, and prayed judgment and foreclosure thereof.

On July 10 the First National Bank, garnishee, answered that it had in hand money, credit and effects belonging to defendant in the sum of $1,286.05.

On December 6, 1926, Gus Keating intervened, claiming that the funds garnished in the First National Bank belonged to him, and had been deposited in the bank by him to the credit of Bryan, defendant, for convenience in payment of claims for labor and material furnished in construction of the house, and could not be used for any other purpose.

On the 23d day of March, 1927, the court entered a decree for J. P. Wright for his debt, and fixed a lien

against plaintiff's house for payment, and in favor of plaintiff against Bryan for $964.35. The decree adjudged Gus Keating, intervener, to be the owner of the funds held by the El Dorado bank to the credit of J. W. Bryan, and that there was no liability of the bank to plaintiff under the garnishment against it. Refused to enter judgment against the other garnishee, the Farmers' & Merchants' Bank of Bearden and Gus Keating, who had been served with a garnishment and failed to answer, holding in the Keating garnishment the pleadings amended to conform to the proof.

Plaintiff appealed from that part of the decree adjudging Gus Keating to be the owner of the funds first garnished in the El Dorado bank to the credit of defendant, Bryan, and from that part of the decree refusing to enter judgment against the Farmers' & Merchants' Bank of Bearden and Gus Keating, garnishees, for want of an answer.

It is urged that the court erred in holding the money deposited in the El Dorado bank, garnishee, to the credit of appellee, Bryan, the contractor, was the property of Keating, and not subject to garnishment, and the contention must be sustained.

The undisputed testimony shows that the money was deposited in the garnishee bank by the owner for whom the building was being constructed, to the credit of the contractor, a general deposit, without restrictions, so far as the bank was concerned, creating the relation of debtor and creditor between the appellee bank and Bryan, the contractor, who was neither agent of nor trustee for Keating, the owner.

This case is unlike *Hine* v. *Brown,* 135 Ark. 393, 205 S. W. 657, and *Geyer & Adams Co.* v. *Bank of Central Arkansas,* 170 Ark. 1016, 282 S. W. 358, which appellees insist are in point and controlling here. In the Hine case there was no apparent general deposit of money in the bank to Brown's credit, but he was given a cashier's check for a specified amount for a particular purpose, under an express direction or agreement that it should be re-

turned to Hine if not used for this purpose for which it was given, of redeeming certain of the lands from a mortgage.

In the other case the bank was advancing the money to Hicks to enable him to make a crop upon which it held a mortgage, and gave credit on its books to the mortgagors, against which they were only permitted to check for expenses of raising the rice crop, the bank reserving the right to refuse to pay any check not drawn for this specific purpose.

Neither Keating, who deposited the money to the credit of the contractor, Bryan, nor the bank in which it was deposited, had or retained any control over the fund advanced. It follows that the chancellor erred in holding the money to be the property of Keating, and not subject to the garnishment.

No error was committed in refusing to render judgment by default against the other garnishees, who had not answered until the trial of the issues in the case, and, no judgment having been rendered against them for want of an answer, the court could have granted them further time to answer, upon proper request made therefor, as had been done already in the first instance. It was within the discretion of the court to permit the answer to be filed, under the conditions existing, and we cannot say that the court abused its discretion in so doing. *Geyer & Adams Co.* v. *Bank of Central Arkansas,* 170 Ark. 1016, 282 S. W. 358.

Since the answer of the garnishee bank disclosed it had in its possession a small amount due the defendant, judgment should of course have been rendered therefor.

It follows that the judgment must be reversed, and the cause remanded with directions to subject the money in the hands of the garnishees, the First National Bank of El Dorado and the Farmers' & Merchants' Bank of Bearden, to the satisfaction of any amount remaining unpaid upon the judgment, and for further necessary proceedings in accordance with the principles of equity and not inconsistent with this opinion. It is so ordered.

ESTEP *v.* BLUE RIBBON COAL COMPANY.

Opinion delivered April 16, 1928.

G. L. Grant, for appellant.

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

KIRBY, J., (after stating the facts). The appeal involves the construction of the statutes giving liens to miners as to whether such liens are superior to prior mortgages, the appellants insisting that the miners' liens are only subject to the mortgage of the leasehold interest in any event, and that their liens upon the machinery, material, supplies and specific improvements at the mine are superior to the bank's mortgage, notwithstanding it was executed and recorded before their labor was done at the mine.

Appellants claim under the statutes, § 7293, C. & M. Digest, which is silent as to the priority of the time given, and act 615 of the Acts of the General Assembly of 1923, the first section of which gives laborers and materialmen who, under contract with the owner or lessee, perform labor or furnish material, machinery, supplies, etc., for operating, equipping, maintaining or repairing any mine, a lien on the land or leasehold interest therein, except the lien does not attach to the fee in the land when the labor is performed or material is furnished to a leaseholder.

Section 4 deals with the priority of the lien given, declaring that it "shall be prior and paramount to and in preference of any and all subsequent liens, incumbrances or mortgages, and * * *. The lien herein provided for shall attach to the machinery, material, supplies and the specific improvements made, in preference to any prior lien, or incumbrance, or mortgage upon the land or leasehold interest upon which the said machinery, material, supplies and specific improvements are placed or located; provided, however, that any lien, incumbrance, or mortgage upon the land or leasehold interest at the time of the inception of the lien herein provided for shall not be affected thereby; and the holders of such liens upon such land or leasehold interest shall not be necessary parties in suits to foreclose the lien hereby created."

The statutory lien given to the miners for work done in operating the mine could not become paramount to a prior recorded mortgage unless the statute creating the lien manifests an intention to give it preference. In *Easter* v. *Goyne,* 51 Ark. 22, a case wherein the question involved was whether a statutory lien would take precedence over a prior recorded mortgage, executed after the passage of the act giving the statutory lien, the court said: "The statute under consideration does not evince the intention to give preference to the statutory lien, and, in the absence of a legislative intent to that effect, the

courts have not, unless in exceptional instances, permitted the lien created by the statute to become paramount to a prior recorded mortgage. Jones on Liens, §§ 691-3, and cases cited; Jones on Chattel Mortgages, § 474." See also the New Mexico case of *Eccles, Artesian Well Supervisors, etc.,* v. *Will,* 170 Pac. 748, L. R. A. (N. S.) 1918C, 1022. In a note to this case, found on page 1024 L. R. A. (N. S.) 1918C, it is said: "The view taken in the Eccles case, that, where the statute creating the lien is silent on the question, the lien does not take priority over an existing mortgage, is in accord with the general rule declared in such cases," many of which are cited, and among them our case of *Easter* v. *Goyne, supra.*

It is true it is expressly provided that the lien given the laborers shall attach to the machinery, material, etc., in preference to any prior lien, incumbrance, or mortgage upon the land or leasehold interest upon which the said machinery, material, supplies and specific improvements are placed or located, provided that any lien, incumbrance or mortgage upon the land or leasehold interest at the time of the inception of the lien herein provided for shall not be affected hereby. The inception of the statutory lien could not have been before the material and supplies were begun to be furnished and the labor done, and it was not the intention of the statute to make the lien of the laborer or materialman superior to the lien of the prior mortgage upon the leasehold interest and equipment of the mine before the inception of the lien given the laborer by the statute, which expressly declares that such mortgage lien shall not be affected thereby. It was obviously not intended that the laborer or material furnisher should have a superior lien upon the leasehold and equipment of the mine to the lien of the mortgage existing at the inception of the statutory lien. In other words, at best, the statute, under a fair construction, cannot be held to intend the giving of a lien to laborers and material-furnishers on the materials,

improvements and equipment of the mine already installed and covered by a valid mortgage of the leasehold at the inception of the statutory lien, which could attach only to such machinery, material, and specific improvements thereafter installed becoming superior to the mortgage lien therefor.

Since the testimony does not show that the machinery, equipment and specific improvements upon which the lien was claimed by appellants were installed in the mine after the miners began their operations and the materialman furnished such equipment, no error is shown in the decree as rendered, which must be affirmed. It is so ordered.

GREAT AMERICAN CASUALTY COMPANY *v.* WILLIAMS.

Opinion delivered April 23, 1928.

Trimble & Trimble, for appellant.

Chas. A. Walls, for appellee.

KIRBY, J. This appeal is prosecuted from a judgment of recovery of benefits or indemnities under an accident insurance policy. The policy provides indemnity for accidental injury to insured "while actively engaged in farming, by actual contact with and while operating a threshing, mowing, reaping or binding machine, harrow or plow."

Appellee was operating a binding machine, harvesting rice; was down under it, making some adjustments or repairs, when a sledgehammer in the seat fell off and struck his foot, so injuring it that he was taken to the hospital, where his toe was amputated, and loss of 15 weeks' time from total disability on account of the injury resulted.

The policy is written in sections or divisions, and contains many separate provisions, in one of which it is expressly provided: "No recovery may be had under more than one of the provisions hereof, and in no event shall the company be liable for more than one of the specific losses named herein."

Appellee alleged the right to recover on one of the provisions for the weekly indemnity of $25 for total loss of time during 15 weeks, under another provision for payment of certain weekly indemnity for time spent in the hospital on account of the accident, not to exceed 4 weeks, and for $10 damages for the specific loss of his toe.

Appellant filed general and special demurrers to each clause of the complaint alleging the right to recovery, all of which were overruled. Denied any liability for the injury at all, and alleged that claiming the payment of the specific loss or indemnity in any one provision of the policy precluded a recovery on every other provision thereof.

Appellant requested an instruction for a directed verdict, which was refused, and the court found in favor of the appellee for $10 for loss of large toe, $25 per week for 15 consecutive weeks for lost time for total disablement, $375, and $25 per week for three consecutive weeks and a fractional part of a week during which appellee was confined in the hospital, $82.14, and from the judgment rendered in the aggregate of $467.14 this appeal is prosecuted.

Appellant insists, first, that the accidental injury was not covered by the terms of the policy, claiming that the injury was not shown to have resulted from actual contact with the binding machine while operating it.

The repairing or readjustment of the machine was necessarily done as a part of its operation, and the accidental injury resulting from the falling of the sledgehammer out of the seat on the binder, where it was carried for use in repairing the machine, on the foot of appellee, while he was so engaged, was necessarily caused by actual contact with and while operating the binding machine, notwithstanding it resulted from the falling of the hammer carried for making such repairs, which was no part of such machine.

It is further insisted that, under the express terms of the policy, appellant was not entitled to recover under more than one of its provisions, and especially that he could not recover indemnity for the time spent in the hospital for treatment of the injury and amputation of his toe, since, in the clause of the policy making provision for payment of hospital benefits, it is expressly provided: "Where such confinement results from injury caused by any accident in or out of business for which no other indemnity is provided by the policy," etc. We think this contention must be sustained, since provision in the policy is made for payment of a weekly indemnity for loss of time for total disablement caused by accidental injury, and also for the specific loss of the toe resulting therefrom, and the court erred in holding otherwise.

In the policy it is expressly stated, under the heading "Important," that it is a limited accident and sickness policy, paying indemnity for loss of life, limb, sight, or time, by accidental means, etc. It expressly provides that appellee is insured for the term of one year, subject to the provisions and limitations herein contained, against "the effects of bodily injuries caused directly, solely, and independently of all other causes, by external, violent, and accidental means," etc.

Under part 3 of the policy a provision is made for payment of a weekly indemnity of $25 for total disablement of the insured for not exceeding 15 consecutive weeks on account of any one accident, and under part 4 for specific losses for fracture of bone of the toe $10, and also, if the insured shall have more than one fracture of those designated, he must elect which one he prefers payment for, since the company is only bound to the payment for one of those specified.

Appellant insists that, even though appellee was injured by coming in contact with the binding machine while engaged in operating it, one of the hazards expressly covered in the policy by clause 12 of part 2, he cannot recover the weekly indemnity provided for accidental injuries, since it is not included in said part 3 of the policy, which attempts to limit the payment of such weekly indemnity to injuries expressly covered by clauses 1 to 9 of part 2.

This policy was prepared by the insurer, and purports to provide a weekly indemnity for injuries resulting from hazards insured against, and, where there is any doubt as to the meaning of the language employed, the policy must be construed strictly against the insurer and favorably to the insured. *Lincoln Reserve Life Ins. Co.* v. *Smith,* 134 Ark. 245, 203 S. W. 698; *Home Mutual Benefit Assn.* v. *Mayfield,* 142 Ark. 240, 218 S. W. 371; *Eminent Household of Columbian Woodmen* v. *McCray,* 156 Ark. 300, 247 S. W. 379; *Benham* v. *American Central Life Ins. Co.,* 140 Ark. 612, 217 S. W. 462.

A reasonable construction of the terms of the policy will not allow the insurer to escape liability for the payment of the weekly indemnity provided for accidental injuries resulting from a hazard expressly insured against, by numerous exceptions and contradictory and ambiguous provisions.

The court erred, as already said, however, in allowing a recovery of the hospital benefits, since, under the plain terms of the policy, no recovery can be had under more than one provision of the policy for the accidental injury, and for one of the specific losses designated resulting therefrom.

If the appellee will enter a remittitur within 10 days of the amount recovered for hospital benefits, $82.14, the judgment will be so modified, and affirmed, otherwise it will be reversed and remanded for a new trial. It is so ordered.

VENABLE *v.* STATE.

Opinion delivered April 30, 1928.

Edward Gordon, for appellant.

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

WOOD, J. The appellant was convicted on a valid indictment of the crime of carnal abuse, and was sentenced by judgment of the court to imprisonment in the State Penitentiary for a period of two years, from which judgment he duly prosecutes this appeal.

1. The indictment charged that the offense was committed in the county of Pope and in the State of Arkansas, "on the first of February, 1927." The bill of exceptions shows the following:

Objection made by attorney for defendant during opening statement of the case by the State: "Do you state that this indictment does not state that this is the date? By the court: The court tells the jury that the date alleged in the indictment is not material. By Mr. Gordon: I want to state now that the prosecuting attorney, or hired counsel for the prosecution, has stated to the jury that, from the acts of intercourse, the prosecuting witness became pregnant, and is some time soon to become a mother; that the allegations in the indictment are material, because the defendant could not go to trial and make a proper defense if a fictitious date was used, and if the prosecuting attorney had another date and deliberately used this one, that we have been met by surprise, and ask that the case be withdrawn from the jury and be continued. Court: The court holds the objection is not well taken. Mr. Gordon: We save our exceptions. The record will show that she had been called as a witness in the lower court, when the case was tried there, and that she swore it occurred just after Christmas. Court: Objections overruled, and your exceptions saved."

Counsel for appellant contends that the court erred in not granting a continuance of the cause, stating that he was able to show by competent physicians and by the physical facts, that the child not having been born at the time of the trial, it was physically impossible for the alleged act of intercourse to have occurred just after Christmas in 1926, or the first of February, 1927; that the prosecutrix had testified in the justice court that the acts of intercourse with appellant by which she became pregnant occurred just after Christmas, 1926; that the prosecutrix had testified on the trial of the cause that the first act of intercourse occurred about March 25, 1927, and the last some time in June. Counsel urge that appellant was taken by surprise, under the above facts, and that the court erred in not granting a continuance on that ground. A complete answer to this contention as to the time alleged is contained in the statute, which provides that:

"The statement in the indictment as to the time at which the offense was committed is not material, further than as a statement that it was committed before the time of finding the indictment, except when the time is a material ingredient in the offense." C. & M. Digest, § 3019.

Time was not a material ingredient of the offense in the case at bar, except to show that, at the time the alleged offense was committed, the prosecutrix was under sixteen years of age. The prosecutrix testified that she was fourteen years old at the time of the trial. The trial court did not err in declaring the date alleged in the indictment was not material. See *State* v. *Gill,* 33 Ark. 129-133; *Marquardt* v. *State,* 52 Ark. 269, 12 S. W. 562; *Oakes* v. *State,* 135 Ark. 221, 205 S. W. 305; *Taylor* v. *State,* 169 Ark. 589, 276 S. W. 577. The motion was not well taken as to what appellant expected to prove.

The statement of counsel in his brief that he was able to prove by physicians certain physical facts, and by other witnesses other facts which would show that his guilt was impossible, would not justify this court in

reversing the ruling of the trial court in overruling appellant's oral motion for continuance. To be sure, the trial court may, in its discretion, grant an oral motion for continuance, under §§ 3129 and 3130, C. & M. Digest, because there is no requirement in these sections that such motions shall be reduced to writing. Nor does § 1270, C. & M. Digest—which, by § 3130, *supra,* is made applicable to criminal cases—require that the motion for continuance be reduced to writing and supported by affidavit, unless the opposite party demands it. Nevertheless, where the trial court overrules an oral motion to continue or postpone a cause on the ground of surprise, the party who complains of such ruling, in order to make the error, if any, appear to this court, should set forth in the record or bill of exceptions the facts constituting such surprise. He should bring to the attention of the trial court, and then of this court, a statement of the testimony or evidence which he claims would show that he was surprised. In *Dixon* v. *State,* 46 Neb. 298, 64 N. W. 961, the Supreme Court, speaking of an oral request for continuance on the ground of surprise, says:

"In the showing made it was not disclosed in what respect the defense expected to be able to meet the new phase of the evidence, or the names of the witnesses by whom it was to be met. In order to procure a continuance it should be shown that the party seeking the continuance expects to be able to procure material testimony, and the nature of such testimony."

The mere statement of appellant that he could prove certain facts, if given an opportunity, is not sufficient, where the court refuses to accept the statement, to show that the court erred. Such a statement is too general. Appellant or his counsel should follow up such statement by detailing the testimony that could be had and the names of the witnesses who would so testify, and then verify the statement. See Standard Ency. Procedure, p. 471.

This court, in *Bourland* v. *State,* 158 Ark. 37, 249 S. W. 591, said: "Appellant filed an unverified motion for

continuance. It was not error to refuse to grant a continuance where the motion was not sworn to by appellant or his attorney." Citing *Brickey* v. *State,* 148 Ark. 197, 231 S. W. 549.

2. The appellant next contends that the court erred in refusing to permit the introduction of the testimony of the prosecuting witness given in the justice court at the examining trial.

The Attorney General answers this contention as follows:

"The court did not refuse to permit the introduction of any testimony taken at the examining trial which was in conflict with that given by the witness in this case. Moreover, the court went further than this by giving permission to counsel for defendant to call the prosecuting witness back for further cross-examination, and, upon re-examination of the witness, she admitted having testified to that part of the testimony previously given, and, notwithstanding this, the court held that the defense might introduce any part of the testimony previously given which contradicted her testimony in this case."

We find that the statement of the Attorney General is borne out by the record. Therefore the above assignment of error cannot be sustained.

3. It is last insisted that "the testimony is insufficient to sustain the verdict." The prosecutrix, at the time of giving her testimony, was between fourteen and fifteen years of age. She testified that the appellant had sexual intercourse with her the first time about March 25, 1927, and the last time in June, 1927. The acts of sexual intercourse were in Pope County, Arkansas, at the home of her brother-in-law, Jim Venable, who was a brother of the appellant. The appellant at the time was living with his brother Jim. It is unnecessary to set forth the testimony of the prosecutrix as to the manner of the alleged sexual intercourse. If it occurred as she described, it was done forcibly, and against her will. But it is obvious that the grand jury did not believe her

testimony to the effect that the acts of sexual intercourse were against the will of the prosecutrix, else the indictment would have been for rape instead of for carnal abuse. And we may say that the testimony of the prosecutrix at the trial as to the circumstances and manner of the alleged intercourse was so unreasonable and unbelievable as to make it highly improbable, if not impossible, that the acts of sexual intercourse took place in the manner detailed by her.

The learned counsel for appellant therefore argues that the jury were not warranted in finding that appellant had sexual intercourse at all with the prosecutrix. That is a manifest *non sequitur*. The prosecutrix was not yet fourteen years of age when the alleged acts of sexual intercourse occurred. That the prosecutrix had sexual intercourse was proved by the physical fact that at the time of the trial she was enceinte. This fact, established by the testimony of the prosecutrix and her mother, was undisputed. The prosecutrix, in testifying that the appellant had intercourse with her by force and against her will, was evidently endeavoring to shield her own conduct as far as possible from any censure, because of what had happened. At least, the jury might have so found. The jury might have discredited her testimony as to the manner of the sexual intercourse, and still have believed that sexual intercourse took place with appellant. Such was the exclusive province of the jury, as the sole judges of the credibility of the witnesses. The jury could accept and believe such parts of her testimony as they believed to be true and discard such parts of her testimony as they believed to be false. If appellant had intercourse with the prosecutrix, since he was indicted and convicted of carnal abuse it is wholly immaterial whether the intercourse was with or without her consent.

The law was correctly declared by the trial court. Therefore the guilt or innocence of the accused, under the evidence, was purely an issue of fact for the jury.

Counsel for appellant relies upon the case of *People* v. *Benson*, 6 Cal. 222, Am. Dec. 507, where it is said:

"The case before us is supported alone by the evidence of the prosecutrix, a young, ignorant girl, thirteen years of age, and is so improbable of itself as to warrant us in the belief that the verdict was more the result of prejudice or popular excitement than the calm and dispassionate conclusion upon the facts by twelve men, sworn to discharge their duty faithfully." But the doctrine thus announced has no application to the facts of this record. Under the rule of our own numerous decisions the case on the facts was peculiarly one for the jury. In one of our very latest cases it is said: 'This issue of fact was one for the jury, and not for the courts to determine on appeal. It was not necessary for the statement of the prosecutrix to be corroborated upon the charge of carnal abuse. We cannot agree with the view expressed by learned counsel for appellant, that the testimony of the prosecutrix was so unreasonable and contrary to human experience that juries and courts should disregard her statement.'" *Head* v. *State*, 175 Ark. 69, 297 S. W. 828. That is the doctrine applicable here.

Therefore let the judgment be affirmed.

WEBB *v.* SMITH.

Opinion delivered April 30, 1928.

Walter L. Pope, for appellant.

MEHAFFY, J. This action was begun in the justice of the peace court in Randolph County, was appealed to the circuit court, and, after the evidence was introduced, the court directed a verdict for the appellee. Motion for a new trial was filed, overruled, and exceptions saved, and appeal prayed and granted.

The appellee testified in substance: That appellant's two mares were bred to appellee's jack, and that the fee was $10 each; that he had a notice on the barn door reading: "Terms $10 to insure a living colt. If mare is traded after service, fee becomes immediately due."

The appellant testified that there was no notice on appellee's barn, and that the only contract he had with appellee provided that appellee would guarantee a living colt, and, if a living colt was born, the fee would be $10 for each colt. He proved that the mares did not get in foal at all, and several months afterwards he traded the mares. Appellant did not claim that he had appellee's consent to trade the mares.

Tim Knotts, who traded for the mares, testified that they were not in foal and they never did get in foal.

The appellant asked the court to give the following instruction:

"You are instructed that, if you find that the contract between the plaintiff, Smith, and the defendant, Webb, was that the plaintiff guaranteed a living colt born to each mare, and that this was the only contract between them, and if you further find that the defendant's mares did not get in foal from the service by the plaintiff's jack, you will find in favor of the defendant."

The court refused to give this instruction, and directed the jury to return a verdict for the plaintiff, which was done.

This court has said, in a case where the contract was that there should be no charge unless there was a

foal, provided the owner of the mare did not sell or trade her during the period of gestation, that that justified the court in finding that the contract was one of insurance upon condition. *Pitchcock* v. *Donnahoo,* 70 Ark. 68, 66 S. W. 145.

It is true that persons could make a contract of that kind, and, if they did, each party would be bound by it. They could make a contract that the fee would be due when the mares were traded or if the mare died, or that it might become due upon the happening of any other contingency, but in the instant case the appellant testifies that there was no such contract. The appellee, to be sure, says there was a sign on his barn door announcing his terms, but the appellant testified that he did not see any notice, and that the only contract made was that the fee was to be due when there was a living colt.

If appellee's contention is correct, the party claiming the fee could bring a suit two or three years after the service if the mares were traded, although they were never in foal. It may be in this case that the contract was as testified to by appellee, but the appellant testified to a different contract, and he had the right to have the question submitted to the jury and let the jury determine whether he was correct or whether the appellee was correct.

"Where a contract for service of a stallion insures conception, but provides for the payment of the fee when the mare 'foals or is traded,' the fee is due and collectable when the mare is sold during the ordinary period of gestation, although she is known to be with young, the sale operating to forfeit the insurance." 3 C. J. 48.

But the appellant testifies that this was not the contract that he made. And they had a lawful right to make the contract that appellant says was made, and it was the duty of the court to submit the question to the jury, and the instruction requested by appellant was proper.

In the case of *Snyder* v. *Slatton,* 92 Ark. 530, 123 S. W. 640, the court said: "The uncontroverted testimony shows that J. P. Step sold the mare to William Snyder,

and the court holds that this amounted to trading the mare." And the court further said in that case that, under the undisputed evidence in the case, therefore the mare was traded, and the debt was due.

The facts in the above case were, as stated by the court, that, under the contract, a colt was insured, and that the debt was due when that fact was ascertained or when the mare was traded. That was the uncontroverted proof in that case. That is not the proof in the instant case.

The Supreme Court of Indiana said, in a case involving a contract of this kind:

"Appellees 'insured' the mares to get with foal; but it was also agreed between them and Moddy, the decedent, that, if he parted with the ownership of the mares before the expiration of eleven months from the date of the service of the horse, he should forfeit the insurance, and pay the agreed sum of $40. Within the eleven months Moddy died, and the appellant, as executor, sold the mares. * * * The insurance or warranty on the part of appellees was conditional, the condition being that Moddy should not part with the ownership of the mares before the expiration of eleven months from the date of the service of the horse. It is not clearly apparent why this condition was annexed, nor how it could be of much importance, but it was a condition which the parties had a right to couple with the insurance, and one therefore by which they and their representative were and are bound. * * * The stipulated condition has not been complied with, and that releases appellees from their insurance. Moddy might have stipulated that the condition be dispensed with in the event of his death, but he did not do so." *Cummings* v. *Peed,* 109 Ind. 71, 9 N. E. 603.

In the case at bar the appellee could have declined to make any contract unless appellant would agree to his conditions, and, if he did, appellant would have been bound. If the contract was that the fee was to be due when the mares were traded, then it would be immaterial whether they were with foal or not, but, if the contract

was as contended for by appellant, then he would owe nothing.

The court therefore erred in its refusal to give the instruction requested by appellant, and for this error the judgment is reversed, and the case remanded for new trial.

SCHALCHLIN *v.* CORNEY.

Opinion delivered April 30, 1928.

Price Shofner, for appellant.

J. F. Wills, for appellee.

McHANEY, J. This appeal comes from a decree of the Pulaski Chancery Court sustaining a demurrer to appellant's complaint, which alleged that the appellee is the administrator of the estate of Bettie Bowers, deceased, and that on February 5, 1923, by order of the Pulaski Probate Court, the appellee sold to him all the right, title and interest of the deceased in and to lot 5, block 5, McDiarmid's addition to the city of North Little Rock, to provide funds to pay the debts against the said estate, for the sum of $1,185 in cash, which sale was confirmed by the probate court, and deed executed to appellant; that appellant and appellee thought a fee simple title was conveyed by said sale, and that the appellee represented to him that he was selling a fee simple title;

that he had a right to rely upon appellee's representations in this regard, and that they both thought, for about two years thereafter, that the fee had been conveyed; that thereafter the collateral heirs of Wash Bowers brought suit against him to recover an undivided one-half interest in said land, and did recover such interest; that he paid the sum aforesaid for the fee, and, by reason of a mutual mistake on the part of both him and appellee, he should recover $592.50, one-half the purchase price paid.

Other allegations are contained in the complaint regarding the claims filed, and an amendment to the complaint was filed, setting up other allegations, which are not necessary to detail.

We think the court correctly sustained the demurrer and dismissed the complaint for want of equity. The administrator was ordered to sell all the "right, title and interest" of Bettie Bowers in and to said lot for the purpose of paying her debts, and only such interest was conveyed by the deed which was executed by the administrator, and no warranty of title was made. There is no allegation of fraud on the part of any one in the complaint, but the substance of the charge is that both he and the administrator thought a fee simple title was conveyed. But the fact that they were both mistaken in this regard does not make the estate liable for one-half the purchase price of said land. He made no investigation of the records of Pulaski County to determine whether the deceased owned the title to said property in fee, but says that he relied upon the representations of the administrator. When he discovered that he did not have the fee simple title, but only an undivided one-half interest therein, he made no offer to rescind the transaction, but elected to keep whatever interest he acquired therein, and to sue for one-half the price paid.

This was a judicial sale. Sales made by executors, administrators and guardians under orders of the probate court are judicial sales, and, as a general rule, purchasers at such sales, as in all other judicial sales, act at

their peril. In the case of *Apel* v. *Kelsey*, 47 Ark. 413, 2 S. W. 102, this court said: "An administrator's sale to raise money to pay debts is a judicial sale, according to all the tests that can be applied."

And in *Black* v. *Walton*, 32 Ark. 321-324, this court said:

"A sale by a guardian of his ward's land, under an order of the probate court, is a judicial sale, and, as a general rule, a purchaser at such sale acts at his peril. The guardian sells such estate only as his ward has, and the purchaser must make inquiry as to the title and the authority of the guardian to sell. The guardian makes no warranty of title, and, if he covenants for title, he only binds himself personally. The rule *caveat emptor* applies to such sales."

In that case the court cited *McCauley* v. *Guynn*, 32 Ark. 97, where it is said: "The rule *caveat emptor* applies to judicial sales. Guynn, in accepting a deed from one claiming to sell as guardian, was obliged to inquire, and he had the means of ascertaining, by what authority he acted, and he took the conveyance at his peril. Rorer on Judicial Sales, § 450; *Washington* v. *Roberts*, 9 Ala. 297; *Bingham* v. *Maxey*, 15 Ill. 295."

We do not think *Black* v. *Walton*, *supra*, gives appellant any comfort in his contentions, for the reason that the facts are wholly different. There the guardian, Walton, attempted to sell land of his wards to which they had no title, at which sale Black became the purchaser, but, before paying the purchase price, he discovered that the wards had no title to the land, and refused to pay his bid, and this court very properly held that Black could not be made to pay his bid, since the wards for whose interest the sale was made had no title whatever to the land. But here, appellant acquired an undivided one-half interest in fee, entered into possession of the whole estate, kept it for two years, when the heirs at law of the husband of Bettie Bowers took from him their

one-half interest therein. The rule of *caveat emptor* applies with all its vigor and strictness to judicial sales, and, this being a judicial sale, it applies here.

We find no error, and the decree is affirmed.

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

Opinion delivered April 30, 1928.

E. T. Miller, E. L. Westbrooke, Jr., and *E. L. Westbrooke,* for appellant.

Walter L. Pope and *Tom W. Campbell,* for appellee.

McHaney, J. Appellee received personal injuries and his wagon was destroyed on account of being struck by appellant's fast passenger train where the dirt road leading to appellee's house crosses the railroad track south of and near Bay, Craighead County, Arkansas. Appellee lived on a farm, his house being about 250 yards west of appellant's main line, on the inside of the field fence. East of the railroad, and parallel with it, running north and south, is the paved highway. To get to the highway, appellee had to cross the railroad tracks on the crossing above mentioned. This was a regular crossing for appellee and others desiring to get on the public highway across the tracks, and was at an angle of about 45 degrees with the railroad in a northeasterly direction from appellee's house, the railroad being elevated about ten feet above the surrounding land. The railroad was fenced at this point, and appellee had to pass through a gate to cross the tracks, and in driving from his home, traveling in a northeasterly direction to the paved highway, and while crossing the tracks, he was struck by appellant's train and injured, as aforesaid.

Some small houses were along the right-of-way, and appellee's view was obstructed to the south, the direction from which the train approached, but the view was open as he approached the track for quite a distance to the south. Appellee says he looked, but did not see the train, neither did he hear it. He testified that the statutory signals were not given as the train approached this crossing, either by ringing the bell or blowing the whistle, and in this he was corroborated by several other witnesses who saw the accident. He did not actually see the train, nor did he hear the whistle until it was almost upon him. The jury returned a verdict for $500.

It is first urged for a reversal of this case that, since appellee could have plainly seen and heard the train, he is presumed, as a matter of law, to have seen and heard it, and he cannot recover, regardless of whether the statutory signals were given. In other words, the gist of this contention is that appellee was negligent in going upon

the track without seeing what was plainly to be seen, and that he cannot recover, whether appellant was negligent or not in failing to give the statutory signals. We cannot agree with counsel in this contention. It is undisputed that he did not actually see the train. It is only insisted that, by the exercise of care for his own safety, by looking and listening, he could have seen the train. It was admitted in this case that appellee was negligent, that is, he was guilty of contributory negligence. Appellant cites several cases to support his contention in this regard, the latest of such cases being *Chicago, R. I. & P. Ry. Co.* v. *Batsel,* 100 Ark. 526, 140 S. W. 726, holding to the effect that the injured person would be deemed to have seen and heard the train where the undisputed evidence shows that, by looking and listening, he could have seen the train, and could not have failed to have seen it by the exercise of care in this regard, and that a recovery could not be had because the injured person would be guilty of contributory negligence as a matter of law. This and all the other cases cited by counsel were prior to the act of 1919, now § 8575, C. & M. Digest, which provides:

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

Under this section the court very properly instructed the jury that no recovery could be had for the damage to the wagon, which was destroyed in the accident, for the reason that the statute above quoted does not cover injuries to personal property, but only for personal injury or death. We cannot therefore say, under the circumstances of this case, and in view of the above sec-

tion of the statute, that appellee was guilty of such negligence as would bar him from maintaining this action.

It is next contended that the undisputed evidence shows that the statutory signals were given. We have examined the evidence carefully on this point, and find it to be in conflict. Four eye-witnesses, including appellee, testified that the signals were not given, or that they did not hear them. The fireman and engineer testified positively that they were given, and it is said that the witnesses for appellee do not say positively that the signals were not given, but only that they did not know, or that they did not hear them. We think the evidence is stronger than that, and is sufficient to take the case to the jury upon this point. As was said in *St. L. S. F. R. Co.* v. *Horn,* 168 Ark. 195, 269 S. W. 577: "The engineer and fireman both testified that the bell was kept ringing from the whistling post down to the crossing, and the engineer testified that the whistle was sounded again after passing the post and before reaching the crossing. But there is substantial testimony from which the jury might have found that there were no signals given, either by bell or whistle, after the whistle was sounded at the post. It is contended by learned counsel for appellant that the testimony on that point is merely negative, but we are of the opinion that the testimony is of more force than that. Witnesses testified that they did not hear the bell, and the jury might have found that the bell was not rung, otherwise the witnesses would have heard it."

It is next insisted that, although the signals were given, appellant was not required to give the statutory signals for this crossing, as it was a private crossing and not a public road crossing, and that, under the law, it was not required to give the signals at such crossing. The statute does not require the road crossing the railroad to be a public road. It requires the bell to be rung or the whistle blown "at the distance of at least 80 rods from the place where the said road shall cross any other road or street, and be kept ringing," etc. "Any other road"

means exactly what the statute says, any road which crosses the railroad tracks, whether the road be a public highway or not. The proof shows in this case that the road was used by any person desiring to pass through at this point in any kind of a vehicle, and that the crossing was a regular grade crossing. We think this such a crossing as requires appellant, under the statute, to give the prescribed signals.

Complaint is made of the giving of instructions 2, 3 and 5, and of the refusal to give instruction Nos. 3 and 10 requested by appellant. Instructions 2 and 3 given for appellee related to the giving of the signals, and were entirely proper instructions. No. 5 was the charge upon the comparative negligence statute above quoted, and was also entirely proper. No. 3 requested by appellant and refused by the court was that "the evidence is not sufficient to sustain the allegations that the employees in charge of the train failed to blow the whistle or ring the bell, as required by law," but what we have said already disposes of this, as we think there was sufficient evidence to submit this question to the jury.

Requested instruction No. 10, which was refused by the court, was properly refused. It told the jury "that the evidence of the engineer and fireman, when reasonable, and uncontradicted, cannot be arbitrarily disregarded by you." There are two reasons why the court properly refused this instruction; one is that the evidence of the engineer and fireman, as we have already seen, was not uncontradicted, and in such case it would be improper to single out certain testimony and give it prominence over other testimony.

It is finally submitted that the evidence is not sufficient to sustain the verdict; but what we have already said disposes of this assignment. The evidence was legally sufficient to take the case to a jury, and is sufficient to sustain a finding for or against appellant.

No error appearing, the judgment is affirmed.

ÆTNA INSURANCE COMPANY *v.* DAGGETT & YANCEY.

Opinion delivered April 30, 1928.

Mann & McCulloch and *McMillen & Scott,* for appellant.

Coleman & Riddick, for appellee.

McHANEY, J. On January 1, 1923, appellant issued to appellees a fire insurance policy, No. 100,019, insuring the buildings and certain personal property on the plantation owned by appellees, known as the Grant place, against loss or damage by fire, in the sum of $9,200, distributed as follows: $800 on barn No. 1, $600 on barn No. 2, $1,000 on grain of all kinds, $300 on hay, straw, etc., $1,000 on harness, saddles, wagons and farm implements, and $5,400 on 28 tenant buildings.

The total premium was $941.65, payable $188.33 in cash and $188.33 due and payable on the first day of January for the years 1924, 1925, 1926 and 1927, and for the deferred payment notes were given, each of which provided that, if any installment be not paid when due, the policy would not be effective while said installment remained unpaid; and the policy contained the following provision: "If any such notes or installments be not paid when due, this policy shall be suspended, inoperative, and of no force or effect while said note or installment remains unpaid, and it is hereby agreed that this

company shall not be liable for any loss or damage occurring during such default."

On February 16, 1924, appellant issued another policy to appellees, No. 537, in the sum of $1,000, covering the harness, wagons, farm implements, tools, etc., on the Grant place. Appellees paid the premium notes due January 1, 1924, 1925, 1926, but failed to pay the one due January 1, 1927, until the 13th day of January of that year, on which date appellee Jesse Daggett, who kept the books and looked after insurance matters for the partnership composed of himself, C. E. Daggett and C. E. Yancey, mailed a check covering the last premium note to appellant at Oklahoma City, which was received on January 15, by appellant. Receipt of such check was acknowledged from the Oklahoma office of appellant under date of January 17. The Home Fire Insurance Company had a blanket policy for $6,000 covering generally tools, harness, buggies, corn, feed, etc., without any particular distribution on the separate items of property. On January 12, barn No. 2, under policy 100,019, grain of the value of $6,288 and tools of the value of $944.79 were destroyed by fire. The Home Company paid $2,193.78 of the loss on grain and $1,114.10 of the loss on tools as its share of the loss covered by the two companies.

Appellant sent two notices to appellees regarding the installment note due January 1, 1927, one advising them of the due date, and the second, after January 1, reminding them that the installment had not been paid, in which it called attention to the fact that, by the provision of the note and the policy, the insurance thereunder was suspended while the note remained unpaid. Jesse Daggett was away from his office from January 1 to the 13th, and, on returning to his office on the latter date, found the notice regarding the note on his desk, at which time he immediately sent check to cover, at a time when he knew nothing about the fire having occurred the day before, and did not learn thereof until the next day. On Saturday, January 15, the manager on the Grant place

came to Marianna and reported to appellees that barn No. 2 and its contents had been destroyed by fire on the 12th, and this was the first knowledge that appellees had that the barn had burned. They had heard that one of the small cabins on the place back of the barn had burned. Mr. Hugh Mixon, the local agent, was immediately notified of the fire. Mixon received this notice of the loss under both policies of appellant on January 15, but did not send in his agency report covering the loss to the company until Monday, the 17th. He made two reports to the company, one under policy 100,019, and the other under policy 537. In the report of the loss on policy 100,019 he inadvertently reported the loss as having occurred on the 17th, whereas under policy 537 he correctly reported the loss as having occurred on January 12. Both reports were received by appellant at its Oklahoma City general office on January 19, four days after the receipt of the money covering the premium note due January 1. Mr. Mixon, the local agent, assured appellees that appellant would settle the loss promptly, but his statements in this regard were made without any knowledge that the premium note was in default of payment at the time of the fire.

The Home Company settled its share of the loss promptly, but an adjuster for appellant did not go to Marianna until March 16, at which time the high water from the overflow covered a large territory, extending from the outskirts of Marianna across the Grant place, some nine miles distant. Appellees secured for the adjuster a boat in which to get to and inspect the loss, and paid the charges therefor. On arriving at the place he was advised that the fire occurred on the 12th. He returned to Marianna, and, upon Mr. Daggett's refusal to sign a nonwaiver agreement, he left without adjusting the loss, but made no contention that there was no liability on account of failure to pay the note prior to the fire. The only complaint he made was regarding the additional insurance on the property covered by the Home policy, which he suggested was not permitted by

appellant's policy. On March 17 the adjuster sent a written report to appellant, advising, among other things, that the fire had occurred on January 12. On March 24, appellant having taken no further steps to adjust the loss, appellees instituted this action to recover $1,624.90 under both policies. The case was submitted to the jury, and a verdict was returned in said sum, plus interest, penalty and attorney's fees, from which is this appeal.

Appellant admits liability under policy 537, and makes no contention here against it thereunder. Its principal contention is that policy 100,019 was not in force at the time of the fire, by reason of the failure of appellees to pay the premium note prior to the fire. It is undisputed that the note was not paid until after the fire, and it is undisputed that both the note and the policy provide that the company shall not be liable for any loss occurring during default in the payment of the note. Counsel for appellant, in their brief, say: "The fire having occurred during the time the policy was suspended, appellant is not liable under that policy, unless there was a waiver of the suspension." Our attention is directed to several of our own cases and many from other courts holding to the effect that, when default occurs in the payment of a note given for the premium, or an installment of the premium on an insurance policy, the clause providing for suspension during the time of default is self-operating, and the policy is automatically suspended without notice to the insured. Two of our leading cases on the subject holding to this effect are *Jefferson Mutual Ins. Company* v. *Murray,* 74 Ark. 507, 86 S. W. 813 and *Patterson* v. *Equitable Life Ins. Society,* 112 Ark. 171, 165 S. W. 454. We agree to these decisions, but we do not consider that they are controlling in the case at bar. Here the policy in question, although covering many different items of property, was one indivisible contract. Appellees did not suffer a total loss under this policy, but only three or four items covered by the policy were involved. The policy covered two barns, 28

tenant houses, and many different items of personal property. Only one barn was destroyed, together with a lot of grain and farming implements. The payment of the premium on January 13, received by the company on the 15th, was for the full term of one year, and covered the total liability of appellant on all property mentioned in the policy for the full term of one year, and not from January 15 or January 17. Appellant's agent in Marianna had notice on the 15th that a loss had been sustained under both policies on the 12th. He so recorded the loss in his agency records. He waited until the 17th to report the loss, and then, through error, reported the loss under the policy in question as having occurred on the 17th, the very date he was sending the notice of the loss under policy 537 as having occurred on the 12th.

Appellant's general office at Oklahoma City knew, on the 19th day of January, that this fire had occurred on January 12, and the slightest inquiry from its own agent at Marianna would have disclosed its agent's error in reporting the loss under this policy as having occurred on the 17th. Therefore on the 19th day of January it had notice that the fire occurred on the 12th, instead of the 17th, both through its own agent at Marianna and through his report under policy 537, and it elected to keep the whole premium for the whole year's insurance until ten or twelve days after suit was brought to recover under both policies, when it returned the whole amount of the premium to appellees, which they refused to accept. Under such circumstances, we think it would be manifestly unjust to permit appellant to retain this premium for a period of nearly three months, during which time appellees were led to believe, both by the assurances of the local agent, Mr. Mixon, and the silence of appellant in this regard, that appellant would settle its liability under this policy. During all this time the appellant's general agent at Oklahoma City knew that the fire had occurred on the 12th day of January, or could have so known by reference to the report of the loss under policy 537, and by thus keeping the premium until after it had

sent its adjuster to adjust the loss, and until after suit had been brought to enforce payment of the policy, it must be held to have waived its right to insist upon enforcing the suspension clause in the policy. Even on the adjuster's visit to Marianna he raised no question regarding the failure to pay the premium when due. It may be said that he did not know of this fact, but appellant's general agent did know of it. This clause, regarding the suspension of the policy on failure to pay the premium on the date specified, was inserted in the policy for the benefit of appellant, and, like any other clause for its benefit, with the knowledge of the facts before it, may be waived by an actual agreement to that effect, or by its affirmative conduct inconsistent therewith. Certainly it could not be said that, if appellant had extended the time of payment by agreement with appellees, they could still insist on the non-effectiveness of the policy, and it occurs to us that, by retaining the premium for the period of time it did retain it, with the knowledge of the date of the fire before it, thereby inducing appellees to believe that the policy was in effect, and that this clause therein would not be insisted upon, constitute an election on the part of appellant to treat the policy as in force and effect as regards this clause.

In addition to this, with the knowledge of the date of the fire before it, appellant caused its adjuster to go to Marianna to adjust this loss, and at considerable trouble and some expense the appellees provided him means to get to and from this property.

In the recent case of *American Life Assn.* v. *Vaden,* 164 Ark. 86, 261 S. W. 320, this court said:

"It occurs to us that the above affords substantial testimony to carry to the jury the question of whether the company, after having knowledge that the note for the first premium had not been paid at the time of the death of Cox, did not, by its affirmative conduct for several months thereafter, induce the appellee to believe that it would not insist on a forfeiture because of such nonpayment, and thereby cause her unnecessary expense,

and put her to unnecessary trouble, while acting under the belief that the company intended to settle her claim."

Again, in the same case, the court said: "The jury might have found that the company, in arousing these false hopes, had waived a forfeiture, under the doctrine announced by this court in numerous cases."

In *Camden Fire Ins. Assn.* v. *Meloy,* 174 Ark. 84, 294 S. W. 378, we said: "Further, the demand and acceptance of the premium after the fire, and after the adjuster had made his investigation, and with full knowledge of the alleged breach of the 'record warranty' or 'iron-safe' clause, constituted a waiver of these defenses."

We there quoted from *Scottish Union & National Ins. Co.* v. *Wylie,* 110 Miss. 681, 70 So. 835, as follows: "By the acceptance of the premium by the agent of the insurance company after the fire, when he had knowledge both of the mortgage on said property and of the other additional insurance upon the same, he waived all irregularities which might or could have existed, either in the issuance or during the continuation of said policy."

In 3 Joyce on Insurance (2d ed.) § 1369, it is said: "The retention of a premium on a fire insurance policy, after knowledge of a breach of a condition involving a right to forfeiture, is an election to waive such breach and continue the policy in force, and the policy should then be construed as though such condition had never existed." See also 24 Cyc. 194, and *New York Life Ins. Co.* v. *Adams,* 151 Ark. 123, 235 S. W. 412.

Appellant does not dispute the principles announced in the quotation above made, but says a distinction should be made in the breach of a condition involving a right to a forfeiture and a clause in the policy providing for the suspension of the policy for failure to pay the premium; that in the latter case it automatically goes into operation and makes the policy null and void *ipso facto,* and cannot be waived. In other words, appellant says it is insisting upon the contract as it stands. However, as we have already seen, the liability of appellant here involves only

two or three items of a policy covering many different items, and, being one contract, appellant had the right to elect as to whether it would treat the whole policy as in effect, or to treat the whole policy as void and of no effect for nonpayment of the premium prior to the fire by returning the whole amount of the premium immediately upon receipt of information that the fire had occurred prior to the payment of the premium. Not having done so, it having elected to keep the premium for nearly three months after receipt of knowledge of the correct date of the fire, we think appellant is bound by its election to treat the whole policy as being in effect from the first day of January, throughout the remainder of the year.

Appellant also complains of instructions Nos. 1 and 2 given at appellee's request. They are as follows:

"No. 1. If you find that the company, with knowledge of the forfeiture, neglected to insist upon it, but by its conduct recognized and treated the policy as being in force, and induced the insured to believe that the company would not insist on the forfeiture and to incur expense and trouble by reason of such belief, then the company waived the forfeiture, and plaintiff is entitled to recover.

"No. 2. Any agreement, declaration or course of action on the part of an insurance company which leads a party insured to honestly believe that, by conformity thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, will constitute a waiver of the forfeiture."

They were correct declarations of law, as will be seen from the principles already discussed and announced herein, and it becomes unnecessary to discuss them further. We find no error, and the judgment is affirmed.

GAULT *v.* NOLEN.

Opinion delivered May 7, 1928.

[redacted]

Davis & Rollow, for appellant.

Hays, Priddy & Rorex, for appellee.

HART, C. J., (after stating the facts). The Legislature of 1925 passed an act to amend the general act relating to the formation of local improvement districts in cities and towns. Among other things it is provided that the petition for such improvement, signed by the majority in value of the owners of real property in the district, shall specify what percentage of the value of the real property as shown by the last county assessment the said improvement shall not exceed in cost. The section contains a proviso that no single improvement shall be undertaken which, alone, will exceed in cost fifty per cent. in value of the real property in such district as shown by the last county assessment. The section con-

tains a further proviso that an improvement may be made which does not exceed one hundred per cent. of the assessed value determined as above if seventy-five per cent. of the property owners in value in said district petition therefor. Acts of 1925, p. 548; Castle's Supplement to Crawford & Moses' Digest of the Statutes of Arkansas, § 5666.

The owners of the real property in the proposed street improvement district proceeded under the last proviso of the section of the act above referred to. In other words, they petitioned to construct an improvement not exceeding one hundred per cent. of the assessed value of the real property in the district as shown by the last county assessment; and in order to do this, seventy-five per cent. of the property owners in value were required to sign the petition. According to the allegations of the complaint, owners of real property of the value of $61,930, as shown by the last county assessment, signed the petition which was presented to the council on the 12th day of November, 1927. At that time the council found the total assessed value of all the property in the district as shown by the last county assessment to be the sum of $83,625. Nevertheless, the council proceeded with the establishment of the district.

If the finding of the council was correct, a mathematical calculation will show that seventy-five per cent. of the owners of real property in the district did not sign the petition. On the 2d day of January, 1928, at a regular meeting of the common council of said town, the same members of the council who were present at the meeting of November 12, 1927, adopted a resolution reciting that a mistake had been made in finding the total assessed value of the real property to be $83,625. The council found that the error was due to a mistake in adding up the assessed value of the real property in the district as taken from the last county assessment, and that the true value of all the real property in the district as shown by the last county assessment amounted to $81,825. The council amended its record to show

this latter sum to be the total value of all the real property in the district as shown by the last county assessment. If the council had the right to make this correction, then a mathematical calculation will show that seventy-five per cent. of the owners of real property in the district as shown by the last county assessment signed a petition praying for the construction of the proposed improvement at a cost not exceeding one hundred per cent. of the assessed value of the real property.

The sole reliance of counsel for appellant for a reversal of the decree is that the council had no right to change the finding made by it on the 12th day of November, 1927, as to the total value of all the real property in the improvement district as shown by the last county assessment. Now, according to the allegations of the complaint, this sum was found by adding up the assessed value of the separate valuations of real property in the district as shown by the last county assessment. A mistake was made in adding up these figures, and the council only attempted to correct such mistake at the meeting held on the 2d day of January, 1928. The same members of the council were present, and no effort was made to change the result in any way, the only change was to correct a clerical error or mistake in adding up a column of figures, which were a permanent record as shown by the last county assessment. The common council not only had the right to correct such clerical error, but it would seem to be its duty to do so. Under the statute, if seventy-five per cent. of the owners of real property in a proposed district sign a petition praying for the construction of a proposed improvement not to exceed one hundred per cent. of the assessed value of the real property as shown by the last county assessment, they have the right to do so and the council could not defeat their will by making a mistake in adding up a column of figures. The common council had complete and plenary power to correct a clerical error or mistake which it had

made in arriving at the total value of all the real property in the district as shown by the last county assessment.

Therefore, the decree will be affirmed.

FOREMAN *v.* DICKINSON.

Opinion delivered May 7, 1928.

[redacted]

J. F. Wills and *Frank Strangways,* for appellant.

E. R. Parham, for appellee.

HART, C. J., (after stating the facts). The decree of the chancery court was in favor of Frank Strangways and W. F. Strangways, and the record shows that they refused to join in this appeal, which is prosecuted alone by Herbert Foreman. Herbert Foreman, in his answer, which was filed on December 29, 1926, disaffirmed his contract for the purchase of the automobile. His disaffirmance is placed on the ground that he was a minor at the time the contract was executed on the 7th day of June, 1926, and that he was still a minor at the time the answer was filed on December 29, 1926.

The decree of the chancery court is based upon the theory that Herbert Foreman became of age on the 10th day of October, 1926. There is no testimony in the record to warrant such a finding except the negative tes-

timony in the statements made by Herbert Foreman in his purchaser's statement and in the representation he made to the salesman of the Little Rock Motor Car Company at the time he made application to purchase the car and in another statement he made to another business firm with a view to purchasing goods from it. All the positive testimony in the record shows that Herbert Foreman was born October 10, 1906, and did not become of age until October 10, 1927. Herbert Foreman testified that this was the date of his birth and that he had seen it recorded in the family Bible. His grandfather, who was the physician who attended his mother at the time of his birth, testified that Foreman was born October 10, 1906, and that he recollected the date of his birth and that after his daughter's death he set down the age of her child in the family Bible. An uncle testified that he recollected that Herbert Foreman was born October 10, 1906.

The date of a person's birth may be testified to by himself or by members of his family. This falls within the rule admitting parol evidence in matters of pedigree, which includes birth, marriage and death. *Lincoln Reserve Life Ins. Co.* v. *Morgan,* 126 Ark. 615, 191 S. W. 236.

This court has also held that an infant is not estopped by his misrepresentations as to age to avail himself of the right to disaffirm his contract. *Arkansas Reo Motor Co.* v. *Goodlett,* 163 Ark. 35, 258 S. W. 975. In this case it was also stated that an infant was entitled to recover the price paid for an automobile purchased by her on returning the car although she had misrepresented her age to the seller, such article not constituting a "necessary" for an infant.

The chancellor was not justified in holding that the positive testimony of the witnesses in the record as to the age of Herbert Foreman was overcome by his misrepresentations as to his age. A preponderance of the evidence clearly shows that Herbert Foreman did not become of age until October 10, 1927, and that before this

time he had disaffirmed his contract for the purchase of the automobile. Indeed, the decree of the chancery court was rendered against him before he became of age.

It follows that the decree must be reversed, and the cause will be remanded with directions to the chancery court to render a decree dismissing the complaint of J. A. Dickinson against Herbert Foreman, and for further proceedings in accordance with the principles of equity, and not inconsistent with this opinion. It is so ordered.

OPINION ON REHEARING.

HART, C. J. We cannot grant the request of counsel for appellees to consider the liability of Frank Strangway sas indorser of the note of Herbert Foreman, for the following reasons: The decree in favor of Frank Strangways was entered of record in the chancery court on July 6, 1927. No appeal was taken from the decree in his favor by the Little Rock Motor Car Company until January 5, 1928. The time for appeal expired on the next day. No summons was issued until March 15, 1928. Summons was served Frank Strangways on that day; and on April 30, 1928, he filed a motion to dismiss the appeal against him. There was an unreasonably delay in the issuance and service of summons. Summons should have been issued immediately and served within a reasonable time. Therefore we must dismiss the appeal of the Little Rock Motor Car Company so far as Frank Strangways is concerned. *Claiborne* v. *Leonard,* 88 Ark. 391, 114 S. W. 917, and *Birmingham* v. *Rice,* 90 Ark. 306, 118 S. W. 1017.

The fact that Frank Strangways appeared as attorney for Herbert Foreman did not enter his own appearance to the appeal. It follows that the motion for a rehearing must be denied.

MERCER *v.* NORTH LITTLE ROCK SPECIAL SCHOOL DISTRICT.

Opinion delivered May 7, 1928.

[redacted]

L. P. Biggs, for appellant.

J. F. Wills, Tom F. Digby and *Carmichael & Hendricks,* for appellee.

HART, C. J., (after stating the facts). It appears from the statement of facts, which need not be repeated here, that the school district advertised and sold the bonds with the following: "said bonds to be offered unconditionally." The bonds were sold unconditionally, and E. M. Ream & Company became the purchaser thereof. The record shows that the bid of the American Southern Trust Company for the bonds was $8,617.60 higher than the bid of E. M. Ream & Company, and that the bid of Brown-Crummer Company was $39,304.70 higher than the bid of E. M. Ream & Company. Hence, it is insisted that one of these bids should have been accepted by the school district. The American Southern Trust Company disclaimed any right in the premises. This leaves Brown-Crummer Company as the contesting bidder. The school district sold the bonds to E. M. Ream & Company because

it made an unconditional bid, and this was in accord with the resolution of the school board relating to the sale of the bonds and with the advertisement pursuant to the resolution.

The bid of the American Southern Trust Company contained a provision that the check attached to the bid was not to be cashed until the bonds were delivered with the approving opinion of J. B. McDonough of Fort Smith, Arkansas, whose fee the bidder agreed to pay. The bid of the Brown-Crummer Company also contained a provision that the school district was to furnish it with the approving opinion of Mr. J. B. McDonough or of Rose, Hemingway, Cantrell & Loughborough, and was also to have the bonds certified and trusteed. Thus it will be seen that both of these bids were conditional. According to Bouvier's Law Dictionary, bidding, in its comprehensive sense, is making an offer; but, in its ordinary sense, it is signifying the making of an offer at an auction. The language referred to in both bids plainly shows that the offer made by each bidder was conditional. The bid of Ream & Company, who became the purchaser of the bonds, was an unconditional bid in accordance with the proposition and advertisement of the school board. The board properly accepted the proposition made in accordance with the terms of the resolution and advertisement of the sale of the bonds, provided it acted in good faith in the premises.

In *Trowbridge* v. *City of New York,* 53 N. Y. Supp. 616, it was held that a bid for municipal bonds, containing the clause, "Our bid is to be subject to the approval of the legality of the issues by our counsel," is a conditional bid.

This view is in accordance with our own holding on the question. In *Bank of Eastern Arkansas* v. *Bank of Forrest City,* 94 Ark. 311, 126 S. W. 837, the court held that a county depository act which directs that the county court shall advertise for sealed bids and shall select as depository of the county funds the bidder offering the highest rate of interest on such funds, con-

templates an unconditional offer, and that a bid whereby the bidder offered to pay a certain percentage more on the funds than the highest and best bid that should be made by any other bidder should not be received.

Again, in *Casey* v. *Independence County,* 109 Ark. 11, 159 S. W. 24, it was held in a similar case that an offer from a bank whereby it agreed to pay a certain per cent. more on county funds than any other bid received was not such a bid as the statute contemplated.

In *Grant County Bank* v. *McClellan,* 112 Ark. 550, 166 S. W. 550, the court said there can be no real competition unless all bidders are required to bid upon the same basis and that no proposition can be considered to be a bid unless it is complete in itself as declared by the courts. Hence, it was again held that where a bank seeking to become the depository of county funds proposed to pay a certain per cent. more than any other bid offered, this did not constitute a bid, for the reason that it could not be acted upon alone without reference to anything outside of itself.

In the present case, E. M. Ream & Company was a client of J. B. McDonough, a well-known bond lawyer, and had secured his approving opinion based upon an examination of the records of the school district. While Ream & Company exhibited this approving opinion to the school board, the latter had no control over the opinion and had no right to deliver it to other bidders to be used by them in making their bids. McDonough expressly testified that the opinion had been sent to be used by E. M. Ream & Company, and that no other person had a right to use it. Hence, the other bidders not only made conditional bids, but attached to their bids a condition which could not be honorably complied with by the officers of the school board. They could have, under the circumstances, no right whatever to use McDonough's opinion for the benefit of other bidders than E. M. Ream & Company, for which the opinion was made and which alone had the right to make use of it.

This brings us to a consideration of whether there was any fraud practiced by the school board in selling the bonds to E. M. Ream & Company. The record shows that it was first agreed that the bonds should be sold at auction, and that the approving opinion of a nationally known bond attorney should be procured by E. M. Ream & Company for the benefit of all who might bid at the public sale of the bonds. Later, E. M. Ream & Company reported to the school board that such an approving opinion could not be secured without causing much delay in the sale of the bonds. The school board then decided to rescind its original contract with E. M. Ream & Company and to make an unconditional sale of the bonds. This it had a right to do if it acted in good faith in the matter, and if there was no fraud or collusion between the school board and E. M. Ream & Company in the premises. There is nothing in the record to indicate fraud or collusion of the school board with E. M. Ream & Company, unless two circumstances, which we shall now proceed to discuss, amount to fraud or collusion.

In the first place the advertisement for the sale of the bonds was made in the twice-a-week Gazette instead of the daily Gazette or some other daily paper. The record shows that the twice-a-week Gazette has a *bona fide* circulation in Pulaski County, where the bonds were to be sold. It is suggested that the daily Gazette or some other daily paper might have a greater circulation. This is not sufficient to show fraud or collusion. The record shows that all the parties who wished to bid knew about the sale and were given an opportunity to bid. The record does not show why the advertisement was made in the twice-a-week Gazette, but perhaps it was done because it was cheaper, and the school district knew as a matter of fact that all persons who wished to bid had actual knowledge of the time, place and terms of the sale. Indeed, the proceedings of the school board were public records, and, as such, were accessible at all reasonable times to any interested person.

Again, it is submitted that there was fraud or collusion between the officers of the school board and Ream & Company because the bid of Brown-Crummer Company amounted to $39,304.70 more than the bid of Ream & Company. As we have already seen, the bid of Brown-Crummer Company was made upon the express condition that the school board should furnish it with the approving opinion of Mr. James B. McDonough or of Rose, Hemingway, Cantrell & Loughborough, and also upon the condition that the bonds be certified and trusteed. If this contention should be sustained, the practical effect would be that a bidder could change the method of sale from an unconditional to a conditional one. This might not be to the advantage of the district. The officers of the school district were public officers, and, as such, are accountable for any breach of trust. The bidder at the sale is accountable to no one. He might make a conditional or an unconditional bid, just as he liked. In the present case the bidder must have known that the sale was to be unconditional, and yet made a conditional bid. The bidder knew that the sale was unconditional. He might have secured the opinion of any lawyer he liked. The school district was not interested in what lawyer approved the bonds for the bidders. It cannot be said that the making of a conditional bid, when an unconditional sale was advertised, showed fraud because the unsuccessful bidder bid $39,304.70 more than the successful bidder.

We are of the opinion that there is not sufficient evidence in the record to justify us in finding that the officers of the school district acted in bad faith or acted fraudulently or collusively with E. M. Ream & Company, the successful bidder, in making the sale of the bonds.

Therefore, the decree will be affirmed.

Justices Wood, Kirby and Mehaffy dissent.

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

Opinion delivered May 7, 1928.

[redacted]

David L. King, for appellant.

E. T. Miller, E. L. Westbrooke, Jr., and *E. L. Westbrooke,* for appellee.

HART, C. J., (after stating the facts.) The first assignment of error is that the court erred in holding that the defendant was entitled to open and close the case to the jury. In order to secure the opening and closing argument in the case before the jury, the defendant admitted the injury and death of the three boys and the loss and damage to the truck by being struck by one of the passenger trains of the defendant at a public crossing in the town of Williford, Sharp County, Arkansas. The admission of the defendant was insufficient to change the burden of proof in the whole case and to give it the right to open and conclude the argument. It was still necessary for the plaintiff to prove the amount of his

damages, and he had the right to open and close, unless the defendant admitted the whole amount of damages claimed by the plaintiff.

In Thompson on Trials (2d ed.) § 228, it is said that, where the plaintiff has anything to prove, in order to get a verdict, whether in an action *ex contractu* or *ex delicto*, and whether to establish his right of action or to fix the amount of his damages, the right to begin and reply belongs to him. Continuing, the learned author said that the unfailing test of this rule is to consider what party would, in the state of the pleadings and of the record admissions, get a verdict for substantial damages if the cause were submitted to the jury without any evidence being offered by either. In § 230, the same author says that in all actions for unliquidated damages, except where the defendant, by his plea or answer, admits not only the cause of action but also the amount of damages claimed, the right is with the plaintiff; since he must introduce evidence showing the extent of his injury, as where, in any action sounding in damages, the cause of action is admitted, and a plea of confession and avoidance is filed, leaving the amount of damages claimed subject to affirmative proof. Our own case of *St. Louis, Iron Mountain & Southern Railway Company* v. *Taylor,* 57 Ark. 136, 20 S. W. 1083, is cited.

In that case a railway company was sued for the killing of stock, and admitted the killing thereof by its train, but denied the value of the animal. The court held that the plaintiff was still entitled to begin and reply, because he was not entitled to a recovery in accordance with the prayer of his complaint if no evidence had been introduced.

In the case of *St. Louis & San Francisco Ry. Co.* v. *Thomason,* 59 Ark. 140, 26 S. W. 598, the railway company was sued for killing stock, and admitted the killing by its train and the value thereof. It was there held that the railway company was entitled to open and conclude the argument, because the plaintiff would have

been entitled to a recovery in accordance with his pleading if no evidence had been introduced.

In a well considered case by the Supreme Court of the State of Georgia, it was held that, to entitle the defendant to the opening and conclusion of the argument in the trial of a case arising *ex delicto,* when the act complained of was not one which, under the law, could be justified, it is necessary that the defendant, by proper pleadings, admit, not only the commission of the act which it is alleged was wrong, but also such other facts as would entitle the plaintiff to have a verdict, without proof, for the amount claimed in the petition. *Brunswick & W. R. Co.* v. *Wiggins,* 113 Ga. 842, 61 L. R. A. 513, 39 S. E. 551. That case was an action instituted by a widow for the killing of her husband by the negligent operation of a train of cars by a railroad company. Among the States cited as supporting this doctrine by adjudicated cases was Arkansas.

In the application of the rule, we are of the opinion that the plaintiff has the right to open and close unless the defendant admits the whole amount of damages claimed by the plaintiff.

It is next insisted that the judgment must be reversed because the court erred in giving instruction No. 6, which reads as follows:

"The court instructs you that, if you find from the evidence that the train was operated at an ordinary rate of speed and that the signals were given, then under the law there could be no liability, and your verdict should be for the defendant."

The vice of this instruction is that it did not submit to the jury the question of keeping a lookout or the question of comparative negligence. This is not like the case of *Davis* v. *Scott,* 151 Ark. 34, 235 S. W. 407, where it was held that it was not necessary to submit to the jury the question of keeping a lookout because the testimony of the engineer that he was keeping a lookout was undisputed and was reasonable and consistent in itself.

Such is not the case here. This case on this point is more like that of *Gregory* v. *Missouri Pacific Rd. Co.*, 168 Ark. 469, 270 S. W. 621. There it was said that, when all the attendant circumstances were considered, the testimony of the employees of the railroad company that they were keeping a lookout could not be said to be undisputed. The court recognized that it was the duty of the driver of the motor bus to look and listen for approaching trains and to stop if necessary to allow such trains to go over the crossing in advance of his motor bus. The court, however, said it was equally the duty of the operators of the train to keep a constant lookout for travelers along the highway, and if the appearance of the motor bus indicated that it was not going to stop for the crossing, the fireman, who saw it approaching, should have signaled the engineer to stop before the motor bus got too close to the crossing.

In the application of the rule to the facts in the present case, it cannot be said that the testimony of the engineer, to the effect that he did not see the truck with the boys in it until he was passing the depot, and that, after he did see it, he did all that he could to stop the train, is undisputed. It is fairly inferable from the evidence adduced in favor of the defendant that the engineer could not see the boys any sooner because his vision was obstructed by the depot, notwithstanding the fact that the track was straight south of the depot. It will be remembered that the engineer testified that he applied the brake in emergency as he was passing the depot and slowed the train down at least five miles an hour before striking the boys at the crossing, which was two hundred feet north of the depot. Witnesses for the plaintiffs, however, testified that they were watching the approach of the train, and that it did not seem to be checked in speed at all. They said that it was going at a rate of speed between fifty-five and sixty miles an hour. The father of one of the boys said that it was going faster than he had ever seen it go. Another witness testified that the engineer admitted to him that he was running the

train at the rate of a mile and a quarter a minute. The engineer admitted on the stand that he was eight minutes behind time and that he was trying to make up lost time. The jury might have inferred from the testimony of the witnesses for the plaintiffs that the engineer could have seen the approaching truck sooner than he did, notwithstanding the depot, if he had been keeping a lookout. The track was practically straight for a mile south of the depot, and there was no other obstruction to the vision of the engineer of the approaching truck except the depot. It was inferable to the jury, when the testimony of all the witnesses is considered in the light of the attendant circumstances, that the engineer could have seen the approaching truck with the boys in it sooner than he did and that he could have slacked the speed of the train so as to avoid striking it, if he had done so. Under these circumstances, it was the duty of the court to have submitted to the jury the question of whether the defendant's engineer was keeping a lookout.

We also call attention to the fact that this instruction closes with the stereotyped phrase "your verdict should be for the defendant," without submitting to it the doctrine of comparative negligence. In *Temple Cotton Oil Co.* v. *Skinner,* 176 Ark. 17, 2 S. W. (2d) 676, it was held that an instruction should be complete in itself when it undertakes to tell the jury when a verdict should be returned for one of the parties, and the court should not instruct the jury that it must find for the plaintiff or the defendant, as the case may be, upon a partial or incomplete statement of the law applicable to the material facts of the case.

We call attention to this question in view of the fact that the judgment must be reversed, and the cause remanded for a new trial, because the court erred in holding that the defendant was entitled to open and close the case in the argument before the jury, and because instruction No. 6 was erroneous in not submitting to the jury the question of keeping a lookout, without deciding whether

the instruction complained of would have been erroneous in leaving out of consideration the question of comparative negligence. In any view of the matter, it would have been better to have left out the concluding part of the instruction to the effect that "your verdict should be for the defendant" unless the question of comparative negligence was also referred to.

For the errors indicated the judgment must be reversed, and the cause will be remanded for a new trial.

JERNIGAN *v.* PFEIFER BROTHERS.

Opinion delivered May 7, 1928.

Sidney Kelley, for appellant.

J. M. Burrow, for appellee.

WOOD, J. On May 28, 1923, Pfeifer Brothers instituted an action in the circuit court of Sharp County, alleging that the defendant Jernigan was indebted to the plaintiff in the sum of $323.82 on open account for merchandise, for which plaintiff asked judgment. Summons was issued on the 28th day of May, 1923, and served on the defendant on that day. The defendant filed his answer on January 7, 1924, denying all the material allegations of the complaint. On January 8, 1924, on motion of the defendant, the court entered an order dismissing the cause for want of prosecution. On July 14, 1924, the court entered an order dismissing the motion of the plaintiff which had been filed at a former term of the court, to reinstate the cause. On September 9, 1924, the plaintiff refiled the original complaint in the circuit court, and summons was issued thereon on the 30th day of June, 1925. Summons was served on the defendant July 2, 1925.

The defendant filed an answer, in which he set up that the last item of the account on which suit was brought was charged to the defendant on December 24, 1920; that the action was instituted on September 9, 1924. The defendant therefore pleads especially the statute of limitations as a complete bar to the cause of action. After the jury was impaneled to try the cause, the defendant moved the court to direct a verdict in his favor on the ground that the action was barred by the three-year statute of limitations. The attorney for the appellant testified on the motion as follows:

"I want to state that when this suit was originally filed and dismissed, after the court gave me permission to refile it, I left the papers with the clerk of the court, and I have a letter from the clerk in which he states that the sheriff refused to serve the papers because the filing was not accompanied with the cash for service. He would not serve the summons because I did not leave the cash for the service." The witness filed the complaint the last time when the court gave witness the right to refile it at that same term of the court. The court did

not, at that juncture, pass upon the motion, but the trial judge announced that he would look up the docket entries and pass upon the motion later. Testimony was thereupon adduced by the plaintiff, which, in view of the conclusion we have reached, it becomes unnecessary to set forth.

At the conclusion of the testimony on behalf of the plaintiff, counsel for the defendant renewed his motion for a directed verdict in favor of the defendant, which motion the court overruled. The court allowed testimony to be introduced on the motion, which consisted of the summons that was issued on May 28, 1923, and served on May 31, 1923; also a summons that was issued on June 30, 1925, and served on July 2, 1925, together with a letter signed by Sidney Kelley, showing that a summons was served on December 10, 1924, and stating that the summons was on a form for chancery court, and that neither the sheriff or his deputy noticed the difference. The court thereupon instructed the jury, and the jury returned a verdict in favor of the plaintiff in the sum of $320. The defendant filed motion for a new trial, in which he moved the court to set aside the verdict and judgment. One of the grounds of his motion for a new trial is that the court erred in overruling the defendant's motion for a directed verdict upon his plea of the statute of limitations. The motion was overruled, and the court rendered judgment on the verdict in favor of the plaintiff against the defendant in the sum of $320, from which is this appeal. The record entries of the proceedings had in this cause are somewhat confusing, but it sufficiently appears that the original action, filed May 28, 1923, was dismissed, and that the appellees refiled their complaint on September 9, 1924. It appears from the exhibits, which were introduced in evidence, that summons was not issued on the complaint filed September 9, 1924, until June 30, 1925, upon which service was had on July 2, 1925. It appears from the testimony in the bill of exceptions that the original action was bottomed upon an open account, the last items of which were furnished

in December, 1920. The original complaint was filed in May, 1923, before the cause of action was barred by the three-year statute of limitations. But the action on the original complaint was dismissed January 8, 1924, and the complaint upon which the judgment was rendered was filed September 9, 1924. Summons was not issued, however, on this complaint until June 30, 1925. It therefore appears that one year, five months and twenty-two days had elapsed between the judgment dismissing the original action and the institution of the new suit based upon the same claim as in the original cause of action. While the last complaint was filed within a year from the time the original cause of action was dismissed, the summons on the last complaint was not issued until a year had expired after the dismissal of the original complaint or cause of action.

The statute declares as follows: "A civil action is commenced by filing in the office of the clerk of the proper court a complaint and causing a summons to be issued thereon." Section 1049, C. & M. Digest. Construing this statute in the case of *Clemens* v. *Davis,* 163 Ark. 452, 260 S. W. 402, we said: "In the case of *Hallam* v. *Dickinson,* 47 Ark. 120, 14 S. W. 477, it was decided that the filing of a complaint does not constitute a commencement of an action, but that summons must also be issued, and that until then the running of the statute of limitations is not arrested." See also *Simms* v. *Miller,* 151 Ark. 377, 236 S. W. 828; *Kansas City So. Ry. Co.* v. *Akin,* 138 Ark. 10, 210 S. W. 350. It appears from the record that the original action was dismissed by the court for want of prosecution, which the court had the authority to do under § 1261 of C. & M. Digest, subdivision No. 2. This dismissal of the action by the court did not bar appellees' right to institute a new action on the same cause of action under the above statute. See *Floyd* v. *Skillern,* 121 Ark. 454, 181 S. W. 298; *Forschler* v. *Cash,* 128 Ark. 412, 194 S. W. 1029. But, on the refiling of the complaint on the 9th of September, 1924, the appellees failed, according to the facts set forth in the bill of exceptions, to have a

summons issued until June 30, 1925. Under the above authorities therefore the new action was not commenced until summons was issued, which, as we have seen, was a year, five months and twenty-two days after dismissal of the original action for want of prosecution. Therefore, under the facts, the appellees do not bring their new action within the provisions of § 6969 of C. & M. Digest.

In *Watkins* v. *Martin,* 69 Ark. 311, 65 S. W. 425, we said: "The three-year statute of limitation having been pleaded in bar of the action, the burden of proof was upon the appellant to show when his cause of action accrued, and that the writ issued was sued out within the three years, or, if two actions were brought upon the same account, and one was dismissed before the commencement of the other, that the first was begun within the time, and that a nonsuit was suffered therein, and that the last was brought within one year after the nonsuit."

Counsel for appellees state in their brief, in substance, that it appears in the files that a new summons was issued after the original action had been dismissed and a new action begun, and that summons was issued in time and placed in the hands of the sheriff and his promise secured to serve same, but, after searching diligently in the bill of exceptions, we do not find any such statement. We find a letter as Exhibit No. 3 from Sidney Kelley, dated January 2, 1925, stating, in substance, that the summons was served on December 10, 1924, on a form for chancery court, and that the difference had not been discovered until just then. This letter does not sufficiently prove that summons had been issued on the complaint filed September 9, 1924. There is no definite, affirmative proof in this record that any summons was ever issued and delivered to the sheriff on the complaint filed September 9, 1924, except the summons of June 30, 1925. To be sure, if a summons had been issued and delivered to the sheriff within a year from the dismissal of the original action, that would have tolled the statute

of limitation, even though such summons had not been served until after the statutory period had elapsed. *Simms* v. *Miller, supra.* All that we can say from the record before us is that it seems probable that a summons may have been issued on this complaint and delivered to the sheriff, but there is no satisfactory proof of same. We can only try a cause here from the facts as they appear in the record. It appears from the record entries proper and the bill of exceptions, as above set forth, that the appellees are barred by the statute of limitations from maintaining this action. The trial court erred in not so holding. The judgment is therefore reversed, and the cause is remanded for a new trial.

BUSINESS MEN'S ASSURANCE COMPANY OF AMERICA *v.* BURKS.

Opinion delivered May 7, 1928.

M. F. Elms, for appellant.

W. A. Leach, for appellee.

SMITH, J. Appellee, Ray O. Burks, was formerly the owner of a tract of land in Arkansas County, and, while such owner, procured a loan of several thousand dollars from the Fidelity Land Credit Company, and, as security therefor, gave a mortgage on the land. The notes evidencing the indebtedness and the mortgage securing them were sold and assigned to appellant, Business Men's Assurance Company of America, hereinafter referred to as the company. The loan contract required that insurance against the hazards of fire and windstorm be maintained on the buildings on the land and that a standard mortgage clause in favor of the holder of the mortgage be attached to the insurance policy.

On February 25, 1924, appellee Burks sold and conveyed the land to Aner Nearhood, a resident of the State of Iowa, and thereafter, on or about March 5, 1924, an insurance policy was procured on the buildings protecting against fire and storm, to which was attached a standard mortgage clause in favor of the company. At this time Nearhood was the owner of the land and the buildings thereon, but, through mistake, the insurance policy was made payable to appellee Burks, instead of to the owner, Nearhood.

The residence on the land, one of the buildings insured, was destroyed by fire, and the insurance company denied liability on the policy which it had written, and a lawsuit resulted. On March 7, 1927, a decree was rendered in favor of Nearhood and the company for $1,500, the face of the policy, with penalty, interest and costs, and the amount thereof was later paid to appellant's attorney, who had successfully conducted that litigation.

The sale of the land to Nearhood by Burks was not a cash transaction, but involved an exchange of Iowa lands for the Arkansas lands, all of which were incumbered, and the grantors exchanged their respective equities. Litigation arose out of this transaction, and Nearhood brought suit in Iowa against Burks, who retaliated by bringing a suit in Arkansas against Nearhood.

Pending this litigation, and by way of compromise thereof, Burks negotiated a sale of the Arkansas land to Mrs. Carrie A. Phillips, which was finally consummated by the execution of a deed from Nearhood to Mrs. Phillips. Burks and Nearhood each dismissed his suit against the other. Mrs. Phillips imposed as a condition to her purchase of the Arkansas land that Burks rebuild the residence thereon, and this he did.

On November 18, 1925, Burks wrote a letter to the company advising that the residence had burned, and that, through the error of making the policy payable to him instead of to Nearhood, the insurance company had denied liability, and it was stated that the assistance of the company might be required to collect the policy. This letter contained the following statement: "Would like very much to use the insurance to build another house on the place, and want to know if this will be satisfactory if we would build a house back that would cost much more than the insurance. The amount of the insurance is $1,500."

In reply to this request the company wrote a letter, under date of November 21, 1925, which contained the following statement: "It will be entirely agreeable to us to have the proceeds of the insurance in its entirety used for the replacement of the house. We, however, suggest that we want to take the same course that we would if we were collecting the insurance for the purpose of retaining the same, but we will make the proceeds of the insurance available to meet the expense and cost of the new improvements as the bills in connection therewith accrue."

On November 23, 1925, Burks answered the letter of the 21st from the company, in which he explained the mistake in the issuance of the insurance policy, which letter concluded with the following statement: "Thanking you for your willingness to allow the entire amount to go back in the new building."

Prior to January 4, 1926, the company received a letter from Nearhood in regard to using the insurance money in rebuilding the residence, and on January 4, 1926, the company wrote Burks as follows: "We have indicated our willingness to carry out the same arrangement with said present owner that we indicated we would do with you. However, as you are the maker of the paper which we hold, we do not want to act in this matter in any way that would disturb your responsibility to us as such maker, and will appreciate hearing from you authorizing the use of the proceeds of the insurance as is contemplated."

Burks answered this letter under date of January 9, 1926, as follows: "Answering your favor of January 4, regarding the insurance on the property that I was the maker of the loan on, in your company's favor. It would be perfectly satisfactory to let the insurance go to Mr. Elms, attorney for the present Aner Nearhood. Thanking you for calling my attention to this, and assure you it will be all right to let the proceeds go as outlined."

The company wrote a letter to Burks advising that the policy had been sent to Nearhood's attorney for collection, and on January 15, 1926, Burks, answering this letter, stated: "It is perfectly all right for you to send this insurance policy to Mr. Elms, as he represents Mr. Nearhood, and is going to sue the company, if necessary, to collect the insurance. The trouble with the insurance is that it was made out in my name through error of the agent here, and the land had already been transferred to Aner Nearhood. They are trying to get out of paying the insurance on this technicality. I do not believe they can do it, but in all probability he will have to sue them to get the premium. It will be all right to apply this

premium on the indebtedness when collected, or allow Mr. Nearhood to build a house instead."

Relying upon this correspondence, Burks rebuilt the residence, and, on March 19, 1927, advised the company that he had done so, and inclosed a fire insurance policy on the new building in the sum of $1,600. This letter also advised the company that the cost of the new building was $2,100, and had been fully paid for, and that the materialman would so advise the company. In addition to the residence, a barn and garage had also been built at a cost of a hundred dollars. This letter referred to the former correspondence, and requested the company to direct the attorney who had collected the judgment against the insurance company to pay the writer the amount of the insurance on the old building.

In answer to this letter the company wrote, under date of March 25, 1927, as follows: "We presume that Mr. Elms will be remitting us for the fire loss shortly, and, when received, will be handled in accordance with our understanding covered in our correspondence concerning the same."

A letter of even date was written by the company to the attorney, in which it was stated that: "There is no intention on our part to default in our promise heretofore made in this connection. What we must be certain about is who paid for the building of the new dwelling. The J. I. Porter Company have written us that the house built on the SW¼ of 34-3-5, at the contract price of $2,100, has been paid for in full, both as to material and labor, and that the house is now occupied by a tenant. We prefer that the fire loss when collected be remitted to us and we will account for it as hereinbefore stated, and I think this method of handling it will, or should, be satisfactory to Mr. Burks. I assume that the judgment you have obtained is in our favor, as you have represented us in bringing the suit."

When the attorney had shown Burks the last-mentioned letter, as he was directed to do, Burks sent a telegram inquiring about his money. In reply to this tele-

gram the company answered and reviewed the correspondence, which was interpreted by the company as giving the company the right "to elect as to applying the proceeds of the fire loss to our loan on the property, or apply it to the rebuilding of a dwelling." The letter also called attention to the fact that the value of the security had depreciated since the mortgage loan was made, and that the property had been acquired by a lady, who was a nonresident of the State and who was in possession of the farm by a tenant, thus making the loan less desirable. The following proposition was then submitted: "If the sum of $750 of this fund be lodged with us as additional security to the loan (your note), you to retain the balance, and when the loan is paid or reduced from its present sum to the extent of $750 we will pay over to you the sum deposited as collateral. * * * This tentative proposal is made subject to the approval of our loan committee, which approval I feel justified in assuring you can rely upon will be forthcoming when your acceptance of same is in hand, and you may exhibit this letter to Mr. Elms for his guidance so far as our interests are concerned."

Upon receipt of this letter Burks brought this suit and made the attorney a party defendant, and prayed that the attorney be enjoined from paying over the insurance money to the company, and that he have judgment for the amount of the insurance, less any sum due the attorney as a fee for collecting the insurance.

It was stipulated that nothing was past due or unpaid to the company on the principal debt and that the interest thereon had been fully paid.

Upon this record the court rendered a decree in favor of Burks against the company for the sum of $1,500, and directed the attorney to pay that amount of the insurance money to Burks, and this appeal is from that decree.

It is not questioned that, under the mortgage clause in the insurance policy making it payable to the mortgagee as its interest might appear, the company had the

right to collect the proceeds of the policy and apply the same to the mortgage debt; but the testimony set out above very clearly shows that it waived this right by agreeing that Burks might apply the amount of the face of the policy to the building of the new residence, which is of course subject to the lien of the mortgage. The security of the company has not therefore been impaired. But it would be immaterial if it had been, as the correspondence set out above shows very clearly that Burks relied upon the promise of the company in advancing the money to rebuild the residence, and the company could not thereafter impose other or additional conditions.

It is said that the company wished to protect itself from the possible assertion of liens of any character against the building and, as a means to that end, reserved the right to settle with the materialmen and laborers, but this contention is answered by saying that in the agreed statement of facts it is recited that Burks has paid in full all bills of every character. It is immaterial therefore that the company was not allowed to pay these bills, as they have in fact been paid. It was further stipulated in the agreed statement of facts that the new building is of less value than the one destroyed, but the amount of this difference was not shown. However, that fact is immaterial, as Burks' original proposition was not to erect a building of greater value than the old one was, but that he would build a house which would cost more than the insurance, and the agreed statement of facts shows that he did this.

The decree of the court below accords with principles of equity, and it is therefore affirmed.

ENGLAND *v.* STATE HIGHWAY COMMISSION.

Opinion delivered May 7, 1928.

Chas. A. Walls and *Ben B. Williamson*, for appellant.

Reed & Beard, H. W. Applegate, Attorney General, *Claud Duty*, Assistant, and *Coleman & Riddick,* for appellee.

SMITH, J. Appellant brought this suit to enjoin the State Highway Commission from entering upon and appropriating a portion of her farm, and for her cause of action alleged that she was the owner of a tract of

land in Lonoke County through which a section of a State highway ran. That, on October 29, 1927, the county court of Lonoke County entered an order widening, extending and changing the right-of-way of said road, in doing which three acres of her land were appropriated. This order was made at the request of the State Highway Commission, and, pursuant thereto, certain persons under contract with the Highway Commission are about to enter upon and take possession of said land, which was alleged to be of the value of four thousand dollars. It was alleged that, inasmuch as the road which the Highway Commission was about to widen and straighten was a part of the State highway system, the county court was without jurisdiction to make the order condemning plaintiff's land.

The order of the county court, which was made an exhibit to the complaint, recited the facts to be that the proposed changes in the road are practicable and will be for the best interest of the county, and are of sufficient importance to the public to warrant the payment of damages, if any, for the land taken. It was also alleged that the county court was without jurisdiction to make the order for the proposed changes in the road or to allow a claim against Lonoke County for the damages occasioned thereby.

In the answer filed by the Highway Commission it was admitted that the road which it was proposed to widen and straighten was a part of the State highway system, and that the order was made by the county court at the request of the commission, and it was denied that the county court was without jurisdiction to make the order or to allow a claim covering the damages which the execution of the order would occasion. It was alleged that Lonoke County had sufficient funds appropriated for roads and bridges available to pay plaintiff for the additional right-of-way which the Highway Commission was about to use and the damages incident to such taking of her property.

A demurrer to the answer was filed and overruled and the cause was dismissed, and the plaintiff has appealed.

The order of the county court was made under the authority of § 69 of act No. 5 of the Acts of 1923 (Acts 1923, Special Session, page 84), commonly called the Harrelson Law, and the question for decision is whether that section conferred jurisdiction on the county court to make the order under which the Highway Commission is about to appropriate the plaintiff's land, in view of later legislation on the subject.

It is very earnestly insisted that this § 69 has been repealed by act No. 11 of the Acts of 1927 (Acts 1927, page 17), commonly called the Martineau Road Law, and by act No. 116, passed at the same session of the General Assembly (Acts 1927, page 352).

The argument in support of this contention is that § 1 of the Martineau Road Law declares it to be the policy of the State to take over, construct, repair, maintain and control all the public roads in the State comprising the State highways as defined in that act. Section 3 of the same act provides 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." By § 4 of the same act it is made the duty of the Highway Commission to construct the roads in the State highway system which are not now constructed, the work of construction to be pushed as rapidly as funds are available for that purpose.

It is further insisted that § 69 of the Harrelson Road Law has been repealed by act No. 116 of the Acts of 1927, *supra,* § 5 of which provides that "The State's right of eminent domain may be exercised by the State Highway Commission in the same manner as in the case of railroads, telegraph and telephone companies for the purpose of condemning land for highways, bridges and their approaches, for securing building material, and for any

other use which said commission may, under the laws of this State, require property for the carrying out of enterprises intrusted to its supervision, but without the necessity of making a deposit of money before entering into possession of the property condemned."

It is not contended that either act 116, from which we have just quoted, or the Martineau Road Law expressly repeals § 69 of the Harrelson Road Law, but it is insisted that there is an implied repeal, resulting from the repugnancy between those statutes.

It is pointed out, in support of this argument, that it was held by this court, in the case of *Connor* v. *Blackwood,* 176 Ark. 139, 2 S. W. (2d.) 44, that the effect of the legislation passed at the 1927 session of the General Assembly was to give the Highway Commission the right of eminent domain in the construction of State highways, and that the exclusive original jurisdiction of the county courts extends only to county roads and county bridges, and that the county courts do not have exclusive original jurisdiction over State roads and State bridges, and therefore the Highway Commission might condemn rights-of-way for State highways independently of the county courts. It was not held in that case, however, nor has it been held in any other case, that § 69 of the Harrelson Road Law has been repealed. No act passed at the 1927 session of the General Assembly professes to repeal § 69 of the Harrelson Road Law, and no canon of construction has been more uniformly followed than the one that repeals by implication are not favored.

In one of the latest cases on the subject, that of *Ouachita County* v. *Stone,* 173 Ark. 1004, 293 S. W. 1021, we quoted from the slightly earlier case of *State* v. *White,* 170 Ark. 880, 281 S. W. 678, as follows:

"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 appli-

cable 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 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' (Citing cases)." See also *Cordell* v. *Kent,* 174 Ark. 503, 295 S. W. 404.

We think it will appear from a consideration and comparison of the 1927 road legislation with § 69 of the Harrelson Road Law that there is nothing in the 1927 legislation to overcome the presumption that there was no implied repeal of § 69.

In the first place, the Martineau Road Law does not purport to take up the whole subject anew or to cover the entire subject-matter of the Harrelson Road Law. On the contrary, the Martineau Road Law is expressly stated in its title to be an amendment of the Harrelson Road Law. Its title reads as follows: "An act to amend act No. 5 of the extraordinary session of the Forty-fourth General Assembly of the State of Arkansas, approved October 10, 1923."

Act No. 5 of the extraordinary session of the Forty-fourth General Assembly, which the Martineau Road Law professedly amends, is itself the Harrelson Road Law, in which the § 69 referred to appears as a part.

Moreover, § 2 of the Martineau Road Law expressly repeals ten sections of the Harrelson Road Law, and § 69 of the Harrelson Road Law is not included in that number. We think it fair to assume that, had that purpose been intended, that section would have been included in the § 2 which did expressly repeal ten sections of the prior act.

We are of the opinion also that there is not such irreconcilable conflict between § 69 of the Harrelson Road Law and the later legislation as to imply repeal of the earlier legislation. Section 69 of the Harrelson Road Law reads as follows:

"The State Highway Commission shall call upon the county court to change or widen, in the manner provided by § 5249 of Crawford & Moses' Digest, any State highway in the county where the State Highway Engineer deems it necessary, for the purpose of constructing, improving or maintaining the road. In the event the county court should refuse to widen the road, as requested, the commission may refuse to construct, improve or maintain that portion of the road until a suitable right-of-way is provided."

It is insisted that § 5 of act No. 116 of the Acts of 1927, which we have previously quoted, is so far in conflict with § 69 of the Harrelson act as to work a repeal by implication. The argument is that, inasmuch as it was held in the Connor case, *supra,* that the Highway Commission might condemn rights-of-way for State highways independently of the county courts, § 69 of the Harrelson Road Law must necessarily be repealed, otherwise there would be and is a conflict of jurisdiction.

This, however, does not follow. It was not held in the Connor case that the county court was deprived of the jurisdiction to condemn land for the use of the Highway Commission, but it was only held that "they do not have exclusive original jurisdiction over State roads and State bridges."

It follows therefore that if § 69 of the Harrelson Road Law is still in force—and we hold that it is—the county courts of the State have the power, upon the request of the Highway Commission, to provide suitable rights-of-way for the use of the commission in changing or widening existing highways.

The county courts are not required to accede to the request of the Highway Commission. On the contrary, § 69 expressly recognizes their right to refuse such a

request. But they may do so in a case where it is found, as the county court of Lonoke County expressly found, that the proposed changes in a road "are practicable ones, and that they will be for the best interest of the county and of sufficient importance to the public to warrant the payment of damages, if any, for the land taken."

Of course, if, for any reason satisfactory to the county court, the request of the Highway Commission should be refused, the commission, under the authority of § 5 of act No. 116, could condemn the necessary right-of-way, in which event it would have to pay therefor.

In other words, the county court has the jurisdiction to comply with the commission's request; and it has also the discretion to refuse to do so, and the commission has the authority to condemn rights-of-way at its own expense where the construction or maintenance of the State highways requires that action.

The existing state of the law, as announced in the Connor case, *supra,* is therefore that the Highway Commission has jurisdiction over State roads, and the county court has jurisdiction over county roads, and there is no conflict in this jurisdiction, nor is there a concurrent jurisdiction, as appellant insists.

Section 5 of act No. 116 and § 69 of the Harrelson Road Law are not in conflict, but make provision for different contingencies. It is easily conceivable that such local conditions might exist that these agencies—each operating in its own sphere—could, by cooperation, beneficially serve the local interests in a way which would not be done if the Highway Commission took into account only the through traffic for which the State highways provide. The county courts were left with this jurisdiction under § 69 of the Harrelson Road Law, and we conclude therefore that the county court of Lonoke County had the jurisdiction to make the order here complained of as being void for the lack of jurisdiction to make it.

We have entered into this extensive consideration of the subject because of the public interest involved, although, as a matter of fact, the opinion in the case of

Crawford County v. *Simmons,* 175 Ark. 1051, 1 S. W. (2d.) 561, is decisive of all questions raised by this appeal.

In that case the county court of Crawford County had made an order identical with that of the Lonoke County court in the instant case.

In the Crawford County case the court made, at the request of the State Highway Commission, on September 20, 1927, which is more than a month earlier than the order here complained of, an order condemning certain additional right-of-way for the purpose of improving a State highway. The Martineau Road Law and act No. 116 of the 1927 session were then in force as the law of the land, as the time within which they might have been referred under the referendum clause of our Constitution had expired. The opinion in that case recites that the county court of Crawford County had proceeded under § 69 of the Harrelson Road Law, just as the county court of Lonoke County did in the instant case, and the order of the Crawford County Court was upheld by an undivided court as a valid exercise of its jurisdiction. That case appears therefore to be conclusive of this one, unless it should be overruled, which we are unwilling to do, for the reason that we think it is correct.

The decree of the chancery court dismissing appellant's complaint is therefore affirmed.

AMERICAN AGRICULTURAL CHEMICAL COMPANY *v.* BOND.

Opinion delivered May 14, 1928.

Shaver, Shaver & Williams and *H. E. Rouse,* for appellant.

Byron Goodson and *J. R. Campbell,* for appellee.

HART, C. J., (after stating the facts). The judgment of the circuit court was wrong. The undisputed evidence shows that Luther M. Bond executed the note sued on to J. L. Cannon, and that the note was transferred before maturity, for value, to the plaintiff. The undisputed evidence shows that the plaintiff kept the note in its possession until July 24, 1926, when it delivered it to a bank in St. Louis, to be forwarded to the First National Bank of DeQueen, Arkansas, for collection. That bank never was able to collect it. It is true that J. L. Cannon gave a check to the cashier of the bank in payment of the note, but the check was never paid, and the bank never collected the note.

The bank was the agent of the plaintiff, and not the agent of J. L. Cannon or the J. L. Cannon Company, for the collection of the note sued on. Neither J. L. Cannon nor the J. L. Cannon Company paid the note or had possession of it after they indorsed it to the plaintiff. The plaintiff became a *bona-fide* holder for value of the note before it was due, and the note, after it was transferred to it, remained in its possession and that of the banks through which plaintiff had endeavored to collect the note. This evidence is not disputed, and the plaintiff is entitled to recover on the note. *Koen* v. *Miller,* 105 Ark. 152, 150 S. W. 411; *Taylor* v. *Oliver,* 137 Ark.

515, 208 S. W. 595; *Exchange National Bank* v. *Little,* 111 Ark. 263, 164 S. W. 731; and *J. I. Porter Lumber Co.* v. *Bonner,* 172 Ark. 828, 290 S. W. 606.

But it is claimed that J. L. Cannon or the J. L. Cannon Company was the agent of the plaintiff, and that it was bound by its acts. Hence they contend that plaintiff is bound by the agreement of J. L. Cannon with the plaintiff to sell his produce and pay the note out of the proceeds. It is well settled that one dealing with an agent, without inquiring of the principal the extent of his authority, does so at his peril. *Pine Bluff Heading Co.* v. *Bock,* 163 Ark. 237, 259 S. W. 408; and *Standard Pipe Line Co.* v. *Haynie Construction Co.,* 174 Ark. 332, 295 S. W. 95. The contract between the plaintiff and the J. L. Cannon Company was in writing. It is somewhat lengthy, and we do not set it out for that reason. It makes the J. L. Cannon Company the agent of the plaintiff to sell fertilizer for it on commission; but, under its terms, the J. L. Cannon Company could only sell for cash. There could be no apparent authority. It is made plain in the last case cited that, to authorize an inference of authority in an agent, it must appear that the thing done or transaction made was necessary in order to promote the duty or carry out the purpose expressly delegated to him. The fact that the plaintiff made the J. L. Cannon Company its agent to sell fertilizer for it on certain terms, in no sense carried with it the implied authority to take notes for the fertilizer payable to J. L. Cannon, and to make an agreement to pay the notes out of the proceeds of produce grown by the buyer of the fertilizer and delivered by him to J. L. Cannon to be sold. The notes were payable to J. L. Cannon, and the contract of plaintiff was made with the J. L. Cannon Company, a corporation.

On this point it is insisted that there is no proof that the J. L. Cannon Company is a corporation and therefore a different person from J. L. Cannon. The credit manager of the plaintiff testified in positive terms

that the J. L. Cannon Company was a corporation, and that J. L. Cannon was the secretary-treasurer of it. No attempt was made to contradict his testimony. This evidence was sufficient to show that the J. L. Cannon Company was a corporation. *Kelley* v. *Stern Publishing & Novelty Co.,* 147 Ark. 383, 227 S. W. 609, and cases cited.

There is no question of the ratification of the unauthorized acts of the J. L. Cannon Company presented by the record. The undisputed evidence shows that the J. L. Cannon Company had no authority, real or apparent, to sell the fertilizer of the plaintiff and take notes payable to the order of J. L. Cannon in payment therefor, with an agreement that said notes should be paid out of the proceeds of the sale of produce delivered by the maker to the payee of the note. The undisputed evidence also shows that the plaintiff became the *bona fide* holder of the note before maturity, and that the note has never been paid. The check given by J. L. Cannon to the cashier of the bank in payment of the note was never paid, and was never received by the bank which held the note for collection in payment of it. The fact that other notes of similar kind were also transferred to the plaintiff does not change the result. Where an agency is created by contract, the nature and extent of the agent's authority must be ascertained from the contract itself, and, unless the language of the contract is technical or ambiguous, it cannot be extended by parol proof of a custom. *Ozark-Badger Co.* v. *Roberts,* 171 Ark. 1105, 287 S. W. 401.

The result of our views is that the plaintiff was entitled to a directed verdict, and, for the error in not granting his request therefor, the judgment must be reversed; and, inasmuch as the case seems to have been fully developed, the judgment will be entered here in favor of the plaintiff against the defendant for $85.30, with interest thereon at the rate of ten per cent. per annum from March 10, 1926, until paid. It is so ordered.

BELLEVILLE LAND & LUMBER COMPANY *v.* GRIFFITH.

Opinion delivered May 7, 1928.

John T. Hicks, for appellant.

Brundidge & Neelly, for appellee.

MEHAFFY, J. On the 21st day of February, 1898, the Des Arc & Northern Railway Company purchased from the St. Louis, Iron Mountain & Southern Railway Company a large tract of land, including the 2,014.12 acres involved in this action, paying $2.50 per acre. The deed from the St. Louis, Iron Mountain & Southern Railway Company contained the following reservation in the granting clause:

"Reserving, however, the right-of-way of the said railroad company 100 feet wide, where the said track of said railroad or its branches has been or may be laid over said land; also reserving all coal and mineral deposits in and upon said lands, with the right to said party of the first part, its successors and assigns, at any and all times to enter upon said lands and to mine and remove any and all coal and mineral deposits found thereon without any claim for damages on behalf of said second party, its successors or assigns."

The appellee, George C. Griffith, became the owner of said lands and held same until 1910, and in 1910 conveyed the same to the Belleville Land & Lumber Company, appellant, by warranty deed, warranting the title to said lands against all claims whatever except taxes for the year 1909. The consideration was $45,000, $10,000 cash and $5,000 annually until the purchase price was paid. It was afterwards discovered that some portion of the lands did not contain the amount of timber the parties thought, and a reduction in price was made by canceling one of the $5,000 notes, and at that time a new mortgage and note was made for the sum of $22,500, balance due of the purchase money at that time.

Appellee brought a suit to enjoin a party who had a contract with the lumber company to cut and remove certain timber remaining on the land, and also to foreclose the mortgage which was executed October 1, 1919, for $22,500.

The defendant filed an answer and cross-complaint, denying the indebtedness, setting up the covenant of warranty and alleging various payments of principal and interest up to and including October 1, 1919.

The appellee, who brought the suit to foreclose, had an absolute title except right-of-way for the railroad company and coal and mineral rights, which rights were reserved in the deed. And appellant says the issue to be determined from all the facts is whether Griffith is entitled to recover money as compensation for a base and spurious title warranted by him to be perfect, but which he never held and could not convey, and whether also he shall repay with interest money received by him upon a false claim of right which he never possessed.

Appellant's first contention is that a covenant of warranty in a deed for land to which the warrantor had no title is broken at the time the deed is executed, and the warrantee is entitled to relief without alleging or proving eviction.

A lengthy discussion of this proposition would be useless, for this court has held that there is no cause of action until eviction. As was said by this court in the case of *Abbott* v. *Rowan,* 33 Ark. 593: "Where anything passes to the vendee, there must be eviction or its equivalent before an action can arise on the covenant of warranty," and this rule has been consistently followed by this court since.

Again this court has said: "Covenants of warranty of title are universally held to run with the land, and ordinarily a right of action does not arise in favor of the grantee or subsequent holder of the title until there has been an eviction under paramount title; but an exception to this rule is that where the title is in the government the covenant of warranty is deemed to be broken as soon as it is made, and the right of action is complete at that time, and the statute of limitations begins to run. * * * Judge RIDDICK, speaking for the court in *Dillahunty* v. *Railway Company, supra,* said that one of

the reasons for the exception was 'that the United States should be considered as always asserting title to their lands.' " *Quinn* v. *Lee Wilson & Co.*, 137 Ark. 69, 207 S. W. 211. See also *Smith* v. *Boyston Land & Lbr. Co.*, 131 Ark. 22, 198 S. W. 107.

It will therefore be seen that this court is committed to the rule that, when the vendee sues for breach of warranty, where there has been an eviction, the statute of limitations applies; that no right of action accrues until there has been an eviction under paramount title. And the only distinction between this case and the cases formerly decided by this court is that the vendee did not bring a suit against the vendor for breach of warranty, but the vendor brought suit to foreclose the mortgage and the vendee interposed the defense of breach of warranty.

While the appellant could not maintain a suit for breach of warranty before eviction, it had the right, when suit was brought against it to foreclose the lien, to set up and prove that the vendor did not have an absolute title, and that it had been damaged by reason of failure of title, and it had a right to show the amount of its damages because of this failure of absolute title, and to have the purchase price reduced by that amount.

It was stated by this court in *Abbott* v. *Rowan, supra*: "Where no title passes nor possession is taken of lands held by a stranger, there have been two lines of decision totally at variance and antagonistic to each other with regard to the rights of a covenantee under a covenant of warranty."

The court then discusses the two lines of authority, but it is unnecessary to call attention to them here. Our court has adopted the rule herein announced.

It is next contended by the appellant that eviction is not a prerequisite to an action for breach of warranty in case of a conveyance of both surface and mineral rights by warranty deed, the vendor being without right to the minerals. This identical question was decided

against the contention of appellant in the case of *Deupree* v. *Steed, supra,* and it would be useless to discuss it further here. We hold, however, that, where the suit is brought to enforce the collection of the purchase money, the vendee may reduce the amount of the purchase price by the amount of damages because of the breach of the warranty.

It is next contended that "the measure of damages for the breach of warranty is the consideration of the land and interest from the date of the deed." The measure of damages would be the value of the mineral rights or whatever the vendor did not have the right to convey, one of the authorities quoted by appellant holding: "Where the land is subject to an incumbrance which cannot be removed, the measure of damages is the depreciation in value of the land by reason of the incumbrance."

Appellant's next contention is that payment of the purchase money is not a condition precedent to the right to recover on the warranty. We have already stated that if the purchase price had been paid, then no cause of action accrued until there was an eviction, but where the vendor sues to collect the purchase price, he may set-off his damages in that suit. And under such circumstances, of course, the payment of the purchase money is not a condition precedent. The suit is for the purchase money, and the damages may be set-off against the claim for the purchase price.

It is next contended by the appellant that an allegation of breach of warranty offered as matter of defense is not barred by the statute of limitations, and in this case the breach is pleaded solely as a defense. The appellant is correct in this contention, and his claim was not barred. * * * As stated above, we have already held that no cause of action accrued until eviction, and a suit could not be maintained for breach of warranty except in cases where suit is brought for the purchase money as in this case.

The next contention of appellant, that knowledge of the purchaser that the vendor has no title does not affect the right to recover for breach of warranty, we think is correct, and in this case it appears that neither party knew anything about the reservation in the original deed until long after the sale.

It is next contended by appellant that mineral rights retained by reservation or exception in the granting clause in a deed are held in perpetuity. This court has said: "There has been a wealth of discussion on the subject whether or not there can be a severance of the surface and mineral rights in land so as to uphold a sale or reservation of the latter, and there is not entire harmony in the discussion, but it appears to us to be in accordance with the great weight of authority to say that there may be such separation, and that mineral rights, even those including gas, a volatile substance and generally referred to as being of a vagrant character and liable to escape, may be the subject-matter of a separate sale or reservation so as to create or reserve a right in perpetuity." *Bodcaw Lumber Co.* v. *Goode,* 160 Ark. 48, 254 S. W. 345.

There are numerous cases cited in the Bodcaw Lumber case, and it is the settled rule in this State that mineral rights retained by reservation or exception, as in the deed involved in this case, are held in perpetuity.

A number of witnesses were introduced and testified with reference to the value of the mineral rights reserved. The appellant offered testimony that the railroad company held the mineral rights in all of its lands at $10 per acre, and it therefore contends that that is the value of the mineral rights and that it ought to recover that amount because of the failure of appellee's title. We do not agree with appellant in this contention. The appellant sells its lands including the mineral rights at $10 an acre. The price at which the railroad company would be willing to sell would not be a criterion and not a proper measure of damages, and is very little evidence, if any at all, as to the real value of the mineral rights.

What appellant is entitled to recover for failure of title to the mineral rights in the vendor is the value of the mineral rights and not what the railroad company would be willing to sell for. If fixing the price at $10 would be the measure of damages, there is no reason why it might not fix it at $50 per acre, and there would be the same reason for contending that that was the value. Besides, the testimony offered by both appellant and appellee conclusively shows that the appellant was purchasing the land for the timber that was on it and really did not consider anything but the timber. It is true it bought the land, and, since it did, it was entitled to a conveyance of the land which included the timber and the mineral rights. The testimony shows that the appellant's agent, before the purchase was completed, went over the land himself for the sole purpose of seeing the timber and estimating it. The character and quantity of the timber alone, in the estimation of both parties, fixed the value. The mineral rights were not thought of by either party and there is no evidence in the case tending to show that the mineral rights on the land in controversy are valuable.

The chancellor allowed appellant $1 an acre. While we think this is more than the proof justified, there is no appeal from this finding, and it will therefore not be disturbed. We think the finding of the chancellor that appellant was entitled to $1 an acre for the mineral rights on the lands in controversy is certainly as much as appellant was entitled to, and the decree of the chancery court is therefore affirmed.

NEWSOM *v.* REED.

Opinion delivered May 7, 1928.

Saxon, Wade & Warren, for appellant.

J. P. Machen, for appellee.

McHaney, J. Appellee was a judgment creditor of W. H. Newsom, husband of appellant, and brought this action against him and appellant to subject certain funds on deposit in the First State Bank of Stuttgart, Arkansas, to the credit of appellant, to the satisfaction of his judgment, on the ground that said fund was the property of W. H. Newsom and had been deposited to the credit of his wife, appellant, in fraud of creditors. An equitable garnishment was issued against said bank. Within four months from the bringing of this suit, W. H. Newsom was adjudicated a voluntary bankrupt in the district court for the Western District of Arkansas, and C. E. Wright became the trustee of his estate. He intervened in this suit, adopted the allegations of fraud of appellee and claimed the fund as the property of said estate. He later, by leave of court, dismissed his intervention, without prejudice, over appellant's objections. Appellant filed an answer and cross-complaint against appellee, claiming that the money in the bank was her property, and that she had been damaged in a large sum by reason of said garnishment in that she was prevented from completing the purchase of a certain 40-acre oil and gas lease on lands in Louisiana, at $15 per acre, which later became worth $150 to $200 per acre, and that she had been damaged to the amount of the difference. After the trustee had petitioned the court for leave to dismiss his intervention, appellant attempted to make the trustee a cross-defendant, claiming damages against him to the extent of legal interest on the fund. After W. H. Newsom was adjudged a bankrupt, no further attempt was made by appellee to collect his judgment out of the funds garnished. He admitted the superior rights of the trustee and the suit thereafter continued on the cross-complaint of appellant against him for damages. The court dismissed the cross-complaint for want of equity.

Seven assignments of error are urged for our consideration, as follows:

1. That the court should not have permitted the trustee to dismiss his intervention when appellant's cross complaint against him was pending. But it was not pending, had not been filed, when the trustee asked leave to dismiss. Another reason is that he could not be held to respond in damages for the alleged wrongful issuing of the garnishment, first, because he intervened on the order and direction of the bankruptcy court, and could not have been held personally liable, nor could the estate which he represented; and second, he did not cause the issuance of the garnishment in the first instance. He simply claimed the fund as the property of the bankrupt. It is further claimed that the dismissal, if at all, should have been with prejudice; but not so, as appellant had no vested right to require the trustee to litigate the matter in that court to the exclusion of the bankruptcy court.

2. We find no merit in the argument that the court erred in granting appellee a continuance in October, 1927, in order to obtain the deposition of Mr. Wall, active vice president of the First State Bank. It is the settled rule of this court that granting and refusing continuances rest in the sound discretion of the trial court, and that error cannot be predicated thereon unless there is a manifest abuse of such discretion. We do not understand counsel to contend that the case should be reversed on this account, and, even though error, we would be at a loss to know how to correct it.

3 and 4. That the court erred in excluding the depositions of W. H. Newsom and appellant. Appellant's deposition was considered by the court. The decree so recites. W. H. Newsom was not a party to this controversy as finally submitted, the only question being the right of appellant to recover damages against appellee on her cross-complaint. He was therefore not a competent witness for his wife. Section 4146, C. & M. Digest, sub. 3.

5. That the court erred in admitting the deposition of Mr. Wall. His deposition was taken on interrogatories which were not crossed, except by the clerk under the statute. Appellant did not file any cross interrogatories. It is said the witness' testimony is in part hearsay, but appellant does not point out that which is hearsay, and did not examine the witness to determine the source of his information. Where a part of a witness' testimony is competent and a part is incompetent, a general objection which does not point out the incompetent part is insufficient. *Eureka Oil Co.* v. *Mooney,* 173 Ark. 335, 292 S. W. 681. This court tries chancery cases *de novo,* and will consider only such testimony as is competent.

6. That the decree is against the preponderance of the evidence. We think not. The damages claimed were too remote, and, moreover, the great preponderance of the evidence shows that the money in bank was really the property of the bankrupt Newsom, and that the garnishment was rightfully issued. We do not review the evidence in detail, but the testimony of Mr. Wall shows clearly that substantially all the money deposited to appellant's credit came from her husband.

"Conveyances 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." *Hernton* v. *Short,* 121 Ark. 383, 181 S. W. 142.

7. That the court refused to hold that the money in said bank was the property of appellant. We think the court was correct in this. The only question before the court was the matter of damages on appellant's cross-complaint, which, as we have already said, was properly denied. The title to the money was then in litigation in the Federal District Court in bankruptcy.

We find no error, and the decree is affirmed.

ÆTNA CASUALTY & SURETY COMPANY *v.* TAYLOR.

Opinion delivered May 7, 1928.

J. A. Sherrill, for appellant.

T. D. Wynne and *Chas. A. Miller,* for appellee.

HUMPHREYS, J. Exceptions were filed by appellant, a creditor of the insolvent Bank of Morrilton, to the purported sale of the assets of said bank to the First State Bank of Morrilton by the State Bank Commissioner under order of the chancery court of Conway County in vacation. Hereafter, for the sake of brevity, the insolvent bank will be referred to as the old bank and the First State Bank of Morrilton as the new bank. The Bank Commissioner took charge of the assets of the old bank on December 15, 1926. On Feb. 11, 1927, the State Bank Commissioner levied an assessment against the stockholders of the old bank of 100 per cent. of the par value of the outstanding shares of the capital stock. On February 16, 1927, the State Bank Commissioner entered into a tentative agreement for the sale of the assets of the old bank, including the assessment against the stockholders therein, and the liability, if any, of the directors for the mismanagement thereof, to the new bank, subject to the approval of the judge of the chancery court of said district. On the same day he presented a petition to said court requesting approval of the same, and, pur-

suant to the request, an order was made on the same day by said court in vacation ratifying and confirming the terms of the contract of sale in all respects. The Bank Commissioner advised that it was to the best interest of the creditors of the old bank to sell its assets to the new bank, and the order of the court directing and approving the contract for the sale thereof contained a recital to that effect.

Appellant's claim against the old bank grew out of a bond which it executed to the State of Arkansas indemnifying the State against any loss by reason of having deposited $35,000 of the State's money in the old bank. A part of the consideration for the sale of the assets of the old bank to the new bank was that the latter should immediately pay all creditors of the old bank 40 per cent. of their claims. The State received out of the proceeds of the sale 40 per cent. of her claim, amounting to $13,673.87, thereby reducing the liability of appellant on its indemnity bond to the State in an equal amount. Appellant then paid the State the balance of her claim, which had been allowed as a common claim by said Bank Commissioner, amounting to $21,326.13, and took an assignment thereof to itself. As claimant by assignment and subrogation appellant filed objections and exceptions in said court to the sale. It attacked said sale upon two grounds: the first ground being that the transaction did not amount to a sale of said assets, but, instead, constituted the new bank a trustee for the purpose of administering the assets of the old bank in place of the Bank Commissioner himself, assigning a number of reasons, which, in our view of the case, it is unnecessary to set out; and the second ground being that the attempted sale was fraudulent and void for a number of alleged reasons which, in our view of the case, it is also unnecessary to set out. A demurrer was sustained to the objections and exceptions, and properly so, for appellant was in no position to attack a sale in equity out of which it had received a benefit. Its indemnity obligation to the State was reduced by the

amount of $13,673.87 out of the proceeds of the sale of the assets of the old bank to the new bank, and it should have tendered this amount back to the new bank before or at the time it filed its objections and exceptions to the sale. It could not be heard to disaffirm a transaction or contract which it had theretofore affirmed and approved by accepting benefits thereunder. Appellant claims under assignment from and by subrogation to the rights of the State. It can therefore have no greater rights than the State had. Certainly it could not be successfully contended that the State could assail the sale after accepting benefits thereunder to the extent of $13,673.87.

No error appearing, the decree is affirmed.

DAVIS *v.* MURPHY.

Opinion delivered May 7, 1928.

Pat McNally and *Jordan Sellers,* for appellant.

Mahony, Yocum & Saye, for appellee.

HUMPHREYS, J. This suit was brought by appellee against appellants in the chancery court of Union County to recover $2,125.60, including interest, evidenced by a promissory note for $1,650 dated August 19, 1922, and to foreclose a mortgage of even date therewith on an eighty-acre tract of land in said county by appellants to appellee to secure same.

Appellants filed an answer, alleging that the note and mortgage were executed and delivered on Sunday, August 20, 1922, and that the note was executed by J. A.

Davis, one of the appellants, as surety merely, and the mortgage executed by both appellants as security for the note, neither of them having received any consideration therefor.

The cause was submitted upon the pleadings and testimony adduced, resulting in a judgment against appellant J. A. Davis for $2,125.60, the foreclosure of the mortgage lien, and an order of sale of the lands to satisfy the judgment, from which is this appeal.

The facts are undisputed. In June or July, 1922, E. E. Davis was desirous of obtaining a loan of $1,650, and his father, J. A. Davis, agreed to sign his note for that amount and to execute a mortgage on eighty acres of land in Union County to secure same. E. E. Davis arranged to get the money from appellee, but did not inform his father with whom he was negotiating, nor did he inform appellee that he was securing the loan by mortgage upon his father's land. On Sunday, August 20, 1922, by arrangement over the telephone, E. E. Davis, J. A. Davis, J. W. Foster and Mattie M. Davis met, either at the home of E. E. Davis or of a justice of the peace by the name of W. R. Pickering, to execute a note and to secure same by mortgage on an eighty-acre tract of land in said county belonging to J. A. Davis. A question was raised about the legality of papers executed on Sunday, so the parties present agreed among themselves to date the note and mortgage on Saturday, August 19, instead of August 20. This was done, and, after the note and mortgage were executed, they were turned over by the justice of the peace to E. E. Davis, the principal in the note. Appellee, the payee in the note and the grantee in the mortgage, was not informed that they were executed on Sunday, and never received information to that effect until appellants filed their answer to his foreclosure suit. On Monday morning, August 21, 1922, E. E. Davis presented the note and mortgage to appellee and received the consideration in money expressed therein. There were no negotiations between appellants and appellee relative to the transaction. They never had any com-

munication with each other about the matter until after the maturity of the note. In the view we take of the case it is unnecessary to state what occurred between them after the maturity of the note relative to the collection and payment of same.

Appellants contend for a reversal of the judgment upon the ground that the delivery on Sunday of the note and mortgage after their execution to E. E. Davis was a delivery of them on the Sabbath day to appellee, the payee in the note and the grantee in the mortgage. It is the settled rule in this State that instruments delivered on Sunday are void. *Tucker* v. *West,* 29 Ark. 386. The controlling factor, with reference to the validity or invalidity of such instruments, is their delivery and acceptance, and not their execution, because they do not become effective until delivered and accepted. Appellants bottom their contention that the note and mortgage were delivered to appellee on Sunday upon the theory that E. E. Davis, the maker of the note, was the agent of appellee. We do not think the basis of their contention sound. E. E. Davis was under no legal duty to present the note and mortgage to appellee after they were executed and turned over to him. Appellee had no legal right to demand them on a tender of the money. E. S. Davis was the maker and the owner of the note. He had a perfect right to destroy the note and the mortgage and never take or accept the loan. He had procured the signatures of his father and J. W. Foster as accommodation sureties on the note and a mortgage on eighty acres from his father and mother to secure his note, in which instrument appellee was designated as the payee, but appellee had no vested right in or to the note and mortgage, as he had not paid a cent for them, and did not do so until presented to him by E. E. Davis on Monday. E. E. Davis was not acting for appellee or in any sense representing him. He was acting and representing himself. He was the maker and owner of the note until he

negotiated same by delivery to appellee. This was not done until Monday, hence the transaction was not a Sabbath day, but a week day, contract.

No error appearing, the decree is affirmed.

HARRIS *v.* STATE.

Opinion delivered May 7, 1928.

J. O. A. Bush and *Dexter Bush,* for appellant.

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

HUMPHREYS, J. Appellant and Billy Cornelius were jointly indicted at the July, 1927, term of the circuit court of Nevada County for the crime of murder in the first degree for killing Aud Hooker. Subsequently the charges were severed, and, upon a second trial of the case, appellant was convicted of murder in the second degree and adjudged to serve a term of five years in the State Peni-

tentiary as a punishment therefor, from which is this appeal.

The first assignment of error urged by appellant for a reversal of the judgment was a refusal of the trial court to sustain his plea of former jeopardy. On the first trial of the case at the July, 1927, term of court, after the jury had been impaneled, sworn to try the cause, the opening statement of counsel made and the testimony of one witness heard, the court was informed that J. A. White, a member of the jury, was on appellant's bond, whereupon the court discharged him and ordered the selection of another juror. After the juror had been excused, appellant made a motion to be discharged on the ground that he was placed in jeopardy when the jury was sworn, which motion was overruled by the court, over appellant's objection and exception. Another juror was selected, but the jury failed to agree upon a verdict. The case was continued to the January, 1928, term of court. When the case was called for trial, appellant filed a written plea of former jeopardy, to which he attached the affidavit of J. A. White, the juror who had been discharged by the court on the first trial, to the effect that he had signed appellant's bail bond at the request of one of his friends and not because he had any interest in the case. He further deposed that he had no bias or prejudice for or against the appellant. The court again overruled appellant's plea, over his objection and exception. Appellant argues that the court had no right to discharge the juror without an affirmative showing of bias by the State. The reason for appellant's position is that being on the bond of an accused does not disclose bias, either actual or implied, on the part of a juror, as defined by §§ 3159 and 3160 of Crawford & Moses' Digest. It is true that § 3160 of Crawford & Moses' Digest prescribed the conditions under which challenges may be made for implied bias, and being on the bail bond of an accused is not one of the conditions. We think, however, the condition is covered by § 3159 of Crawford & Moses' Digest, which is as follows:

"Actual bias is the existence of such a state of mind on the part of the juror in regard to the case, or to either party, as satisfies the court, in the exercise of a sound discretion, that he can not try the case impartially and without prejudice to the substantial rights of the party challenging."

Under the section quoted, actual bias is the state of mind of a juror. By the act of signing the bond in the instant case the juror aligned himself with the cause of appellant, and necessarily became interested in the result of the prosecution. He was responsible for the presence of appellant, and, had appellant not appeared, would have been responsible on the bond, and was responsible thereon until taken into custody after conviction. Indeed, it would be a travesty on justice to allow interested jurors to try cases. In the case of *Martin* v. *State,* 163 Ark. 103, 259 S. W. 6, 33 A. L. R. 133, this court quoted with approval from the Supreme Court of Maine in the case of *Slorah* v. *State,* 118 Me. 203, 106 A. 168, 4 A. L. R. 1256, the following language: "The administration of justice requires that verdicts, criminal as well as civil, shall be found by impartial juries, and shall be the result of honest deliberations absolutely free from prejudice or bias. The public as well as the accused have rights which must be safeguarded. If, during the progress of the trial, it shall become known to the court that some of the jury do not stand indifferent, whether toward the State or the accused, it would be a travesty on the administration of justice if the trial must proceed, and, if acquitted by such a tribunal, the constitutional safeguard may be invoked against placing him in jeopardy before an impartial jury. Such a trial obviously should not constitute jeopardy, whether the jury be prejudiced or influenced in behalf of the accused or the State. To prevent such a perversion of justice, it is now well recognized that, if it comes to the knowledge of the presiding justice that such conditions exist, it creates that imperious, manifest necessity that will war-

rant a discharge of the jury, and such discharge will constitute no bar to another trial on the same indictment." The state of mind of a juror is necessarily manifested by signing the bond of an accused. The trial court did not err in overruling appellant's plea of former jeopardy.

The second assignment of error by appellant for a reversal of the judgment was the refusal of the trial court, after severance of the charges, to try Billy Cornelius first. The court overruled a motion of appellant, in which Billy Cornelius joined, to that effect, over appellant's objection and exception. In support of this assignment of error, appellant cites § 3140 of Crawford & Moses' Digest, which provides:

"When jointly indicted for a felony, any defendant requiring it is entitled to a separate trial, and, when the trials are severed, the defendant may elect the order in which they shall stand upon the docket for trial; but, if no such election is made, they shall stand in the order in which their names appear upon the indictment."

This statute is merely directory, and not mandatory. After the cases of persons jointly indicted for crime are severed, the cases stand on the docket independently of each other. Neither has any concern about the order of trial of the other. This is the interpretation placed upon the statute quoted by this court in the case of *Sims* v. *State,* 68 Ark. 188, 56 S. W. 1062, and *Burns* v. *State,* 155 Ark. 1, 243 S. W. 963. The court did not err in trying the case of appellant before placing Billy Cornelius on trial.

The third assignment of error by appellant for a reversal of the judgment was the admission of the testimony of the sheriff to the effect that appellant did not tell him that Aud Hooker had shot up the door in the house before he killed him. This is an issue in the case, and the conduct of appellant in failing to claim that the deceased had shot into the house on that night was admissible as tending to throw light upon that issue. The

statement of the sheriff was competent, and the court did not err in admitting it.

The fourth and last assignment of error by appellant for a reversal of the judgment was the refusal of the court to grant a new trial on account of the alleged disqualification of Bob Davis, a member of the jury which convicted appellant. It was stated in an affidavit of S. R. Morgan, attached to the motion, that he heard Bob Davis say, before being selected on the jury, that he did not see how any man could vote to turn appellant loose. Bob Davis was introduced as a witness, and denied making the statement, so it became an issue of fact to be determined by the trial court. The finding of the court, on conflicting evidence, that the juror was not disqualified, is conclusive. *Pendergrass* v. *State,* 157 Ark. 364, 248 S. W. 914; *Corley* v. *State,* 162 Ark. 178, 257 S. W. 750; *Lane* v. *State,* 168 Ark. 528, 270 S. W. 974.

No error appearing, the judgment is affirmed.

BANK OF MANILA *v.* WALLACE.

Opinion delivered May 7, 1928.

Little & Buck, for appellant.

J. F. Gautney, for appellee.

MEHAFFY, J. The appellant brought suit against the appellee in the Craighead Circuit Court to recover on a note of $1,400 given by the appellee to C. A. Thompson.

Appellee admitted the execution of the note, but denied liability on the ground that Thompson was the agent of the Jonesboro Cotton Mills, and that the note was given for stock in the Jonesboro Cotton Mills; that the sale of the stock to Wallace for which the note was given was made for the corporation.

The appellant contended that the note was given to Thompson, and not to the corporation, for stock, and that it was an innocent purchaser.

After hearing the testimony the court directed a verdict in favor of the appellee, and appellant prosecutes this appeal to reverse said judgment.

The appellee testified that he gave the note for stock in the Jonesboro Cotton Mills, a corporation; that he bought it from Thompson, but that Thompson was representing the corporation, and the note was given for stock of the corporation. No stock was ever issued to appellee. The note was executed on the 10th of March, and the appellant's witnesses testified that, on the 14th of March, Thompson came to the bank with the note and that the bank purchased it, discounting it $80 because the interest rate was 8 per cent., whereas the bank charged more than that.

Testimony shows that Mr. Shaver, the president of the bank, called up Robert Braden of the Monette Bank and asked him if he would consider Mr. Wallace's note good for about $1,400. Braden thought the note was good, but asked him if it was in connection with the purchase of stock, and, when Mr. Shaver said it was, Braden told him he would have trouble collecting it, because Mr. Wallace had talked to Braden about being dissatisfied with the deal.

There is no dispute about this conversation between Shaver and Braden, and no dispute about the fact that it occurred before the Bank of Manila purchased the note.

It is also shown by the appellant's witnesses that the bank told Thompson that it would not buy the note without a letter from Wallace; that a letter was written in the bank at the same time, on the 14th of March, and Thompson took it, and came back after a while with a letter signed by Wallace.

The president of the bank testified that he had this letter from Wallace before he purchased the note, and that he did not know at the time he purchased the note that the Jonesboro Cotton Mills had any interest in it. That he assumed that Thompson had sold Wallace some of his stock. Thompson had told Shaver that he owned a good deal of stock, and was going to buy more. He thought it was Thompson's because Thompson was in possession of it.

It would serve no useful purpose to set out the testimony in detail. The testimony on the part of appellee tended to show that the note was given for stock of the corporation, and that it was void because given by Thompson for the corporation for capital stock, and that the bank bought it with knowledge.

The evidence was sufficient to justify the court in submitting to the jury, first, whether the note was given for stock of the corporation and whether Thompson was simply acting for the corporation, and, second, whether the appellant was an innocent purchaser.

If the note was given for stock in the corporation and Thompson was merely acting for the corporation, selling its stock, then, under the law as settled by the decisions of this court, the note was void. And if the bank was not an innocent purchaser, it could not recover.

Section 8 of article 12 of the Constitution provides that no private corporation shall issue stock or bonds except for money or property actually received or labor done. In construing this section of the Constitution this court has said:

"When notes are taken in exchange for stock it is a palpable violation of the constitutional provision, because notes are merely evidences of indebtedness, and such a transaction shows upon its face that the stock has not been paid for. The design of the framers of the Constitution was that stock should not be issued and sold except for its value in money or property actually received, or labor done. A note is not property in the sense of the Constitution, because it only indicates that the stock has not, in fact, been paid for, and, where the notes are worthless, the stock has been exchanged for nothing. Notes are not money and not bankable paper, but mere choses in action, and it in no sense meets the requirements of the above provision of the Constitution to accept a note in exchange for stock." *Bank of Commerce* v. *Goolsby,* 129 Ark. 416, 196 S. W. 803; *Bank of Dermott* v. *Measel,* 172 Ark. 193, 287 S. W. 1017.

If Thompson was representing the bank, selling the stock for it, and accepted a note in payment of the stock, the note is void. This would be an evasion of the Constitution and doing a thing indirectly which the Constitution prohibits. It is argued, however, that the corporation actually got money. It got money by discounting the note at the bank, if appellee's theory is correct, but that does not alter the fact that the note was originally taken for the stock. If a corporation could sell its stock, take a note and go to the bank and discount it, and thereby make valid the void contract, the provision of the Constitution would have no effect.

This court said in the case of *Bank of Dermott* v. *Measel,* 172 Ark. 193, 287 S. W. 1017:

"If the corporation could not take the note of a subscriber in payment of its own capital stock, it is plain that it could not lend money to a subscriber to its own capital stock in payment of it. This would be a palpable evasion of the Constitution. There is no more a payment of money where the corporation lends the money to the subscriber and then receives it back in payment of the

stock than where it receives a note originally in payment of a stock subscription."

In this case, if the note was actually given for the stock it was void. And the fact that the corporation, or Thompson for the corporation, afterwards sold the note and the corporation received the money, would not affect the invalidity of the note.

In the case of *City National Bank* v. *DeBaum,* 166 Ark. 18, 265 S. W. 648, it was held that contracts made in violation of law are not rendered valid by renewal or by subsequent promises to pay them. If the law were otherwise, the constitutional provision would have no practical use.

This court said in a recent case: "It was admitted that the stock for which the note was given was sold in violation of the Blue Sky Law, and the court instructed the jury that the burden was upon the appellee to show that it was an innocent holder. The only thing necessary for appellant to show, in order to entitle him to a verdict, was that the appellee knew that the note was given for stock of the corporation which had been sold in violation of the law." *Fentress* v. *City National Bank,* 172 Ark. 171, 290 S. W. 58.

It is a question of fact to be determined by the jury from the evidence whether the appellant was an innocent purchaser. And, as stated in the case last mentioned, if appellant knew that the note was given for stock of the corporation, then it was not an innocent purchaser, and this question should have been submitted to the jury.

The court therefore erred in directing a verdict and in its failure to submit the questions of fact to the jury. For these errors the judgment is reversed, and the case is remanded for a new trial.

ARKANSAS BRICK & TILE COMPANY *v.* CRABTREE.

Opinion delivered May 7, 1928.

A. D. Whitehead, for appellant.

W. G. Dinning, for appellee.

MEHAFFY, J. This is the second appeal in this case. The opinion on the former appeal is in 172 Ark. 752, 290 S. W. 361. On the former appeal this court said: "The law requires an affidavit for an appeal from a justice court to the circuit court as a prerequisite to the circuit

court's jurisdiction to entertain an appeal, and, unless waived, is ground for dismissal. * * * The appellant *in limine* objected to the jurisdiction of the circuit court, and therefore did not waive the affidavit for appeal. * * * This is likewise the law as to appeals from municipal courts. * * * We find no affidavit for appeal in this record. This is not a case where a defective affidavit was filed, but where there is no affidavit at all. The judgment is therefore reversed, and the cause is remanded, with directions to the trial court to require the municipal court to amend the transcript so as to show that an affidavit for appeal was made, if it can be done consistently with the truth, and that the cause be tried *de novo*. But, upon failure of the appellee to thus perfect his transcript, the same shall be dismissed by the trial court." *Ark. Brick & Tile Co.* v. *Crabtree,* 172 Ark. 752, 290 S. W. 361.

The municipal court amended its transcript so that it contains the following: "Thereupon, the defendant having filed his affidavit for appeal as required by law, and his motion for appeal, which said motion was granted by the court, and all the papers in the case are transferred to the Phillips Circuit Court."

Appellant contends that this amendment is not sufficient to comply with the statute and the decision of this court on former appeal. The statement in the judgment of the municipal court that the defendant had filed his affidavit as required by law is sufficient, unless the other party had shown that no affidavit was in fact filed. The presumption is that the judgment reciting the fact that an affidavit as required by law had been filed is correct.

Appellant introduced the attorney for appellee, who testified that he did not know whether he filed an affidavit for an appeal in this case or not. He did not say that he did or that he did not. And here the appellant rested, so far as any effort to show whether or not the recital of the judgment of the municipal court was correct. The municipal judge evidently knew whether an affidavit as

required by law had been filed, and could have been required to testify, but, since this was not done, and since there is no testimony showing that the affidavit was not filed, the recital in the judgment that it was filed will be presumed to be correct.

The decision in this case on former appeal is the law of the case on the questions decided by this court on that appeal. And the court there held that the cause was reversed, and remanded with directions to the trial court to require the municipal court to amend the transcript so as to show that an affidavit for appeal was made, if this could be done consistently with the truth. The municipal court made the correction as required by the opinion of this court on former appeal, and the opinion on that appeal is the law of the case now.

As we have said, there was no effort to show that an affidavit was not filed other than the questions asked the attorney for the other party, and his statement that he did not know whether he filed an affidavit or not is not sufficient to overcome the recital in the judgment that the affidavit was filed.

It is insisted by the appellant that, because a check was deposited in the First National Bank and credited to the account of appellant's agent, said bank was a *bona fide* holder, and that there is a rule that the drawer of a check cannot stop payment of it after it has passed into the hands of a *bona fide* holder. Appellant calls attention to the case of *Gage Hotel Co.* v. *Union National Bank,* 171 Ill. 531, 49 N. E. 420, 39 L. R. A. 479, and the case of *Union National Bank* v. *Oceana County Bank,* 80 Ill. 212. These cases have no application here, for the reason that appellant in this case did not sue the bank, and it is wholly immaterial whether appellee could have stopped payment on the check or not. This question would have been involved if the suit had been against the bank, but the appellant sued the appellee, the maker of the check, and, of course, the question then was whether the appellee owed appellant the amount of the check.

And this is the only other question discussed by the appellant.

The court gave to the jury the following instruction: "Gentlemen of the jury, this is a suit brought by the Arkansas Brick & Tile Company against G. W. Crabtree upon a check executed by the defendant, G. W. Crabtree, to the plaintiff in payment of a carload of brick. It is admitted upon the part of the defendant that he purchased the brick from the plaintiff, and upon that admission, gentlemen of the jury, you are instructed that the burden is on the defendant to show payment for the brick. It is also claimed on the part of the defendant that he paid one Mr. Foster, who he claims represented the Arkansas Brick & Tile Company. You are instructed that the burden is upon him to show that Mr. Foster was an agent of the plaintiff and that he had a right to receive the payment, if he did so receive the payment."

The above instruction submitted the question of payment and the question of the agency of Foster to the jury properly. And there was substantial evidence to sustain the verdict of the jury. The court told the jury that defendant admitted getting the brick and the burden was on him to show payment. The jury were also instructed that the burden was upon the defendant to show that Foster was the agent and had a right to receive the money. These were questions of fact to be determined by the jury, and the verdict of a jury, if supported by any substantial evidence, is conclusive here. This court does not pass upon the credibility of witnesses nor the weight to be given to their testimony.

The appellant insists that the court erred in refusing to give instructions requested by it. Number two requested by the appellant is a peremptory instruction telling the jury that, if they find from the evidence that the plaintiff purchased the goods and gave the check, they should find for the plaintiff. This instruction was erroneous because, although the defendant gave the check, he would still have a right, when sued for the amount, to show that it had been paid,

Number three requested by appellant is fully covered by the instruction the court gave, and number four is also covered by the instruction given. Number five is erroneous because it tells the jury that they must find for the defendant unless the plaintiff shows fraud or undue influence. Neither fraud nor undue influence was an issue in the case. The only questions in the case are, first, whether payment was made to Foster, and second, whether Foster had authority to bind the appellant by receiving payment. The undisputed testimony showed that Foster was a representative of the plaintiff, that he ordered the goods himself, and that this was the fourth car ordered from the appellant, and that other payments for cars bought from appellant through Foster were made in the same way. It is true the appellant's witnesses testified that Foster had no authority as agent to collect the money, but there was sufficient evidence to take the question to the jury as to whether Foster had such authority, and, as we have said, the finding of the jury under proper instructions is conclusive here.

The judgment of the circuit court is therefore affirmed.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY *v.* LITTLETON.

Opinion delivered May 7, 1928.

W. G. Dinning and *H. D. Minor,* for appellant.

Fred M. Pickens, for appellee.

McHaney, J. Appellee, W. R. Littleton, is the father of the other appellee, Henry Littleton, a boy 14 years of age in 1925. Prior to December 10, 1925, Henry Littleton had been visiting with his brother, Earle, in Vicksburg, Mississippi, where he contracted typhoid fever, and was confined for some weeks in a hospital. After being discharged from the hospital, he stayed with his brother some three or four weeks, and then decided to go home. He went to the station, in company with his brother, Earle, and cousin, M. S. Littleton, and there bought a ticket to Newport, Arkansas, via Memphis, Tennessee. Earle informed the station agent that the ticket was being purchased for his brother, Henry, who was in a very weak condition on account of a long spell of the typhoid fever, and the agent directed him to the conductor of the train on which Henry would make the journey to Memphis. They saw the conductor, stated the facts to him regarding his condition, that he would need assistance in getting on and off the train, and in making his transfer in Memphis, and the conductor assured them he would look after appellee and assist him in making the transfer in Memphis. He was thereupon assisted on the train at Vicksburg, and the attention of the conductor was directed to him and his location on the train. But for the assurance of the conductor that he would look after Henry, Earle would have gone with him, as he was not able to take care of himself.

On arrival in Memphis, the conductor neglected to take any care of Henry, and in attempting to get off the train and get into the station alone, he fell and received severe and painful injuries. Thereafter this action was

instituted, and a recovery was had against appellant in the sum of $1,000 in favor of W. R. Littleton and $1,500 in favor of Henry Littleton.

The only error relied upon for a reversal of this case is the giving, over appellant's objection, of appellees' instruction No. 1, which is as follows: "You are instructed that, when a carrier accepts as a passenger a sick or disabled person, with full knowledge of said person's infirmities, if special care is necessary to be bestowed for the protection of such passenger, the carrier will be held negligent if it fails to bestow such care; and if you find from a fair preponderance, or the greater weight of testimony in this case, that the defendant company accepted as a passenger the plaintiff, Henry Littleton, and that the said Henry Littleton was in a weak and disabled physical condition, to such an extent as to need assistance in alighting from the train of the defendant and getting into the station at Memphis, Tenn., and that defendant's conductor, on said train on which plaintiff was a passenger, was notified of plaintiff's condition before his acceptance as a passenger, and had full knowledge of same, and that defendant's employees failed and neglected to bestow the care necessary to prevent plaintiff from being injured in alighting from said train and getting into the station at Memphis, Tenn., and as a result of defendant's employees' negligence in failing to bestow such assistance and care upon said plaintiff, the plaintiff was injured, and that the negligence of the employees of defendant company in failing to bestow such care as aforesaid caused said injury, then you would be authorized to find for the plaintiff."

The particular part of said instruction complained of is "that defendant's employees failed and neglected to bestow the care necessary to prevent plaintiff *from being injured* in alighting from said train and getting into the station at Memphis," and that, as a result of defendant's "failing to bestow *such assistance and care* upon said plaintiff," the injury occurred, the plaintiff was entitled to recover. It is said that this instruction requires more

than has ever been required of any passenger carrier, because it makes the carrier an insurer. And it is further said that the instruction is wrong for the further reason that, after a passenger arrives at his destination and gets off the train, it is not required to exercise the extraordinary care required by law of a carrier of passengers during actual transportation. And the following quotation from Hutchinson on Carriers is relied upon, to the effect that, "while the carrier of passengers does not warrant the safety of his passengers as the common carrier does that of goods, he is bound to provide for their safe conveyance as far as human care and foresight will go, or, as some courts have expressed it, to exercise for the safety of his passengers while upon his conveyance the highest or utmost degree of care and diligence which human prudence and foresight will suggest, in view of the character and mode of conveyance employed." Hutchinson on Carriers, 3d ed., § 896.

St. L. I. M. & S. Ry. Co. v. *Woods*, 96 Ark. 311, 131 S. W. 869, 33 L. R. A. (N. S.) 855, is also relied upon, where this court said:

"The higher degree of care is exacted only during the time in which a passenger has given himself wholly in charge of the carrier—while on the train or getting on or off—for then only is the passenger subjected to the peculiar hazards of that mode of travel, against which the carrier must exercise the highest degree of skill and care."

We agree entirely with these statements of the law, but here we have a person who was incapable of taking care of himself, and both the agent selling the ticket and the conductor in charge of the train were notified of such condition. In fact, Earle Littleton would have accompanied his brother to Memphis and attended to his transfer himself had not the company, through its conductor, assured him that this duty would be performed willingly and readily by him. The railroad company had the right, through its agents, to refuse to accept the passenger in the condition he was without an attendant, but,

having accepted him as a passenger, with the agreement on the part of the conductor to take care of him, not only while on the train but in getting off and making his transfer to another train, or safely into the depot, the law placed upon the company the same high degree of care after alighting from the train as it did during actual transportation. It is undisputed that he continued to be a passenger at the time he was injured. The relation of passenger and carrier still existed, and, under the peculiar circumstances existing in this case, it was the duty of the company, through its conductor, to have given that care and attention necessary in order to protect him from the very injury that occurred to him.

Mr. White, in his work on Personal Injuries on Railroads, vol. 2, page 586, states the law as follows:

"The law does not require a passenger carrier to receive and carry an insane or drunken person, or one with an infectious disease, or whose physical or mental condition is such that his presence may cause injury or discomfort to other passengers, and the carrier may rightfully refuse to carry such persons. Nor is it compelled to accept disabled or sick persons, traveling without an attendant or nurse, where due care toward such persons would require an attendant or nurse to properly look after the welfare of such a passenger.

"Where the carrier voluntarily accepts such a person as a passenger, however, if special care is necessary to be bestowed for the protection of such a person, the carrier will be held negligent if it fails to bestow such care; and in case of injury to such a passenger, by the neglect of his additional duty, made necessary because of the physical condition of the passenger so accepted, the carrier would be liable in damages therefor."

In this instance the passenger required special care and attention. Appellant voluntarily accepted him as a passenger, knowing his condition, knowing that he required special care and attention, and was guilty of negligence in failing to exercise such care. This, as we understand the instruction complained of, is all that it

requires. The injury having occurred in Tennessee, the action for negligence, if any, is governed by the law of Tennessee. *K. C. Sou. Ry. Co.* v. *Phillips,* 174 Ark. 1019, 298 S. W. 325.

We do not understand the rule in Tennessee to be different from that heretofore stated by Judge White. See *Louisville, Nashville & Great Sou. Rd. Co.* v. *Simon Fleming,* 14 Lea 128, and *Southern Railway* v. *Mitchell,* 98 Tenn. 27, 40 S. W. 72.

The rule in Tennessee and Mississippi, as elsewhere, is that the carrier is under no obligation to furnish an attendant for disabled passengers, and that they may refuse to accept them as passengers without an attendant. But, having accepted them as passengers, knowing them to be disabled, it is their duty to render such special attention as may be necessary under the circumstances in each case.

We find no error, and the judgment is affirmed.

STIFFT *v.* W. B. WORTHEN COMPANY.

Opinion delivered May 14, 1928.

[redacted]

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Cockrill & Armistead, for appellant.

Frauenthal & Johnson, Rose, Hemingway, Cantrell & Loughborough, for appellee.

HART, C. J., (after stating the facts). The first ground relied upon for a reversal of the decree is that the chancery court had no jurisdiction. It is the settled rule in this State that a court of equity will not entertain suit brought solely for the purpose of interpreting a will, or to interpret a will disposing of purely legal estates, but it is equally well settled that equity will take jurisdiction when trust relations are created with reference to the property devised under the will. *Williamson* v. *Grider,* 97 Ark. 588, 135 S. W. 361; *Heiseman* v. *Lowenstein,* 113

Ark. 404, 169 S. W. 224; *Booe* v. *Vinson,* 104 Ark. 439, 149 S. W. 524; *Le Flore* v. *Handlin,* 153 Ark. 421, 240 S. W. 712; *Gaines* v. *Arkansas National Bank,* 170 Ark. 679, 280 S. W. 993; and *Norris* v. *Johnson,* 151 Ark. 189, 235 S. W. 804.

In the instant case it cannot be said that only legal rights are involved. The executors are specifically designated as trustees of the will, and are expressly given the power to dispose of any part of the property when it is for the best interest of the estate to do so. The legacy to the widow was first made a charge on certain real property, and the income from this property failed to pay the legacy. Then it was made a charge upon the partnership property, and the net income from it was not sufficient to pay the legacy. The widow demanded payment out of the body of the estate, and her demand caused actual litigation in respect to matters which were purely of equitable cognizance. It required the intervention of a court of chancery to enforce the trust in favor of the widow under the will, and, as an incident to the exercise of that jurisdiction, the chancery court was required to interpret the will in order to properly enforce the trust. So it will be seen that the performance of the duties of the executors as trustees under the will was directly affected, and this gave jurisdiction to the chancery court.

This brings us to a consideration of the clauses of the will giving a legacy of $5,200 annually, payable quarterly, to Mrs. Sophia Leon Stifft, the widow of the testator. Her rights under the will directly involved the interpretation of items two and six, which are set out in full in our statement of facts, and which need not be repeated here.

Counsel for appellants rely for a reversal of the decree upon the ground that the legacy of Mrs. Stifft was payable solely out of the net income to be derived from the real property designated in item two of the will, or, in event there was a failure or deficiency from that

source, from the net income of the partnership business of the Charles S. Stifft Company. On the other hand, counsel for Mrs. Stifft seek to uphold the decree on the theory that the will gave to Mrs. Stifft a demonstrative legacy, and that, upon the failure to pay the legacy out of the net income of the property upon which it was charged, the legatee will not be deprived of her legacy, but will be permitted to receive it out of the general assets.

The three different kinds of legacies are clearly defined in 3 Pomeroy's Equity Jurisprudence, 4th ed., §§ 1130-1133 inclusive, and in 2 Page on Wills, 2d ed., §§ 1230-1231.

In other words, it is contended that this was a demonstrative legacy, payable out of the net income from certain designated property; but, like a general legacy, it is payable out of the general assets of the estate if the particular fund should fail or there should be a deficiency in it. The authorities bearing upon the question are very numerous, and many illustrative cases on the subject are cited and reviewed in the briefs of counsel for the respective parties. The most important of these cases are collected and reviewed in a case-note in 4 Ann. Cas. 163. No useful purpose could be served by reviewing and distinguishing many of them from the case at bar. An examination of the cases shows that no positive rule applicable to every case can be laid down, but each case must be determined upon a consideration of the material provisions of the will to be construed and the extrinsic circumstances as they probably present themselves to the testator, which may be brought to bear in arriving at his intent. The authorities seem to be clear in holding that whether a legacy is to be treated as a demonstrative legacy or as one dependent upon a particular fund, is a question of construction to be determined according to what may appear to have been the general intention of the testator. Where the language of a will is clear and unambiguous, all the courts hold that the will must be

construed so as to ascertain the intention of the testator, and, when that is done, his intention must be carried out. So each case must depend upon the meaning of the language used by the testator in his will.

From these cardinal rules it seems clear that, when an annuity is given out of the net income of certain designated property, and such income turns out to be insufficient for full payment, the deficiency cannot be made up from the *corpus* of the estate.

On the other hand, if the will itself provides for the payment of the deficiency from the body of a certain designated part of the estate, that shows a clear intention on the part of the testator that the legacy is not to be paid out of the general assets of the estate.

In the application of these well-settled rules to the case at bar, the terms of the will of Charles S. Stifft must be examined in the light of the circumstances surrounding him at the time he executed the will. The primary rule of construction in the interpretation of a will is to ascertain the intention of the testator according to the meaning of the words he had used, deduced from a consideration of the whole will and a comparison of its various clauses in the light of the situation and circumstances which surrounded the testator when the instrument was executed. *Wooldridge* v. *Gilman,* 170 Ark. 163, 279 S. W. 20.

When this is done, we perceive no difficulty in arriving at the intention of the testator. He was a successful business man, and in partnership with some of his children by a deceased wife, when he desired to marry again. He entered into an antenuptial contract with the woman he intended to marry. He promised to give her certain personal property and also to provide an annuity of $5,200 per year for her, in case she outlived him, and to make the payment of it a charge upon the income of certain designated property. After his marriage, he executed the will which we are asked to interpret. Under item two of the will, he devises certain business prop-

erty in the city of Little Rock to his executors in trust with directions to apply $5,200 of the net income quarterly to Sophia Leon Stifft, pursuant to and for the purpose of carrying into effect an antenuptial agreement entered into between said parties on January 22, 1921. Item six provides that it is the intention of the testator that the provisions in item two directing that $5,200 of the net income of a certain designated apartment house shall be paid in quarterly installments of $1,300 to Sophia Leon Stifft. It further provides that, if the net income from said property should not be sufficient to pay his wife said sum of $5,200 per year or to meet any one of said quarterly installments of $1,300, said deficiency shall be made out of the net earnings of the Charles S. Stifft Company. It further provides this shall be a first charge on said net earnings, and, if said earnings are not sufficient to meet said charge, or if said business be discontinued, such deficiency shall become a first charge upon all the property and assets of said Charles S. Stifft.

Continuing, the clause reads: "And, if necessary, that a sufficient amount of the assets of said company be set apart and invested by my trustee to secure a sufficient sum out of which to discharge any such deficiency or deficiencies, the amount of the fund so necessary to be set apart and invested for such purpose and the necessity for setting the same apart to be determined by my said trustee, and my said trustee's determination as to the setting apart of such a fund from said business and the amount thereof to be final, conclusive and binding on all the beneficiaries of my will."

Item seven gives the residue of his property to his children.

We think it is plain that it was the intention of the testator, from the language used, that he only intended that any failure or deficiency in the payment of the legacy to his wife, after the failure of the particular fund, should be made up out of the *corpus* of the property of the Charles S. Stifft Company, a firm of which the

testator was a member, and not out of the general assets of his estate.

In other words, it is our opinion that the quarterly payments of the $5,200 annuity should be paid, first, out of the net income of the designated apartment house; and, if that income should not be sufficient, then out of the net earnings of the Charles S. Stifft Company; and, if the net income from both of these sources should not be sufficient, the deficiency shall be paid out of the interest of the testator in the *corpus* of the property of the Charles S. Stifft Company, which, under the terms of the sale of the executors, amounts to $32,500.

The result of our views is that the decree of the chancery court should be modified, and, to that end, the decree will be reversed, and the cause remanded with directions to enter a decree in accordance with this opinion. The costs will be paid by the executors out of the general assets of the estate.

BANK OF ALPENA *v.* MEYERS.

Opinion delivered May 14, 1928.

Festus O. Butt, for appellant.

C. A. Fuller, for appellee.

MEHAFFY, J. C. O. Lamb, one of the appellees, was indebted to O. C. Meyers, the other appellee, and gave him a check for $384 on the Farmers' & Merchants' Bank of Green Forest, dated July 18, 1926, and Meyers deposited the check on the same day in the Bank of

Alpena. The amount of the check was credited to his account. Said check was then forwarded in the usual course and the usual way to its correspondent bank for collection, finally reaching the First National Bank of Green Forest, and on the same day the First National Bank of Green Forest presented it to the Farmers' & Merchants' Bank of Green Forest for payment, and payment was refused.

There is no complaint or charge of negligence because of the manner in which the check was sent to the bank on which it was drawn. The bank called on appellees to pay the amount of the check, and they refused, their contention being that the Bank of Alpena, the appellant, had not notified them as required by law, and the only contention or controversy is as to whether they are discharged because of failure to receive notice from appellant.

The circuit court directed a verdict in favor of appellees, and appellant has properly prosecuted this appeal.

Appellant, Meyers, himself testified that the Bank of Alpena never did notify him until the 13th of August, but that he had learned on the very day that payment of the check had been refused from the cashier of the First National Bank of Green Forest.

A check was sent by another bank to the National Park Bank of New York for presentment to the Columbia Trust Company and for collection. The court said:

"The National Park Bank might have given notice to the parties liable upon the note or to its own principal. * * * Both the Park Bank and the Whaling Bank used due diligence, and the defendant received all the notice of dishonor he was entitled to, either under the Negotiable Instruments Act or under the common law of New York, which, so far as the giving of notice of dishonor is concerned, does not differ from our own common law. As this notice was sufficient, we need not inquire as to the sufficiency of the notice directed to the defendant at New

London." *Gleason* v. *Thayer,* 87 Conn. 248, Ann. Cas. 1915B, 1069.

In the above case the Park Bank, to whom the check was sent for collection, just as it was sent to the National Bank of Green Forest in this case, gave the notice through a notary public, and the court held that that was sufficient notice.

It has been said: "From an examination of the question, we are of opinion that this branch of the law merchant is correctly stated in Ch. Bills, 527, where it is said: 'It suffices if notice be given, after the bill is dishonored, by any person who is a party to the bill, or who would, on the same being returned to him, and after paying it, be entitled to require reimbursement, and such notice will, in general, inure to the benefit of all the antecedent parties, and render a further notice from any of those parties unnecessary, because it makes no difference who gives the information, since the object of the notice is that the parties may have recourse to the acceptor.' This, however, must be taken with the qualification, elsewhere stated, that a stranger to the bill cannot give the notice. * * * It was impossible for the drawer not to have known from it that the bill was unpaid, and that it had been protested by the holder for the purpose of holding the parties liable." *Brailsford* v. *Williams,* 15 Md. 150, 74 American Decisions, 559.

The National Bank of Green Forest was the bank to whom the check was sent for collection, and it had authority to collect, and, upon failure to collect, authority to notify all the parties, or it might have notified the bank which sent it to it. In this case, according to Mr. Meyers' testimony, he was notified the very day that the check was dishonored. He testifies, however, that, if the Bank of Alpena had notified him, he could have protected himself on the 5th of August to the extent of $250, by reason of having in his possession a check made to him which belonged to Lamb. But he actually received the notice on the first day of August, and saw Lamb that day, and concluded that Lamb would make it all right. The notice

served by the Bank of Alpena would not have given him any information or knowledge of any facts that he did not get from the cashier of the First National Bank of Green Forest.

Our conclusion is that the court erred in directing a verdict in favor of the appellees. The judgment is therefore reversed, and judgment is ordered entered here for the appellant for the amount sued for.

MISSOURI PACIFIC RAILROAD COMPANY *v.* GREENE.

Opinion delivered May 14, 1928.

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

MEHAFFY, J. The appellee filed suit in the Hempstead Circuit Court, alleging that on February 9, 1927, defendant negligently with its train struck and killed plaintiff's bird dog, of the value of $150, at a grade crossing between Hope and Guernsey, Hempstead County. The train was operated in a negligent manner, in that no whistle was blown or bell was rung in approaching the crossing. Defendant was further negligent in maintaining at said point a blind crossing which prevented the dog from being able to see the train until it went on the track, and the killing was due to the maintenance of the

blind crossing and because of earth embankment and trees on the right-of-way.

Defendant answered, denying the material allegations of the complaint. There was a jury trial, and a verdict for plaintiff for $50. Appellant prosecutes this appeal to reverse said judgment. Motion for a new trial was filed and overruled, and exceptions saved.

E. A. T. Creecy testified, in substance, that he and plaintiff were hunting together on February 9, 1927, and, about the time it was getting dark, or about six o'clock, plaintiff's dog was killed by passenger train No. 6. It was on a crossing on a public road running north and south across the railroad track. There is a hill there, and the railroad cuts through the hill, a deep cut with an embankment on each side. One of the dogs was on the side of the railroad that witness and appellee were on, and the other dog was on the other side. Witness saw the dog and the dog saw witness and appellee, and came down the center of the road, and, when he got to the railroad, the train hit him and cut him in two, and killed him. Witness does not know whether the train blew any whistle or rang any bell.

The appellee testified, in substance, that he and Creecy were hunting, about two miles southwest of Hope, and testified to the killing of the dog substantially the same as the witness Creecy. Witness made experiments to see how close, when coming the way the dog was coming, one would have to get to the railroad before he could see the train. He would have to get so close it would be impossible to hardly stop to get off the track before the train got there. Even with a man it would be eight or ten feet from the first rail, and with a dog it would be just practically on the track before he could see the train. There is a curve in the road that comes in kind of southwest, and the dog was coming from the south of the track, going north. Appellee and Creecy were on the north side of the track, and both dogs were on the left-hand side opposite from witness. Appellee heard the train whistle around the curve, and it caused him to

look back and see where his dogs were, and they were back on the left-hand side of the track. He did not hear the whistle after it passed the whistling post. He did not hear the bell ringing. Both dogs came down, and one barely got across the track, and the other got there just in time to collide with the train. He evidently must have missed the cow-catcher, as his head went under the wheels and they cut his head off. Witness did not have time to go back across the tracks and get his dogs. It was impossible to do anything. There is a right-hand curve at the place in the railroad.

C. Cook testified that Greene's dog was worth about $125.

Charles Snodgrass testified that he was running the locomotive pulling train No. 6 on the 9th of February, 1927. Right after the date he had his attention called by the claim department to the fact that a dog had been struck at the crossing between Guernsey and Hope that day. At that time the incidents of that trip were fresh in his mind. At that point the railroad is on an up grade and a curve to the right, and comes through a cut with an embankment on each side across a public road, which also is in a cut with an embankment on each side. It was getting dark when the train reached the crossing, and witness did not see the dogs. As he approached the crossing he was sitting on his seat box, looking ahead on the track and blowing the whistle. That was the proper place. He blew the regular road-crossing whistle for that crossing, and the sound hadn't died away when the front of the engine went over the crossing. The bell was ringing. The bell was turned on at Texarkana and was not shut off until they left Prescott. The locomotive was equipped with an air-ringer, operated by compressed air turned on from a cylinder. When it is started, it rings continuously until you shut it off. That bell rang from Texarkana until they left Prescott. If the dog got on the track when he was nearer than 200 feet to it he would not see it. The headlight would be shining over it. It would be out of his vision. If a dog came on the track

so shortly as to be injured by the wheels behind the pilot, then witness would not see it. The headlight was turned on at Texarkana.

Appellant's contention is that the testimony is insufficient to support the verdict. The statute provides: "All railroads which are now or may be hereafter built and operated in whole or in part in this State shall be responsible for all damages to persons and property done or caused by the running of trains in this State." C. & M. Digest, § 8562.

This statute has been construed by this court many times, and it has been held that the killing of an animal by the operation of a train is *prima facie* proof of negligence on the part of the defendant. And this court, in *St. L. I. M. & S. R. Co.* v. *Fambro,* 88 Ark. 12, 114 S. W. 230, said: "The court has held this presumption applicable in the following cases, which are indistinguishable from the case at bar: *Barringer* v. *St. L. I. M. & S. R. Co.,* 73 Ark. 548 (85 S. W. 94); *Kansas City So. Ry. Co.* v. *Davis,* 83 Ark. 217, 103 S. W. 603; *St. L. I. M. & S. R. Co.* v. *Stell,* 87 Ark. 308, 112 S. W. 876; *St. L. I. M. & S. R. Co.* v. *Briggs,* 87 Ark. 581 (113 S. W. 644).

Many cases have been decided by this court involving the statute above quoted since the cases referred to, and all of them hold that, where it is shown that an injury is caused by a moving train, this is *prima facie* proof of negligence on the part of the defendant. The statute makes the killing of the animal by the operation of the train proof of negligence, and this presumption created by statute is all the evidence of negligence in this case. There is no other proof of negligence.

The engineer testified that he was keeping a lookout on the track; that it was getting dark, and that, if the dog came on to the track closer than about 200 feet to the train, the light from the headlight would be above the dog and he could not see it; that the crossing was in a cut and near a curve.

While the engineer testified that he was on his box looking ahead on the track and blowing the whistle, he

did not testify that he was keeping such a lookout as would enable him to see objects approaching the track or near the track. He says if the dog got on the track when he was nearer than 200 feet he could not see it; the headlight would have been shining over it; but nowhere in his testimony does he say that he was keeping a lookout for objects near or approaching the track. This was a road crossing, and it was the duty of the engineer to keep a lookout not only on the track, as he testified he did, but along the side of the track, so as to ascertain whether any persons or animals were approaching the track, in order that he might take such precaution as was necessary if he discovered any animals approaching the track. It may be, of course, that the engineer was keeping a proper lookout; that he could not see to the side of the track because of the cut or other obstructions, and if he had shown by his testimony that he was keeping a proper and efficient lookout not only on the track but for objects near the track as he approached this crossing, and could not see them, this would have been a complete defense, if the jury had believed his testimony. But the credibility of this witness, as well as all other witnesses, and the weight to be given to their testimony, was for the jury to determine. The evidence of the killing of the animal, which raises the presumption, or, as this court has said before, is proof of negligence, is submitted to the jury, together with all the other testimony offered, and the jury determines the credibility of the witnesses and the weight to be given to their testimony. The instructions given by the court properly stated the law to the jury.

There is no dispute about the condition of the crossing. All the witnesses say that there was a cut and an embankment on the side of the dirt road as well as the railroad.

If the engineer had been keeping a lookout near the track as well as on the track, and had testified either that he could not see the dog, or that he did all that was possible to do after discovering it, it would bring it within

the rule announced by Judge Hill in *Jones* v. *Bond,* 40 Fed. 281, in which he said: "I have, within my judicial experience, tried quite a number of cases for injuries to persons and property, against railroad companies and receivers, from alleged carelessness and negligence on the part of employees operating railroad trains, and have read the opinions of the courts in many more cases, but this is the first dog case that has been brought to my attention, and therefore I am at a loss to know what rule to apply. I presume the reason that other cases of like kind have not been before the courts is that the dog is very sagacious and watchful against hazards, and possesses greater ability to avert injury than almost any other animal; in other words, takes better care of himself against impending dangers than any other. He can mount an embankment, or escape from dangerous places, where a horse or cow would be altogether helpless; hence the same care to avoid injuries to an intelligent dog on a railroad is not required on the part of those operating the trains that is required in regard to other animals. The presumption is that such dog has the instinct and ability to get out of the way of danger, and will do so, unless its freedom of action is interfered with by other circumstances at the time and place."

The appellant in its brief says: "There is no reasonable basis for any inference that a dog which runs into a train after the front end of it has passed by him would have been prevented from so doing by the ringing of a bell upon an approaching train while the train was out of sight of the dog. There is no reasonable ground for imputing to the dog running on a public highway the power of reasoning from a bell ringing that a train was coming which was then out of his sight."

We agree with this statement of the appellant, but, if the engineer had seen the dog and sounded the stock alarm, we think it cannot be said as matter of law that the dog, exercising the ability and watchfulness suggested by Judge Hill, might not have avoided getting killed.

There is no proof in the case as to how far the hill was from the track, and no proof in the case as to whether the engineer could have seen the dog if he had looked elsewhere than on the track. The fireman did not testify, and there is no testimony about the performance of the duty by the railroad company's servants, except the engineer's. And, as we have said, there is no proof of negligence other than the statutory presumption, but a majority of the judges are of opinion that it was proper to submit the question of negligence to the jury, and the finding of the jury is conclusive on us.

The judgment is therefore affirmed.

OLD CITY IRON WORKS *v.* BELMONT.

Opinion delivered May 7, 1928.

J. R. Wilson, for appellant.

Coulter & Coulter, for appellee.

KIRBY, J., (after stating the facts). Appellant contends that there was no express or implied warranty of the condition of the second-hand drilling rig sold to appellee, and that the court erred in holding otherwise and awarding appellee damages for breach of an implied warranty, and offsetting the award against the amount which appellant was entitled to and allowed to recover upon its claim.

The note sued on recites that it is given for the purchase price of the following described property, this day delivered to H. B. Belmont, itemizing it, a reservation of title in the property till paid for, permitting it to be moved to a described location, but not elsewhere without written consent of appellant; also that, as additional security for the obligation, the maker is assigning to the appellant company an interest of $9,000 in a judgment and decree recovered in the Ouachita Chancery Court in the case of *Belmont* v. *Johnson,* 172 Ark. 851, 291 S. W. 77, on appeal to the Supreme Court; and "it is further stipulated that said assignment of an interest in said judgment as additional security for the above obligation shall be executed as a separate instrument;" purports to contain the entire contract or agreement of sale, and was signed and acknowledged by appellee, and contains no mention of a warranty of the condition of the property sold. There is no allegation of the pleadings or claim made by appellee that the warranty was omitted by mistake, nor of misrepresentations made or fraud practiced inducing appellee to sign the contract, and the warranty could not be incorporated in the contract by parol evidence. *Schneider* v. *Fairmon,* 128 Ark. 425, 194 S. W. 251.

It is undisputed that the property, the drilling rig, was second-hand, known to be such by the parties; that it was examined and inspected by appellee before his purchase thereof, and, under the circumstances, there was no implied warranty as to the condition or quality of the

property purchased. *Yellow Jacket Mining Co.* v. *Tegarden,* 104 Ark. 573, 149 S. W. 518; *Case Threshing Machine Co.* v. *Bailey,* 89 Ark. 108, 115 S. W. 949; *Hartin Com. Co.* v. *Pelt,* 76 Ark. 177, 88 S. W. 929; *Colchord Machinery Co.* v. *Loy-Wilson Foundry & Machinery Co.,* 131 Mo. App. 540, 110 S. W. 630; note 29 A. L. R. 1231; 24 R. C. L. 1705; 35 Cyc. 408.

It follows that the court erred in holding otherwise and in adjudging damages to appellee for a breach of an implied warranty and setting-off the amount of such recovery against appellant's judgment for the balance of the purchase money due on the drilling rig and open account for machinery and supplies furnished the appellee.

The judgment on the cross-complaint is accordingly reversed, and the cause dismissed, and a judgment in appellant's favor for the said amount found to be due is affirmed, and judgment will be entered here accordingly. It is so ordered.

WARE *v.* SHOEMAKER-BALE AUTO COMPANY.

Opinion delivered May 14, 1928.

G. B. Colvin, for appellant.

Frank B. Pittard and *John H. Quidor*, for appellee.

WOOD, J. This is an action in replevin begun by the plaintiff in the justice of peace court to recover two tractors and a touring car. The property was described in the affidavit, and the total value placed at $277. The value of each separate article was not stated. The plaintiff executed bond required for order of delivery. The property was taken by the sheriff. The defendant did not execute any retaining bond, and the property was delivered to the plaintiff.

The day the cause was set for hearing in the justice court the defendant demurred to the affidavit in replevin, on the ground that the value of each article was not stated. The defendant moved that the affidavit be dismissed and that he be given judgment for the property or its value in the sum of $350 as damages for the wrongful taking. The plaintiff asked and was granted leave to amend its complaint, and did amend same by stating the value of each article of property, but the total value was still shown in the complaint as amended to be $277. The court heard evidence upon the issue of the right to

the property and its value, and thereupon found that the property was of the value of $350, and entered an order directing the plaintiff to restore the property or its value to the defendant.

The attorney for the defendant moved to dismiss the cause because the value of the property taken was in excess of $300, but asked the court to retain the issue as to damages for the wrongful taking. The court retained this issue, and sent the same to the jury. The jury returned a verdict in favor of the defendant for damages in the sum of $192. The justice court thereupon rendered judgment in favor of the defendant against the plaintiff and its bondsmen for that sum, from which the plaintiff duly appealed to the circuit court. When the cause was reached for trial in the circuit court, the parties, by consent, submitted the cause to the court sitting as a jury. The defendant moved to quash the order of delivery, and offered to show that he was damaged by the wrongful taking and withholding of his property. The court overruled his motion to quash the order of delivery, to which ruling the defendant duly excepted.

It appears that there were two trials in the circuit court. On the first trial the court found that the plaintiff was entitled to recover the property, but afterwards set aside this judgment and granted the defendant a new trial. On the second trial the cause was again, by consent, submitted to the court sitting as a jury, and the court found from the evidence that the property in controversy was in excess of $300 in value and therefore beyond the jurisdiction of the justice, and that the circuit court had no jurisdiction, and entered a judgment dismissing the cause for all purposes. From that judgment is this appeal.

The cause is ruled on the question of jurisdiction by the case of *Kaufman* v. *Kelley,* 78 Ark. 176, 95 S. W. 448, where we said:

"The Constitution of this State provides that justices of the peace shall have concurrent jurisdiction in suits

for the recovery of personal property where the value of the property does not exceed the sum of $300. Art. 7, § 40. The value which determines the jurisdiction is the real value, and not the alleged value, of the property. That having been shown in this case to exceed $300, the justice of the peace had no jurisdiction, and the circuit court acquired none by appeal. The motion should have been sustained. *Davenport* v. *Burke,* 91 Mass. 116, and cases cited; *Sackett* v. *Kellogg,* 2 Cush. 91; *Corbell* v. *Childers,* 17 Ore. 528 (21 Pac. 670); *Vogel* v. *People,* 37 Ill. App. 388; *Darling* v. *Conklin,* 42 Wis. 478; *Chilson* v. *Jennison,* 60 Mich. 235, 26 N. W. 859; *Sandford* v. *Scott,* 3 Conn. 244; *Small* v. *Swain,* 1 Mo. 133."

In that case, as in the case at bar, the defendant moved to dismiss for want of jurisdiction. But the instant case differs from the above case in that the appellant insists that the trial court, upon ascertaining that the justice court, and therefore the circuit court, did not have jurisdiction to determine the rights of property, should nevertheless, under appellant's pleadings and offered proof, have retained the cause for the purpose of quashing the wrongful order of delivery and have entered judgment for the defendant for a return of the property or its value according to the proof which appellant offered to produce. The appellant contends that he was entitled to this relief under § 8656 of C. & M. Digest, which reads as follows:

"Judgment against sureties in plaintiff's bond. If, upon the trial of any such cause, judgment be given for the defendant in the action, the court or jury trying such cause may render judgment, not only against the plaintiff for the value of the property taken under the order of delivery in the case, provided the same has not been surrendered to the defendant, upon bond, as provided for in said § 8649, together with all damages sustained by the defendant in the action, but may, upon motion of the defendant, also render judgment against the sureties upon the bond of the plaintiff for the value of such

property and all damages sustained by the defendant in the action."

The above statute has no application to judgments rendered dismissing an action in replevin for want of jurisdiction. The above statute contemplates that, where there has been a trial of the cause on the merits and judgment rendered in favor of the defendant, then the court, where the plaintiff is in possession of the property under his bond and order of delivery, and does not surrender same, may render judgment against plaintiff and his bondsmen for the value of the property and the damages sustained by the defendant in the action. But the statute has no application where, as in the case at bar, the action, on motion of the defendant, is dismissed for want of jurisdiction of the subject-matter of the action. This court has ruled in many cases that, "to maintain replevin for goods, the plaintiff must not only have title, general or special, in them, but must be entitled to immediate possession thereof. Section 8640, C. & M. Digest, subdiv. 3; *Thatcher* v. *Franklin,* 37 Ark. 64-66, and cases cited; *Carpenter* v. *Glass,* 67 Ark. 135-137, 53 S. W. 678; *Hall* v. *Benton,* 160 Ark. 254, 254 S. W. 530; *Ellis* v. *Caruthers,* 137 Ark. 134, 208 S. W. 425.

The right to recover damages for the wrongful taking of property necessarily turns upon the issue as to whether the plaintiff who took possession was the owner of such property and had, at the time of the taking, the right to such possession. It occurs to us that it would be anomalous and illogical, to say the least, to hold that, while the court had no jurisdiction to determine the issue of the right of property and the right of possession, it nevertheless did have jurisdiction to determine that the defendant was wrongfully deprived of the possession of the property and the damages sustained by him because of such deprivation. The statute relied upon by the appellant certainly does not contemplate that the court, not having jurisdiction to try the issue of the right of property and the right of possession, would neverthe-

less have jurisdiction to try the issue of damages necessarily subsidiary to, and growing out of, the issue of ownership and right to possession.

To sustain his contention, counsel for appellant cites the case of *Parker* v. *Bradford,* 68 Minn. 437, 71 N. W. 619, which holds that: "Where the affidavit and complaint in replevin in justice court state the value of the property at $100 or less, and the bond is given, the justice acquires jurisdiction to proceed and dispose of the case on the merits, though the value is not in fact more than $100, unless the defendant, as he may do, pleads and proves, in bar to the jurisdiction, the fact that the value exceeds the jurisdictional limit; but pleading the fact alone does not oust the justice of jurisdiction. Fact must be proved and determined in favor of the defendant, and, when this is done, the jurisdiction of the justice thenceforth, and not before, ceases for all purposes, except to enter the statutory judgment of dismissal in replevin cases." This case cites also *Darling* v. *Conklin,* 42 Wis. 478.

These cases, it would seem, are bottomed upon statutes which the courts construe to mean that, where the action in replevin is brought in the justice court and the complaint alleges the value of the property to be within the jurisdiction of the justice, the justice court, and the trial court on appeal from the justice court, could retain jurisdiction of the cause and enter judgment for damages in favor of the defendant, even though the court ascertained that the justice court had no jurisdiction to try the cause on the merits as to the title and right to possession. We need not review these cases, for they would have no application to our statute, and are not in harmony with our own decisions, and would be unsound as a construction of our own statute. For, in *Kaufman* v. *Kelley,* above, Judge Battle, speaking for the court, says: "The value which determines the jurisdiction in replevin cases is the real value, and not the alleged value, of the property;" whereas, in *Parker* v. *Bradford, supra,* the case

relied on by the appellant, it is held that, if the value of the property is ascertained on the trial to exceed the jurisdiction of the justice, such jurisdiction ceases for all purposes, except the entry of the statutory judgment of dismissal in replevin.

In *Norman* v. *Fife,* 61 Ark. 33, 31 S. W. 740, in an action before a justice of the peace, an attachment was issued and levied upon certain property belonging to Fife upon the execution of an attachment bond by Norman. On appeal to the circuit court, judgment was rendered by that court upon the attachment bond in the sum of $40 and for the return of the property or its value, $311.25. The court said:

"In *Whitesides* v. *Kershaw,* 44 Ark. 377, it was said that, on appeal, the jurisdiction is derived from and dependent upon the appeal; and the circuit court can render no judgment that the justice could not have rendered. The judgment of the circuit court for $311.25 was beyond the jurisdiction of the justice, and therefore void. Neither was it proper for the court to render judgment for damages, and also for a return of the property or its value. * * * If the damages claimed by defendant on account of the issuance of the attachment exceed the sum of $300, his remedy will be by an original suit on the attachment bond in the circuit court." See *Fortenberry* v. *Gaunt,* 69 Ark. 433, 64 S. W. 95, where we held (quoting syllabus): "Under Constitution 1874, art. 7, § 40, giving to justices of the peace jurisdiction in suits for the recovery of personal property where the value does not exceed $300, the circuit court, on appeal from a justice of the peace, can, upon a dissolution of an attachment, give judgment for the return of the property attached or its value, where the value does not exceed $300."

True, these cases were in attachment, but the property was taken out of the possession of the defendant under a bond by the plaintiff under an order of attachment. The statute provides in such cases: "If judgment is rendered in favor of the defendant, attachment shall

be discharged." Section 567, C. & M. Digest. The doctrine of the above cases, by analogy, is applicable here on the issue of jurisdiction and the proper judgment to be rendered in the cause. In both cases the property is taken out of the possession of the defendant on the execution of the bond by plaintiff. As we construe our statute in replevin, *supra,* when the action is disposed of on a plea by defendant in bar, the replevin or order of delivery is discharged, just as an attachment is discharged where judgment is rendered in favor of the defendant in attachment. Certain it is that the Legislature, under § 8656, *supra,* did not have in mind the disposition of the action in replevin on a plea in bar, but only intended to prescribe what may be done upon the final determination of the cause on the merits by jury trial or by the court sitting as a jury.

Under the decision in *Kaufman* v. *Kelley, supra,* it follows that the justice had no jurisdiction. We have held in a long line of cases that, where the justice has no jurisdiction, the circuit court acquires none on appeal from judgment of the justice court. *Levy* v. *Sherman,* 6 Ark. 182; see also *St. Louis S. W. Ry. Co.* v. *O'Neal,* 163 Ark. 193, 259 S. W. 393.

Looking beyond our State, the Supreme Court of Nebraska, in *State ex rel. Savage* v. *Letton,* 56 Neb. 158, 78 N. W. 533, announces the sound doctrine as follows (quoting syllabus): "In an action of replevin, wherein the property has been taken under the writ and delivered to the plaintiff, if the defendant, on motion for such purpose, secures a declaration of the nonjurisdiction of the court over the subject-matter of the suit, and a dismissal thereof for that reason, he is not entitled, by virtue of the provisions of §§ 190 or 1041 of the Code of Civil Procedure, or otherwise, to have a jury impaneled to inquire of his rights of property and possession." See also *Hall* v. *Bloomer,* 1 Pinney's (Wis.) 463; *Jordan* v. *Dennis,* 17 Met. (Mass.) 590; *Gray* v. *Dean,* 136 Mass. 128; *Vogel*

v. *People,* 37 Ill. App. 388; *Smith* v. *Fisher,* 13 R. L. 624; *Burdett* v. *Doty,* 38 Fed. 491; Cobbey on Replevin, § 1198.

It must be remembered that the taking of the property from the appellant under the order of delivery simply changed the possession during the pendency of the action for replevin. This transfer of the possession of the property to the plaintiff under his bond and order of delivery did not determine that the plaintiff was the owner and entitled to possession of the property. That could only be determined where the issue was raised in a court having jurisdiction to determine such issue. See *Moore* v. *Herron,* 17 Neb. 697-701, 24 N. W. 425. The appellant therefore is not without remedy in damages for the wrongful taking of his property, if he indeed be the owner and entitled to possession thereof, and if he was wrongfully deprived of such possession by reason of the taking of his property under the order of delivery obtained by the appellee from the justice court.

Having determined that the trial court had no jurisdiction of the subject-matter of the issue of the title and right of possession in this case, we deem it unnecessary to discuss the construction to be given § 8654a of Crawford & Moses' Digest, because, manifestly, the procedure prescribed by that section applies only in cases where the court has jurisdiction of the subject-matter of the action. Section 8654a, like section 8656, *supra,* has no application and cannot be invoked in actions in replevin where the defendant in the action has succeeded in having the complaint or cause of action dismissed on the ground that the court is without jurisdiction to try the issue of title and the issue of the right to the possession of the property in controversy. See *State* v. *Letton, supra,* and cases there cited.

It follows that the judgment of the trial court is correct, and the same is therefore affirmed.

MIDLAND SAVINGS & LOAN COMPANY *v.* HOME BUILDING & SAVINGS ASSOCIATION.

Opinion delivered May 14, 1928.

Pratt P. Bacon, for appellant.

SMITH, J. Mrs. Emma E. Shields and James S. Shields, her husband, brought this suit against J. T. Ford, Home Building & Savings Association, of Fort Smith, Arkansas, Dan Dewberry, and the Midland Savings & Loan Company of Denver, Colorado, and for cause of action alleged: That plaintiff, Mrs. Shields, owns a house and lot in the city of Texarkana, and on March 20, 1925, borrowed $1,100 from the Home Building & Savings Association, hereinafter referred to as the Home Association, and, as security therefor, executed a deed of trust on her lot. That thereafter, to pay off this loan and to secure additional funds, she obtained a loan from the Midland Savings & Loan Company, hereinafter referred to as the Midland Company, for $1,600, on December 10, 1926, and, as security therefor, executed a deed of trust on the lot. The check evidencing the last loan was sent by the Midland Company to Dan Dewberry, its agent at Texarkana, with directions to discharge the prior incumbrances, which consisted of the deed of trust to the Home Association, and one to Dewberry himself, securing an indebtedness of $209.86, and another to J. T. Ford, evidencing an indebtedness of $..... That

Dewberry placed the deed of trust to the Midland Company of record, but embezzled the money, and failed to discharge the prior liens. There was a prayer that the equities of the parties be adjudged, and for general relief.

The Midland Company filed an answer, denying that Dewberry was its agent, and praying the foreclosure of its deed of trust.

The Home Association filed an answer, alleging the priority of its deed of trust, and praying the foreclosure thereof.

A receiver was appointed to take charge of the property, and, after much testimony had been taken, the court, on the final submission, entered a decree which contained the following recitals of fact: That Dewberry conceals himself, so that a summons cannot be served upon him. That, in closing up the loan made by the Midland Company, Dewberry acted as and was the agent of that company, and that he was directed, out of the proceeds of the check of the Midland Company, to satisfy all prior liens.

Upon these findings of fact the court decreed that the Dewberry mortgage had been paid, and it was canceled; that the indebtedness due the Home Association was a first lien, and that the Midland Company loan was extinguished to the extent of the debt due the Home Association, for the reason that its agent should have paid the same, and that, if the Midland Company satisfied the indebtedness due the Home Association, it should then have a first lien for the full amount of its debt, otherwise the Midland Company should have a second lien, and that only to the extent of the difference between the amount of its debt and the debt to the Home Association.

There appears to have been no adjudication of the rights of Ford, as the testimony showed that the mortgage in his favor had been paid and duly canceled. The foreclosure of the deeds of trust was decreed and the

equities of the parties declared as stated, and from this decree the Midland Company has appealed.

It appears from the facts stated that the question presented by this appeal is purely one of fact, that fact being whether Dewberry was the agent of Mrs. Shields or the agent of the Midland Company in closing up the loan made by that company.

It was shown in the testimony that Shields and his wife were indebted to J. T. Ford in a sum which was secured by a mortgage on the lot, and that they applied to Dewberry for assistance in procuring a loan, and that Dewberry procured a loan for them from the Texarkana Building & Loan Association, with the proceeds of which the Ford mortgage was paid. Later Shields and wife desired to retire the Texarkana Building & Loan Association loan, and they again applied to Dewberry for assistance, and he negotiated the loan above referred to from the Home Association, and with the proceeds of that loan he paid the Texarkana Building & Loan Association and returned to Shields and wife the canceled note to the Texarkana Building & Loan Association and the deed of trust securing the note given it.

Shields and wife had a long and intimate acquaintance with Dewberry, and, after obtaining the loan from the Home Association, Dewberry made to Mrs. Shields a personal loan of $209.86, and as security therefor took a mortgage on the lot. Later application was made by Mrs. Shields to Dewberry to procure the loan from the Midland Company for the purpose of paying off the loan to the Home Association and the Dewberry mortgage, and of making certain repairs to the house. The application for the loan stated the purposes to which the proceeds of the loan would be devoted, and the Midland Company wrote Dewberry a lengthy letter of instructions in regard to closing up this loan. The check from the Midland Company was made payable to Shields and wife and to Dewberry as agent, and the managing officer of the Midland Company testified that this was done in

order that Dewberry might, by following the letter of instructions, acquire for that company a first lien on the property. This officer denied that Dewberry was the agent of the Midland Company, and testified that Dewberry was acting as the agent of Mrs. Shields, and without expectation of compensation for his services on the part of the Midland Company, and that Dewberry did not present the Midland Company any bill for his services, and nothing was paid him.

It appears to have been the practice of the Midland Company, in making loans, to sell the borrower stock of the company in a sum equal to the amount of the loan, with which, when the stock was matured, the loan was discharged. This stock was paid for in monthly payments, and Dewberry was authorized to receive these payments and remit them to the company, and, as compensation for this service, he received one per cent. of the amount of the monthly payments.

The letter of the Midland Company transmitting the check to Dewberry was offered in evidence, and this is the letter which gave the specific directions as to the disbursement of the proceeds of the check. This letter contained the statement that "in closing this loan you act as our agent."

This letter required Dewberry to pay the prior deeds of trust, to take out a policy of insurance on the house, payable to the Midland Company, to take a receipt from the contractor for the repairs to the house, and to deliver to Mrs. Shields a passbook in which receipts would be noted for the monthly payments on the building and loan stock contemplated as a part of the loan.

Mr. and Mrs. Shields testified that Dewberry presented the check to them, and they indorsed it and returned the check to him for collection, as he was also a payee therein, in order that he might discharge the requirements of the Midland Company in regard to closing the loan. They did not thereafter ask Dewberry if he had properly applied the proceeds of the check, nor

did they demand of him their canceled notes and deeds of trust, but they supposed he had properly attended to these matters, and were not advised to the contrary until Dewberry absconded.

The case stated is somewhat similar to the case of *Commonwealth Farm Loan Co.* v. *Wall,* 122 Ark. 281, 183 S. W. 193, and is controlled by it. The syllabus in that case reads as follows:

"Appellee, whose property was subject to a mortgage, desired to procure a loan from appellant, which appellant agreed to make, it being agreed that the existing mortgage be paid off out of the mortgage to appellant. Appellant sent the money to its local correspondent at the place of appellee's residence, with instructions, but the local correspondent appropriated the money to his own use, without applying the money as directed. *Held,* in determining as between appellant and appellee as to whose agent the intermediary was, and upon whom the loss would fall, the controlling question is one of fact for whom was the agent or intermediary acting in the particular transaction; and *held* further, in this particular case, that the intermediary was the agent of and acting for appellant, that the duty to satisfy the existing mortgage was within the apparent, if not the actual, scope of his authority, and that appellant, who held him out as his agent, must sustain the loss."

In that case, as in this, the controlling question is the question of fact, for whom was the intermediary agent?

The court found the fact to be that Dewberry was the agent of the Midland Company, and we think that finding is not contrary to the preponderance of the testimony, and, that being true, the Midland Company, as Dewberry's principal, must suffer the loss resulting from its agent's dishonesty. The court was correct therefore in holding that the note from Shields and wife to the Midland Company had been discharged to the extent of the balance due the Home Association which the Midland

Company's agent should have paid out of the proceeds of the check transmitted to Dewberry for that purpose.

The decree of the court below must therefore be affirmed, and it is so ordered.

EDWARDS *v.* PERDUE.

Opinion delivered May 14, 1928.

Pope & Jennings, for appellant.

Goodwin & Goodwin, for appellee.

HUMPHREYS, J. This appeal involves the construction of the following escrow contract:

"This escrow agreement made and entered into by and between J. M. Perdue and Dr. A. J. Edwards, both of El Dorado, Union County, Arkansas. J. M. Perdue, owner of certain lands lying in section 23-18-15, Union County, Arkansas, has executed the accompanying lease to Dr. A. J. Edwards for the consideration of $500, twenty-five of which was paid, the receipt of which is hereby acknowledged by J. M. Perdue. The remaining $475 to be paid to his order at the Exchange Bank of El Dorado, Arkansas, as follows: Seventy-five dollars to be paid as soon as Dr. A. J. Edwards' attorneys have passed favorably on his title to the lands mentioned in the lease. An abstract to be furnished by J. M. Perdue

within 10 days. And the remaining $400 to be paid $100 each month. Now if the said Dr. A. J. Edwards shall promptly pay the above mentioned moneys as outlined in this contract and accompanying lease, to be turned over to him on receipt of the last payment or on completion of the payment of the remaining balance due under this agreement at any time, but default in any payment the bank is to return *to* lease to J. M. Perdue and no obligation shall remain.

"El Dorado, Arkansas, this December 9, 1926.

Indorsements: "First $100 paid Dec. 23, 1926, J. M. Perdue. A. J. Edwards. Signed J. M. Perdue, A. J. Edwards."

Appellee construed the agreement to be a conditional sales contract with privilege to appellee to elect to deliver the lease to appellant and collect the balance of the purchase price, and, based on that construction of the contract, brought suit against appellant in the chancery court of Union County for a specific performance of same, tendering the lease and praying that the amount due be declared a purchase money lien, and, if not paid, that said lease be foreclosed and sold under proper order of court to pay the amount due.

Appellant construed the escrow agreement as an option contract on his part to lose what he had paid and to forfeit all rights thereunder without further obligation on his part. Appellant interposed this defense to the action.

The cause was submitted upon the pleadings and testimony introduced by the parties in explanation of the meaning of the contract, which resulted in a decree in accordance with appellee's construction thereof, from which is this appeal.

We do not think the contract is ambiguous, its meaning clearly being that, in case of default in payment of the balance of the purchase money, the escrow agent should return the contract with lease attached to appellee, without further obligation or liability on the part of

appellant. The last clause in the contract could have no other meaning, and was a remedy provided by the parties for ending the contract. It is a settled principle of law that, when the parties themselves in a contract provide the remedy in case of default by either party, the remedy so provided is conclusive.

The decree is reversed, and the cause is remanded with directions to dismiss appellant's complaint.

Mr. Chief Justice HART and Mr. Justice SMITH dissent.

MACCABEES, INCORPORATED, *v.* PIERSON.

Opinion delivered May 14, 1928.

Austin J. Calhoun and *King & Whatley,* for appellant.

Edwin Upton, for appellee.

HUMPHREYS, J. One of the appellees, Lewis E. Pierson, made a written application to the Conservative Loan Company of Little Rock, Arkansas, on February 28, 1923, for a loan of $2,500 with which to pay the balance due W. E. Hurd and his wife, Frances E. Hurd, on the purchase price of the following described real estate in Lafayette County, Arkansas, to-wit: All that part of the south half of the southeast quarter lying west of the Lewisville and Hope road, containing 77.20 acres, and the east half of the southwest quarter of section 34, all in township 15 south, range 24 west, containing in all 157 acres, more or less.

The application contained a provision designating said Conservative Loan Company Pierson's agent for the purpose of obtaining a loan. At the same time the Piersons executed the Conservative Loan Company a note in the sum of $2,500, with interest coupon notes attached, the first being for $107 and maturing October 1, 1923, and the other ten being for $175 each, and maturing on the first day of October annually thereafter, until and including the year 1933, which coupon notes represent the interest on the $2,500 for the time it was to run at seven per cent. per annum from date until maturity, interest being paid annually. It was provided that the interest should bear 10 per cent. per annum if not paid at maturity. The principal note of $2,500 contained a provision that, if default should be made in the payment of any installment of either principal or interest at maturity, all of said principal and interest should become due and payable at once, at the option of the holder.

On the same day the Piersons executed a mortgage on the lands aforesaid to said Conservative Loan Company to secure the principal and coupon notes, and, after recording the mortgage, delivered the application for the loan, with said notes and mortgage attached, to the Con-

servative Loan Company. On the 6th day of April thereafter W. E. Hurd and his wife, Frances E. Hurd, conveyed to Lewis E. Pierson, by quitclaim deed, the 77.20 tract of land, which, according to the evidence, was executed for the purpose of correcting a misdescription and to clear the title so the Piersons could borrow money on it. The purpose for which it was executed was not incorporated in the quitclaim deed. On July 16, 1916, the Piersons sold all the pine and gum timber ten inches and above at the stump on a portion of the land to J. B. and P. D. Burton for an expressed consideration of $200. The timber deed was recorded in deed record book N5, at page 51. On April 14, 1923, the Conservative Loan Company sold the Pierson notes and mortgage, through a firm of brokers by the name of A. W. Knapp & Company, for the face of the note with accrued interest to the date of the sale. The Conservative Loan Company never paid the money or any part thereof which it received from appellant to the Piersons, and later changed its name to Fidelity Trust Company of Little Rock, and, according to the testimony of one witness, the Conservative Loan Company became insolvent. It does not appear whether the Fidelity Trust Company is insolvent.

Default was made in the payment of some of the coupon notes, and appellant elected to declare the whole indebtedness due, and brought this suit in the chancery court of Lafayette County, praying for judgment on the principal note for $2,500 and the five past due coupon notes, amounting to $807, and for a decree of foreclosure of the mortgage lien and an order of sale of said real estate to satisfy the judgment. It made W. E. Hurd and Frances E. Hurd parties defendant, praying that its lien be declared prior and paramount to their lien for the balance due on the purchase money of the land. It also made J. B. and P. D. Burton parties defendant, praying that their timber deed be canceled.

The Piersons filed an answer, interposing the defense that the notes and mortgage were obtained by

fraudulent representation, in that they were executed on condition that they were to receive a loan from the Conservative Loan Company, the mortgagee, with which to liquidate the balance of the purchase money indebtedness owing to the Hurds by the Piersons; that no part of the loan contracted ever had been received; that appellant knew those facts when the notes and mortgage were assigned to it, and that it was in collusion with the Conservative Loan Company to defraud the Piersons out of the lands involved in the suit; that said notes and mortgage were without consideration, and should be canceled. They also alleged that they owed a balance on the purchase money for the property to W. E. Hurd, which was secured by a vendor's lien on same, and is paramount to appellant's alleged lien. They admitted the execution of the timber deed to the Burtons, but denied that they received a $200 consideration therefor. They also filed a cross-complaint, asking to make the Fidelity Trust Company, successor to the Conservative Loan Company, a party defendant therein, and praying for judgment against it for any amount that appellant might recover on the notes and mortgage in question. They also attached to their cross-complaint a list of interrogatories, in compliance with the statute, in an effort to obtain information as to whether appellant was in collusion with the Conservative Loan Company in an attempt to defraud them out of their land.

The Hurds filed an answer, denying that appellant's mortgage was superior to their lien for the balance of the purchase money which the Piersons owed them.

The Burtons filed an answer denying any right in appellant to have their timber deed canceled.

The interrogatories propounded to appellant and the Fidelity Trust Company, successor to the Conservative Loan Company, and attached to the cross-complaint of the Piersons, were not all answered directly, but were substantially answered in the depositions of the witnesses subsequently taken by appellant.

The cause was submitted to the court upon the pleadings and testimony, from which he found that the Conservative Loan Company perpetrated a fraud upon the appellant in obtaining the notes and mortgage without consideration, and that there were sufficient facts disclosed by the record of Lafayette County, and other evidence, to have put appellant upon inquiry, which facts were notice to it, and which, if followed up, would have led to a knowledge of fraud and failure of consideration of the notes and mortgage. He further found that the notes and mortgage were usurious and void. A decree was rendered in accordance with the findings dismissing appellant's complaint for the want of equity, from which is this appeal.

The only record evidence in Lafayette County which would have put appellant on notice was the deed of the Hurds to the Piersons in which a lien was retained for the balance of the purchase money. It was stated in the application that the loan was being obtained to pay and satisfy the vendor's lien, and the Conservative Loan Company was designated in said application as agent of the Piersons to negotiate the loan. This is the only information appellant would have gained by an inspection of the record in Lafayette County and an inquiry of the Piersons and Hurds. Prior to the purchase of the notes and mortgage the Hurds executed a quitclaim deed to the Piersons for the 70.20 tract. The effect was the release of that particular tract from the vendor's lien, in so far as innocent parties were concerned. The quitclaim deed itself did not state that it was given to correct a misdescription only. The undisputed testimony is to the effect that there was no collusion between appellant and the Conservative Loan Company to defraud the Piersons out of their land. At the time the loan was negotiated, through a firm of brokers by the name of A. W. Knapp & Co., George W. Christner, the president of the Conservative Loan Company, and the agent of the Piersons, informed appellant that the Conservative Loan

Company had paid the Piersons and was the owner of the notes and mortgage. They had a right to rely upon the statement of Pierson's agent, as they had constituted the Conservative Loan Company their agent for the purpose of negotiating the loan. If either of two innocent parties is to suffer, the one who made it possible for the wrong to be perpetrated must bear the loss.

The trial court also erred in finding that the notes and mortgage were usurious and void. The finding was based upon the fallacious construction of the principal and coupon notes. The court proceeded upon the theory that, while the principal note provided for the payment of 7 per cent. per annum, the coupon notes were executed for an additional 7 per cent. per annum, making a total interest charge of 14 per cent. The coupon interest notes evidenced the interest of 7 per cent. called for in the principal note, and not for an additional amount of interest. The notes and mortgage were not usurious and void.

On account of the errors pointed out, the decree will be reversed, and the cause will be remanded with directions to render judgment against the Piersons upon the principal note and past due coupon notes, and to decree a foreclosure of the mortgage lien in favor of appellant, and to order a sale of the lands described in the mortgage to satisfy the judgment, subject to a prior lien of the Hurds for the unpaid purchase price due them upon the east half of the southwest quarter, section 34, township 15 south, range 24 west, being that part of the land described in the mortgage to which they did not execute a quitclaim deed to the Piersons.

COTTON *v.* BOONE COUNTY.

Opinion delivered May 14, 1928.

James M. Shinn and *Crump & Foster*, for appellant.
Shouse & Rowland, for appellee.

HUMPHREYS, J. Appellant brought suit in the Boone County Court for fees alleged to be due him for services rendered in his official capacity as chancery clerk and recorder of Boone County. He based his action upon fees allowed for such services by statute prior to October 31, 1904.

Special act No. 63 of the Acts of the General Assembly of 1903 placed the officers of Boone County on a salary. Said act went into effect October 31, 1904. It was alleged in the complaint that said act was repealed by act No. 77 of the acts of the General Assembly of 1927. The county court ruled that it did not, and disallowed appellant's claim. On an appeal to and trial *de novo* in the circuit court of said county, the trial court found that act No. 63 of 1903 was not repealed by act No. 77, 1927, and dismissed appellant's action, from which is this appeal.

The sole question presented by appeal is whether appellant, as clerk and recorder of said county, was on a salary after the approval of act No. 77 of 1927, on March 3 of that year. This depends on whether said act 77 of 1927 repealed act 63 of 1903, placing the officers of Boone County on a salary.

In the title and the body of act 77 of 1927, in both §§ 1 and 2, the declared intent was to repeal special acts relating to and fixing salaries of certain officers of Carroll

County. No other purpose is mentioned in the body of the act, so the phrase "and for other purposes," at the end of the title, is without meaning. If any meaning could be accorded the phrase, it would have to be a meaning in harmony with the declared purpose of the act and not a meaning foreign to such purpose. It being the declared intention in the body of the act to repeal all special acts relating to and fixing the salaries of certain officers of Carroll County, the necessary implication is that acts relating to and fixing the salaries of certain officers in other counties were not intended to be repealed. Only two special acts relating to and fixing the salaries of officers in Carroll County were mentioned or referred to in the act. Of course they were repealed. The other four acts referred to by number and the date of their respective approval had nothing whatever to do with fixing the salaries of certain officers in Carroll County, so it is evident that those acts were inadvertently and unintentionally included in the statute. Obviously their inclusion was a clerical mistake or error. *Athletic Mining & Smelting Co.* v. *Sharp,* 135 Ark. 330, 205 S. W. 695.

No error appearing, the judgment is affirmed.

HEINRICH *v.* HEINRICH.

Opinion delivered May 14, 1928.

Harb & Barnard and *Robert J. Brown, Jr.,* for appellant.

Watkins & Pate, for appellee.

HUMPHREYS, J. The only question presented by this appeal for determination is whether the chancery court of Pulaski County erred in divesting the title out of appellant and investing same in appellee to lot 8 of Schlatter's subdivision to the northwest quarter of the northwest quarter of section 22, township 2 north, range 12 west, Pulaski County, Arkansas, subject to a lien of $150 in favor of appellant as part of the purchase price paid by him for the lot.

The decree respecting the property was rendered in a divorce suit brought by appellee against appellant, in which appellee prevailed. The case was tried upon testimony taken *ore tenus,* and it has not been brought into the record by bill of exceptions, so the review before this court must be limited to errors appearing upon the face of the record. *Ft. Smith, S. & R. I. R. Co.* v. *Lovelady,* 150 Ark. 508, 234 S. W. 634. The court found that appellant and appellee purchased the property under contract from the Bankers' Trust Company, and that said contract of purchase was in the name of both appellant and appellee; that appellant paid $150, which was the initial payment at the time the purchase was made, and that the rest of the purchase money was paid by appellee. As the purchase money had been paid, this created an equitable estate in entirety by appellant and appellee. *Roach* v. *Richardson,* 84 Ark. 47, 104 S. W. 538. An estate

by entirety, either legal or equitable, cannot be divested out of the husband and invested in the wife, or *vice versa,* by the courts. The right to the whole estate by the survivor prevents this. *Roulston* v. *Hall,* 66 Ark. 305, 50 S. W. 690, 74 A. S. R. 97. Appellant contends, under the rules announced in the two cases cited, that the power and authority of the trial court was limited to making a division of the rents thereafter accruing from the property in question between appellant and appellee. This would be true with reference to any lands not embraced in the homestead, but not as to homestead land. There is nothing on the face of the record to show that the five-acre tract in question was not a homestead, so we must indulge the presumption that the testimony reflected that fact. This presumption brings the case clearly within the rule announced in *Woodall* v. *Woodall,* 144 Ark. 163, 221 S. W. 463, to the effect that courts may award to the innocent party in divorce suits the possession, for a limited time, or absolutely (meaning for life) of a homestead held by entirety.

The court erred in divesting title to the five-acre homestead tract out of appellant and investing same in appellee, subject to a lien for such portion of the purchase price as was paid by appellant, and for that reason the decree must be reversed, and the cause remanded with directions to award possession of the tract to appellee for life, subject to the right of survivorship. Cost adjudged against appellant.

GATE CITY BUILDING & LOAN ASSOCIATION *v.* FRISBY.

Opinion delivered May 14, 1928.

Arnold & Arnold, for appellant.

Frank S. Quinn, for appellee.

HART, C. J., (after stating the facts). The chancellor found that the Gate City Building & Loan Association had the paramount lien on the lands involved in the action and decreed a foreclosure of its mortgage under its cross-complaint for the amount due under its mortgage. In ascertaining the amount due appellant under its mortgage and in finding the amount appellant should recover upon the basis of the cancellation of the stock in said association described in appellant's notes and

mortgages, the chancery court held that, to ascertain the present value of the principal and the unmatured installments, interest should be calculated at six per cent. as the legal rate for half the unmatured monthly installments, instead of at ten per cent., as provided in the mortgage. The correctness of the chancellor's decision in this respect presents the only issue on the merits raised by the appeal. It will be seen that, while this issue is of small consequence in so far as the result in dollars and cents in the case at bar is concerned, it is of great importance alike to building and loan associations and stockholders and borrowers from them.

The chancellor seems to have proceeded upon a wrong conception of what was decided in *Roberts* v. *American Building & Loan Association,* 62 Ark. 572, 36 S. W. 1085. In that case the court expressly said that the rule for determining the amount which most nearly enforces all the contract obligations is "to ascertain the amount of stated dues and interest which will become due during the future existence of the corporation as estimated; then find the principal which, with interest for the supposed time, will amount to the dues and interest already calculated; this will be the present value of the anticipated payments; to this principal add the arrearage due, and the fines for the time between the date of default and the entry of the decree of sale."

After approving the above, the court referred to another rule, which is "to ascertain by proof the probable duration of the society, then to estimate the aggregate amount of the weekly and monthly installments payable during that time, from that sum rebate a just amount of interest, and add thereto the arrearage due, after allowing for payments made to the society, and the sum thus ascertained is the amount which the mortgagee is entitled to receive *in praesenti* in satisfaction of the mortgage."

The court said that either of these rules would be just to the borrowing member and to the associations.

Preference was given to the first rule because it gives a certain and accurate method of arriving at the amount, whereas by the latter rule the amount of interest to be rebated is not fixed, but is such as the chancellor may deem just.

But it is insisted that in the Roberts case the court fixed the rate of interest at six per cent., the legal rate for all cases. We do not think so. The rule adopted, as well as the reasoning of the court, shows that the contract rate was adopted and the interest was computed at six per cent. because that was the contract rate, and not because it was the legal rate. This was the interpretation placed upon the opinion in *Abrams* v. *Citizens' Building & Loan Association,* 125 Ark. 192, 188 S. W. 557. Eight per cent. was adopted in calculating the interest. The court expressly stated that the rule established in the Roberts case has become a rule of property. In discussing the subject the court said:

"This rule does no violence to the by-laws of the association, and therefore does not constitute the making by the court of a new contract for the parties. The parties have a right to stipulate in advance what the terms of settlement shall be in event of foreclosure, and a by-law on the subject would constitute a contract. But there is no by-law of appellee association providing for terms of settlement in case of foreclosure."

Since we have no express provision in the contract between the parties on this particular subject, it becomes necessary for the chancery court to fix the terms of settlement which are found to result from the contract, and we believe it to be not an unjust method to follow the rule laid down in the Roberts case.

In the later case of *Nakdimen* v. *Brazil,* 131 Ark. 144, 198 S. W. 524, the court said: "Moreover, the bond and mortgage constituted the last expression of the terms of the contract, and must control."

So we may consider it as the settled law of this State that the contract rate of interest must govern in

finding the present value of anticipated payments in foreclosing mortgages given by borrowers to the association. In the Abrams case it was also held that, in computing the present worth of the anticipated payments, the interest should be calculated for the average time of the payments, which would be one-half of the time from the date of the decree to the estimated maturity. In short, the court holds that, in ascertaining the amount of stated dues and interest that will become due during the future existence of the corporation as estimated, the contract rate of interest applies.

Having reached this conclusion as to the interpretation to be placed upon our own opinions which have heretofore been held to govern in cases of this sort, and which have become a rule of property in this State, no useful purpose could be served by citing or reviewing the decisions of courts of other States or text-writers on the subject.

It is next contended that the appeal should be dismissed because, after the appeal was taken by appellant, it caused the land embraced in the mortgage to it to be sold under the foreclosure decree, and became the purchaser at the sale. Under the terms of the mortgage, the mortgagee was given the right to become the purchaser at the foreclosure sale. Under these circumstances the mortgagee had a right to become the purchaser, and nothing is more common than for him to do so. Indeed, it is beneficial alike to the mortgagee and mortgagor for the former to purchase at the foreclosure sale, for a purchase by the mortgagee often prevents a sacrifice of the property. *Keller* v. *Whittington,* 106 Ark. 525, 153 S. W. 808; and *Easton* v. *German-American Bank,* 127 U. S. 532, 8 S. Ct. 1297.

The soundness of this rule has been conceded as to sales made under a power of sale contained in the mortgage as to foreclosure sales in chancery, but the rules laid down by this court in *Jones* v. *Hall,* 136 Ark. 348, 206 S. W. 671, and other cases, is applicable here. In that case

it was held that a party is estopped to appeal from a judgment where he has accepted the amount awarded to him by the judgment, if, by taking such appeal, he incurs the hazard of recovering less than the amount of the judgment. In that case, under the facts presented by the record, the appellant, by prosecuting the appeal, incurred the hazard of recovering less than was awarded her by the decree appealed from. The court, however, called attention to the fact that in *Coston* v. *Lee Wilson & Company,* 109 Ark. 548, 160 S. W. 857, it had approved the following from *Betchel* v. *Evans,* 10 Idaho 147, 77 Pac. 212:

"If the party has collected his judgment, and, in seeking to gain more by the prosecution of an appeal, thereby incurs the hazard of eventually recovering less, then his appeal should be dismissed. If, on the other hand, the appeal is from such an order or judgment as that he could in no event recover a less favorable judgment, and that he incurs no hazard of ever receiving less than the judgment already collected by him, we see no objection to the prosecution of his appeal."

In the case at bar the chancery court held that appellant had the paramount lien on the mortgaged property, and there was no dispute as to the amount of the mortgage indebtedness. In these respects the decree was not appealed from. The only dispute was as to the rule to be adopted in charging interest in finding the present value of the anticipated payments. There was no other contention between the parties. The chancery court adopted the legal rate, which was lower than the contract rate. Hence appellant incurred no hazard whatever of recovering a less amount upon appeal, and we think the motion to dismiss the appeal should be overruled.

The Home Building & Loan Association had a second mortgage upon the same property. The record shows that the mortgaged property did not sell for sufficient to pay both mortgages, and that a deficiency judgment against the owners of the mortgaged property

could not be collected. It is claimed that the difference in the amount to be collected by appellant is smaller than the costs of the appeal. Hence it is claimed that it would be inequitable to tax the costs of the appeal against any of the proceeds derived from a sale of the mortgaged property, but that the same should be taxed against the remaining assets of the mortgagor in the hands of a receiver of his estate. Now, the appellant had a right to appeal from an erroneous decree of the chancery court, whether the result of the appeal was much or little to it. As we have already seen, the question was of much consequence to appellant in the general prosecution of its business, and it had a right to have a decision from a court of last resort upon the matter. Hence it would be inequitable to tax the costs of the appeal against it. The general creditors had a right to the general assets in the hands of the receiver to pay their claims. This court has acquired no jurisdiction over them. It has acquired jurisdiction by this appeal over the proceeds derived from the sale of the mortgaged property, and may direct the chancellor to allow the receiver to pay the cost of the appeal out of such funds, after paying the decree in favor of appellant. The cost of the additional bond required of the receiver pending the appeal on motion of appellant will be taxed against appellant.

It results from our views that the decree of the chancery court must be reversed, and it will be directed to enter a decree in accordance with this opinion and for further proceedings in accordance with the principles of equity. It is so ordered

MANLEY *v.* MOON.

Opinion delivered May 14, 1928.

James M. Shinn, for appellant.

Woods & Greenhaw, for appellee.

MEHAFFY, J. Appellants filed a petition with the county board of education, Boone County, Arkansas, asking that a school district be created out of the territory described in the petition. The creation of the districts as described in the petition would, in effect, consolidate District No. 30 and District No. 46. Residents of District No. 46 filed a protest, objecting to the creation of the district as requested, insisting that the board of education had no authority to consolidate school districts under the provisions of act No. 156 of the Acts of the General Assembly of 1927, authorizing the board of education to

form new school districts and to change the boundary lines between any school districts heretofore formed, etc.

The only question involved in this case is the construction of act 156. That act provides that:

"Upon a petition being filed with the county board of education, signed by a majority of the qualified electors in the territory to be affected, said county board of education of any county within the State of Arkansas shall have the right to form new school districts and to change the boundary lines between any school district heretofore formed where, in the judgment of such board of education, it would be for the best interest of all parties affected; provided, however, that no change shall be made that would impair any outstanding indebtedness of any school district now formed."

Section 2 provides: "This act shall not repeal or affect act 274 of the Acts of the General Assembly of 1915. And is cumulative to all other laws and parts of laws defining the powers and prescribing the duties of county boards of education and of school districts, boards or directors thereof, and all other officers and persons mentioned in this act; and, except in cases of irreconcilable conflict herewith, it shall not be so construed as to repeal any other law or part of a law," etc.

It is earnestly insisted that two school districts cannot be consolidated under this act of 1927. And numerous cases have been cited and are relied on to support the contention of appellee. These cases, however, were all decided on questions that arose prior to the passage of this act, and we do not think they are applicable here.

In the case of *School District No. 25* v. *Pyatt Sp. Sch. Dist.*, 172 Ark. 602, 289 S. W. 778, the court said that, where a special act of the Legislature created a certain school district, the county board could not change it. We said that, however, because we construed the law, as it then existed, as not giving the county board of education the authority to change a district created by the Legislature. But we further said with reference to school districts in that case: "The legislative power in

these respects is full and complete, and is conferred by the provisions of the Constitution." We also said in that case: "The Legislature has full power, it may organize a district itself, and may do so without the consent of the inhabitants of the district, or it may authorize the county court or board of education or other governmental agency to form districts and change boundary lines."

We also said, in the case of *McCrory Spec. School Dist.* v. *Curtis,* 174 Ark. 343, 295 S. W. 971, that the county board of education has no jurisdiction to annex territory already comprised in a special rural district created by special act. We also said, in the case of *Carter Special School Dist.* v. *Hollis Special School Dist.,* 173 Ark. 781, 293 S. W. 722, that the county board of education had no right to dissolve a district created by the Legislature. And in the case of *Park* v. *Rural Special School Dist. 26,* 173 Ark. 514, 292 S. W. 697, that the county board of education had no authority to change the boundaries of rural special school districts. But we again announced the rule that the Legislature had full power and might organize the district or authorize any governmental agency to organize it, and that it could do this without the consent of the inhabitants.

After these cases had been decided, the Legislature passed act 156 in 1927. It was evidently the intention of the Legislature and the Department of Education to establish a system of schools in obedience to the mandate of the Constitution.

Section 1 of article 14 provides that the State shall ever maintain a general and suitable and efficient system of free schools. This is evidently what the Department of Education and the Legislature are endeavoring to do.

Section 4 of article 14, the article on education, is as follows: "The supervision of public schools and the execution of laws regulating the same shall be vested in and confined to such officers as may be provided for by the General Assembly."

The makers of the Constitution had in mind that the system of free schools provided for would require the

vesting in and confining to certain officers authority and power to make the system what the framers of the Constitution intended that it should be. And in carrying out this system, after this court decided the cases to which attention has been called, the Legislature passed act 156 in 1927. And that act, as we have already said, provides that the board of education shall have the right to form new school districts and to change the boundary lines between any school districts in any county in the State of Arkansas.

The decision in this case depends upon the meaning of act 156. It gives the board of education authority to change the boundary lines of any district, and we think it necessarily leaves to the board of education the manner in which it will do this. That is to say, whether it will do it by consolidating districts or otherwise. "Any school district" is sufficiently broad and comprehensive to include any school district and every school district in the State. It might as well be said that any county did not mean all the counties, but meant those that had a certain population, as to say that any school district did not mean all the school districts in the county.

"Certainly the words 'any contract' are sufficiently comprehensive to include special contracts as well as contracts which arise by implication, unless the materialman is secured by a deed of trust or mortgage or in some other form of security repugnant to the theory that he ever intended to hold a lien under the mechanics' lien law." *McMurray* v. *Brown,* 91 U. S. 257, 23 L. ed. 321.

This court, in construing a statute providing for sale of the 16th section, said:

"This contention is based upon that section of the act of 1881 which provides that, if 'any tract (school land) was offered and not sold, it might be offered again, upon like notice, upon the first day of the next or any succeeding term of the county court, and so on offered until sold, without a new petition.' He insists that the words 'the next or any succeeding term of the county court, and so on offered,' should be construed to mean that the

land should be offered at each succeeding term of the county court until sold. We do not think so. It should be construed in that way if the language had been 'if any tract was offered and not sold, it might be offered again, upon like notice, upon the first day of the next and every succeeding term of the county court, and so on offered until sold, without a new petition.' But 'or' does not mean 'and,' but 'either' and 'any' does not mean 'every,' but 'one indifferently.' We think that the act of 1881 authorizes the sale of any tract, if it was not sold at the time it was first offered, on the first day of any succeeding term of the county court." *Brown* v. *Rushing*, 70 Ark. 111, 66 S. W. 442.

An important rule in the construction of statutes or the interpretation of statutes is to ascertain the meaning or intention of the Legislature. And if this intention can be had from the words used, then we construe it according to the words used by the Legislature. And when the Legislature said 'any district in any county in the State,' it meant all the districts, just as when it said 'any county,' it meant all the counties in the State of Arkansas.

It is insisted that a consolidation of the districts cannot be had under this act because there is another act providing for consolidation. But this act expressly provides that it is cumulative and that it does not repeal any act that is not in irreconcilable conflict. We do not think the act providing for consolidation of districts is in irreconcilable conflict with this act, and it is therefore not repealed, but the board of education may proceed under either act.

We all agree that the Legislature had the power under the Constitution to give the board of education the power to change the lines between any and all districts, and the only question here is whether, in act 156, it did that. The Constitution intended that the Legislature should provide for an efficient system of free schools, and this can best be done by and through the boards of education.

It is insisted that this consolidation should not be had, and that it may be impractical because the children residing in District No. 46 could not attend school at Lead Hill on account of the distance that they would have to travel and the fact that said territory is so cut up by streams and mountains that they could not be transported to said school by cars or busses.

It is the province of the board of education to determine all these questions, and none of them were gone into in this case by the circuit court on appeal. The court sustained a demurrer to the petition, and dismissed the petition.

We think the court was in error, and the judgment is therefore reversed, and the cause remanded with directions to overrule the demurrer, and for such further proceedings as are not inconsistent with this opinion.

HART, C. J., and WOOD and KIRBY, JJ., dissent.

WALK *v.* BARRETT.

Opinion delivered May 14, 1928.

Scott & Goodier, for appellant.

Wilson & Wilson and *Strait & Strait,* for appellee.

MCHANEY, J. At the time of his death in 1923, E. H. Walk was the owner of two certain tracts of land in Yell

County, one containing 80 acres and one 5 acres; also some town lots on which he resided in Ola. His wife, Mrs. Mary Walk, died some 13 months prior to her husband. He left a will giving all his property, real and personal, to appellants, nephews of the testator, except his home place or residence in the town of Ola. This will was admitted to probate. Appellee, Aris Barrett, from infancy lived with Mrs. Walk's mother until the latter's death, and thereafter, until her marriage in 1905, lived with Mr. and Mrs. E. H. Walk. After the probate of said will, appellees brought this action for specific performance of an alleged contract between them and E. H. Walk, whereby said Walk agreed, in 1907, to execute a will, giving appellees all his property at his death, in consideration of their rendering certain personal attention and financial assistance to him and his wife during their lives, or the lives of either.

The Walks did not live in the home of appellees, but maintained their own separate establishment, near the home of appellees. Mr. Walk was a strong and vigorous man, both in body and mind. There is no contention that he was incapable of making the will executed. A day or two after the death of his wife, Mr. Walk went to live in the home of appellees, whereupon Mrs. Barrett asked him for a deed to the property to secure her for her services, and he immediately left. She tells the story as follows: "At Cousin Moll's death I prepared a home for Cousin Henry. Prior to her death we had entered into an agreement to render personal and financial assistance in every way to make their lives easier, and I felt that a verbal agreement had been going sufficiently long, and I asked Cousin Henry to make me a deed to secure me of my time and fulfill the contract. Which he objected to, and left."

After leaving their home, he never returned, and it is not contended they ever did anything further for him. It is admitted that, during all the years after it is said the contract to convey was made, Mr. Walk attended to all his business, rented out his farm land, collected the

rents, made several small loans to various individuals, from $112 to $200, taking mortgages as security, and it was not generally known that he was dependent for a living on the bounty of appellees. His pastor and other witnesses all contradict the idea of his being thus dependent and that the financial and other assistance claimed to have been rendered was, in fact, rendered. He deposited $270 in bank during the last year of his life, and had $170 on deposit when he died.

The chancellor found the facts in favor of appellees, and decreed specific performance of the alleged contract. In this we think he was in error. The rule of law applicable in such cases is that, before a court of equity may grant specific performance of a parol contract to convey lands, the evidence of such agreement must be clear, satisfactory and convincing. It must be so strong as to be substantially beyond reasonable doubt. *Williams* v. *Williams,* 128 Ark. 1, 193 S. W. 82. Appellees cite and rely upon this case, as also *Fine* v. *Laster,* 110 Ark. 425, 161 S. W. 1147, Ann. Cas. 1915C, 385; *Boyd* v. *Lloyd,* 86 Ark. 169, 110 S. W. 596; *Whittaker* v. *Trammell,* 86 Ark. 251, 110 S. W. 1041; and *Salyers* v. *Smith,* 67 Ark. 526, 55 S. W. 936. In the Williams case the contract to convey was sustained under the above rule, but the plaintiff left his own home and lucrative employment and went to live with deceased on the land, and carried out his part of the contract. In *Fine* v. *Laster* a deed to the property was executed by deceased and delivered to the cashier of the bank to be delivered at his death. In the Boyd, Whittaker and Salyers cases, deeds were executed. In all these cases the claimant or grantee was put in possession of the properties under agreement to support; but here, not only is there no deed or other writing, but a mere alleged oral promise to convey. It is a strange coincidence that Mr. Walk should immediately leave the home of appellees when they requested of him a deed to secure them for their services, if he had previously agreed to give them the property at his death. Shortly thereafter he executed

the will heretofore mentioned, and left appellees entirely unprovided for therein.

We do not review the testimony in detail, as it would serve no useful purpose. We have carefully read same, and find it insufficient to measure up to the clear, satisfactory and convincing rule heretofore announced. The decree will therefore be reversed, and remanded with directions to dismiss the complaint for want of equity.

REBSAMEN, BROWN & COMPANY *v.* VAN BUREN COUNTY.

Opinion delivered May 14, 1928.

Taylor Roberts and *Carmichael & Hendricks,* for appellant.

W. H. Cooper, for appellee.

MCHANEY, J. Appellants are certified public accountants of Little Rock, Arkansas, and on the 4th day of December, 1926, entered into a contract with the county judge of Van Buren County, to make an audit of the books and records of said county for a period of four years, ending December 31, 1926, and submit a report of such audit to the county judge, for which they were to be paid the sum of $1,000. Acting under said contract,

they entered upon said work in December, 1926, and finished same in March, 1927, submitted a report of their audit to the county judge at Bee Branch, in said county, the last day of April or the first day of May, which the county judge declined to accept. They thereafter filed a copy of said report on July 5, 1927, with the clerk of the court. The county judge who made and executed the contract for appellee went out of office December 31, 1926, and a new county judge came in January 1, 1927.

At a meeting of the quorum court held November 15, 1926, said court took the following action:

"Now on this day, on motion of G. C. Pledger that the county judge be requested to make an order directing an audit of the county records. Vote 16 for, J. W. Hutchins being absent, same being a majority in favor of an audit."

With reference to the appropriation for making an audit, the following occurred: "Now on this day, on motion of G. C. Pledger, that an appropriation of $1,000 be made for the purpose of paying for county audit. Vote by roll call. 12 in the affirmative, and 4 against"; setting out the names of those voting for and against.

The record in this case fails to show an order of the county court authorizing the county judge to enter into said contract with appellants, nor is there any order of the county court in this record ratifying or confirming the contract as made by the county judge on the 4th day of December, 1926. The claim was presented to the county court, disallowed by it, and an appeal was taken to the circuit court, where, on a trial *de novo,* the circuit court also disallowed the claim.

In view of the disposition we make of it, we find it necessary to discuss only one question, and that is, whether the contract between appellants and appellee, executed by the county judge, was valid and binding on the county. By section 28, article 7 of our Constitution, county courts "have exclusive original jurisdiction in all matters relating to * * * 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 * * *."

Section 2279, C. & M. Digest, provides: "The county court of each county shall have the following powers and jurisdictions: Exclusive original jurisdiction in all matters relating to county taxes * * *; to audit, settle and direct the payment of all demands against 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."

Thus it will be seen that, by the Constitution and statutes of this State, the county court, and not the county judge, had the power and authority to make the contract here involved. It was so held, after reviewing the above section of the Constitution and the above and other sections of our statutes, in *Leathem & Co.* v. *Jackson County,* 122 Ark. 114, 182 S. W. 570, Ann. Cas. 1917D, 438, where it was held that the county court had the authority to employ expert accountants to audit the books of the county. The contention was there made that the contract between Leathem & Company and Jackson County was made by the county judge, and not by the county court, and that the contract was therefore void. But in that case the county court, after entering into the contract, entered of record an order ratifying the employment of the auditors, and stating the reason therefor. Also, the county court made an order allowing the claim of appellants, which was appealed to the circuit court, and the circuit court held that there was no authority in law for the making of the contract, and that as made it was void, as well as the order ratifying it. With reference to that question this court said:

"It will be noted that the county judge first made the contract with appellants. The county court subsequently entered of record an order ratifying the contract and setting forth the reasons which caused the court to make the contract. The county may, like an individual, ratify

an unauthorized contract made in its behalf if it is one the county could have made in the first instance. Such ratification will be equivalent to original authority.'' Citing cases.

But in the case now under consideration the contract was not made by the county court by an order entered of record, nor was it subsequently ratified by an order confirming and approving the contract. The county judge who made the contract went out of office twenty-seven days thereafter, and, when the audit was completed and presented to the new county judge, he refused it, declined to allow the claim therefor, and we find nothing in the record showing that the county has ratified the making of the contract. Neither is it shown that it has accepted said audit, or any benefits therefrom. The action of the quorum court in requesting the county judge to make an order directing an audit has no binding effect on the county. An appropriation was made by it to pay the expense of an audit, but, as we have seen, the jurisdiction to make the order entering into the contract rested solely with the county court, and, not having been done by the county court, but by the county judge, it must be held that his action in entering into this contract was not binding upon the county.

It necessarily follows that the judgment of the circuit court must be affirmed.

SANDUSKY *v.* WARREN.

Opinion delivered May 14, 1928.

Jesse Reynolds, for appellant.

Paul McKennon, for appellee.

McHaney, J. Appellee brought this action to recover damages for personal injuries received by him while employed in appellant's heading mill on September 24, 1926. He was 22 years old at the time. He was employed, about three days before his injury, to operate a trimming-saw by running the heading through such saw in order to trim off the bad part of the heading. While doing this, a splinter of wood from a piece of heading was thrown off by the saw, which struck appellant in his left eye, and totally destroyed it. The saw was operated through a table, the upper half of the saw passing some eight or ten inches above the top of the table. He was inexperienced in this particular character of work, and alleged that he was not aware of the danger, and was not warned by his employer, or anyone else thereof, and that the defendant was negligent in failing to place a guard or screen over the saw at which he was working, which would have prevented his injury.

Appellant denied all the allegations of negligence, and pleaded contributory negligence as a bar to recovery.

A trial of the case in December, 1926, resulted in a verdict and judgment for appellee for $250. On motion of counsel for appellee, the verdict and judgment in that case were set aside on account of misconduct on the part of some of the jurors in this trial. The case again came on for trial on December 9, 1927, which resulted in a verdict and judgment for appellee for $750, from which is this appeal.

Several assignments are made for reversal of this case, the first being that the court erroneously set aside the verdict and judgment in the first trial. The action of the court setting aside that judgment was made at the same term, and upon testimony which has not been brought into the record by a bill of exceptions, and was not objected to. Appellant admits that testimony was introduced on this question without objection. We cannot therefore consider this assignment of error, as there is nothing in the record upon which to base the assignment contained in the motion for a new trial. *Shackleford* v. *State,* 176 Ark. 578, 3 S. W. (2d.) 962.

In the next assignment complaint is made of the insufficiency of the evidence to support the verdict—that there is no evidence on which to base the verdict. Ed Haigwood and S. A. Holt both testified that, in the operation of a saw exactly similar to that of appellant at which appellee received his injury, it was proper to use a screen guard over the saw. They had both been engaged in the lumber business instead of the heading business, but they used similar saws to the one in question in their mills, and they used guards on the saws for the protection of the operator against slivers and dust. This was competent testimony, as tending to show that the saw in question would have been safer with such a guard or screen. Appellant raised no objection to this testimony when it was offered, as reflected by his abstract, and therefore, even though incompetent, it was waived. This testimony tends to support appellee's theory that appellant was guilty of negligence in failing to exercise ordinary care to provide appellee a safe place in which to work.

It is finally insisted that the court erred in giving instructions Nos. 3, 4, 6 and 7. Nothing but general objections were made to any of these instructions. We do not set them out in full, as no useful purpose could be served thereby. Appellant asked no instructions on his own account, but was content to let the case be submitted to the jury on instructions given by the court, both on its own account and at the request of appellee. We have examined them carefully, and find no error in them. No. 3 told the jury that the master is not an insurer of the safety of the servant, but is required to exercise only ordinary care and diligence to furnish him a safe place in which to work, and safe machinery with which to work, and that, if appellant "understood and appreciated the dangers that he was going into when he took that sort of employment, and knew what those dangers were, then he would assume whatever risk might attach to it." No. 4 was simply a statement of the contentions of appellee, and that as to whether appellant was negligent was a question for them to determine. In this instruction the question was left to the jury as to whether it was negligence on the part of appellant in failing to provide a guard or shield for the saw to prevent flying splinters or fragments from striking the employee and injuring him.

In No. 6, the question of his inexperience and as to the necessity of being warned were submitted to the jury. In this instruction it is said:

"It is the duty of the master to advise the servant of the existence of those dangers in connection with the work and to point out to him this danger and warn him, and if he fails to do that, it is a question for you to determine whether or not his failure was negligence."

No. 7 is a continuation along the same line. In this instruction the court told the jury that, if they found "that Earl Warren entered upon that work there and could see and did see and did know and realize that it was dangerous, and he went ahead and worked there after he appreciated the danger and knew what it was, then he assumed the risk."

We have examined all the instructions given in the case, and find them to be correct declarations of law as applied to the facts in this case. We think there was sufficient evidence to take the question of liability to the jury, and its decision is binding on this court. No error appearing, the judgment is affirmed.

STANDARD LIFE INSURANCE COMPANY *v.* ROBBS.

Opinion delivered May 14, 1928.

U. A. Gentry and *Carmichael & Hendricks,* for appellant.

R. E. Wiley and *McMillan & McMillan,* for appellee.

SMITH, J. This is a suit on an insurance policy in the sum of $5,000, instituted July 17, 1926. The policy sued on was made an exhibit to the complaint, which alleged that, under the terms of the policy, the beneficiary had the option to demand payment in successive monthly

installments of $100 each until the sum of $5,000, plus the accumulations named in the policy, had been paid, and that this option of payment had been exercised. It was further alleged that, under this option, seventeen payments of $100 each had matured and were payable, and judgment therefor was prayed.

A petition for removal to the Federal District Court was filed, in which diversity of citizenship was alleged. It was also alleged that the amount in controversy exceeded $3,000, and there was a denial of any liability on the policy. The prayer of the petition was denied. An answer was then filed, in which the right to remove was reserved. The answer admitted the execution of the policy and the death of the insured on February 28, 1925, but alleged that the insured had committed suicide within one year from the date of the policy, which contained the following provision:

"Suicide. Self-destruction, sane or insane, within one year from the date of this policy, is a risk not assumed by the company under this policy. In such event the company will return the premiums actually received."

The policy contained an incontestable clause reading as follows:

"This policy shall be incontestable after one year from its date for the amount due, except for nonpayment of premiums, and except for death while in military or naval service in time of war, which is a risk not assumed by the company under this policy; and except as to provisions and conditions relating to benefits in the event of total and permanent disability and those granting additional insurance specifically against death by accident, which provisions may be attached hereto by rider."

The answer—which was filed more than a year after the issuance of the policy—alleged that the incontestable clause in no way affected the liability of the company, because the risk of death by suicide was not covered by the policy. In an amendment to the answer it was alleged that no proof of death was made within a year from the date of the policy, and that no guardian was appointed

for the beneficiary, who was a minor, until the 19th day of May, 1925, which was more than a year after the date of the policy, and that, immediately upon receipt of the proof of death, liability was denied upon the ground that suicide within a year of the date of the policy was not a risk assumed under it.

A demurrer which was interposed to this answer was sustained, and, defendants declining to plead further and announcing that they stood on the answer and amendments thereto, the court found that plaintiff was entitled to a judgment for the amount sued for, with the statutory penalty and attorney's fees, and judgment was accordingly rendered, from which is this appeal.

The first question presented is whether the cause was removable to the Federal District Court, and upon the authority of the case of *Mutual Life Insurance Company of New York* v. *Wright,* decided by the Supreme Court of the United States on March 12, 1928, we hold that it was not. 276 U. S. 602, 48 S. Ct. 323. In this opinion the Supreme Court of the United States affirmed the decision of the Circuit Court of Appeals for the Fifth Circuit, which had reversed the ruling of the Federal District Court refusing to remand the cause to the State court in which the case originated and from which it had been removed to the Federal District Court.

The facts in that case were as follows: A citizen of Alabama brought a common-law action in a State court to recover $420 upon seven monthly installments then due upon a policy of insurance exceeding $3,000 in value, but which was payable in monthly installments of $30 each, upon proof of the death of the insured, but which was of twice that amount if the proof of death showed the death of the insured had been caused by accidental means. The Court of Appeals held that the value of the "matter in controversy" was not the face of the policy, but the amount for which judgment was prayed in the action, and that, as that amount did not exceed $420, regardless of the cause of the insured's death, the amount in controversy was less than is required to confer juris-

diction on a Federal District Court, although a judgment for the amount sued for would work an estoppel against the insurance company to deny liability for future installments in an aggregate amount exceeding $3,000. It was stated that the effect of the judgment would be to fix the ultimate liability of the insurance company at an amount exceeding $3,000, but that the collateral effect of a judgment was not the test of jurisdiction, and that the amount in controversy is determined by the amount involved in the particular case, and "not by any contingent loss either one of the parties may sustain by the probative effect of the judgment, however certain it may be that such loss will occur."

In affirming the opinion of the Circuit Court of Appeals, the Supreme Court of the United States, in the *per curiam* opinion, *supra,* merely said: "Affirmed, for the reason that the amount involved is not sufficient to sustain Federal jurisdiction, on the authority of * * * (Cases cited)."

The next question presented is whether the answer stated a valid defense, and it is the opinion of the majority, upon the authority of the case of *Missouri State Life Ins. Co.* v. *Cranford,* 161 Ark. 602, 257 S. W. 66, 31 A. L. R. 93, that it did not.

It appears from the recitals of the answer that the defendant insurance company took no action to cancel the policy or to deny liability thereunder until more than one year after the date of the issuance of the policy, as more than one year had expired after the date of the policy before the answer was filed in which liability was denied.

As appears from facts already stated, it was recited in the suicide clause that "self-destruction, sane or insane, within one year from the date of this policy, is a risk not assumed by the company under this policy. In such event the company will return the premiums actually received." And it also appears, from the recitals of a separate clause of the policy on the subject of incontestability, that the policy was made incontestable after one year except for certain excepted causes, and that

death by suicide was not mentioned as one of the exceptions.

In the case of *Missouri State Life Ins. Co.* v. *Cranford, supra,* the court cited and approved the case of *Mareck* v. *Mutual Reserve Fund Life Assn.,* 62 Minn. 89, 64 N. W. 68, 54 Am. St. Reps. 613. In that case the policy sued on contained a clause which provided that: "Death of the member by his own hand, whether voluntary or involuntary, sane or insane at the time, is not a risk assumed by the association in this contract, but in every such case there shall be payable, subject to all the conditions of this contract, a sum equal to the amount of the assessments paid by said member, with six per cent. interest; but the board of directors or the executive committee of the association at its option may, in writing, waive this condition."

The policy also contained an incontestable clause reading as follows: "After five years from the date of this certificate it is incontestable for any cause, except nonpayment of dues or mortuary assessments at the times and place, and in the manner herein provided—the age of the member being correctly stated in the application for this certificate."

The insured in that case died by his own hand, but after the expiration of the five-year period. It was contended, notwithstanding that fact, that, the insured having committed suicide in violation of that clause, his beneficiary was precluded from recovering under the policy, for the reason that death by suicide was not a risk insured against. It was held, however (to quote the syllabus in that case) that: "A life insurance association issuing a policy providing that it does not assume the risk of the death of the insured if caused by his own hand, but that such condition may be waived in writing, and then providing that, after five years from the date of the policy, it shall be 'incontestable from any cause' except nonpayment of dues or mortuary assessments, if the age of the applicant is correctly stated, is liable for the full amount of the policy, if the insured commits sui-

cide or dies by his own hand more than five years after the policy is issued, provided the insured has stated his age correctly, and all dues and mortuary assessments have been paid up to the time of his death."

In approving that case it was held in the Cranford case, *supra,* that: "The modern rule is that a life insurance policy containing a provision that it shall be incontestable after a specified time cannot be contested by the insurer on any ground not excepted in that provision. It is said that the practical and intended effect of such a stipulation is to create a short statute of limitations. By the stipulation the insurance company agreed that it would take a year to investigate and determine whether it would contest the policies of insurance, and that, if it failed within that time to discover any grounds for contesting the same, it would make no further investigation and would not thereafter contest the validity of the policies."

It follows therefore that, inasmuch as the policy here sued on did not specify suicide as one of the defenses in the incontestable clause which might be asserted as a defense against a claim of liability, it cannot be asserted after the year when the policy became incontestable, except as against the matters excepted in the incontestable clause.

The Cranford case, *supra,* is authority for holding that the suicide clause is not available here, for the reason that it was not interposed until more than a year after the date of the policy, when it had become incontestable for that cause. In the Cranford case the incontestable clause reads as follows: "Unrestricted, and after one year incontestable as follows: This policy is free from conditions as to residence, occupation, travel or place of death, in times of peace, and shall be incontestable after one year if the premiums are duly paid, except for violation of the provisions relating to military or naval service in time of war."

It was there alleged that the issuance of the policy had been procured by fraud practiced upon the company;

but it was held that, as that defense was not named in the incontestable clause, and was not asserted until the year had expired, it was not available to the insurance company. The insured in that case had died before the expiration of the year after the date of the policy, but the insurance company did not raise the defense of fraud until it filed its answer to the suit brought to recover on the policies, and the answer was not filed until after the expiration of the year.

In holding that the defense had not been raised in apt time, the court quoted from the case of *Mutual Life Ins. Co.* v. *Hurni Packing Co.,* 263 U. S. 173, 43 S. Ct. 90, (erroneously cited as 260 U. S. 712), as follows:

"In order to give the clause the meaning which the petitioner ascribes to it, it would be necessary to supply words which it does not at present contain. The provision plainly is that the policy shall be incontestable upon the simple condition that two years shall have elapsed from its date of issue; not that it shall be incontestable after two years if the insured shall live, but incontestable without qualification and in any event" (Citing authorities).

After stating that a contest, in law, implies an adversary proceeding in which matters in controversy may be settled by the courts upon the issues joined, this court, in the Cranford case, *supra,* after thus defining the word "incontestable," proceeded to say:

"In the application of the rule just announced, we think the natural and most reasonable view is to hold that the insurer has not contested the policy until it has acted in the premises. The contract provides that the policy shall be incontestable after one year, and no action on the part of the insured or of the beneficiary can relieve the company of its duty to act. In order to contest the policy it was required to file an answer to the suit brought by the beneficiary within one year, or to have instituted an action of its own in equity to cancel the policy on the ground of fraud. In short, we are of the opinion that,

construing the clause in the light most favorable to the insured, no contest was made in the case at bar until the insurance company filed an answer, in which it averred that the contract should be set aside on the ground of the fraud of the insured in procuring it. Having waited until a year had elapsed before it elected to contest on this ground, the company is barred of relief under its own contract."

It is therefore the opinion of the majority—in which view the writer does not concur—that, inasmuch as the insurance company did not, within the year in which it reserved the right, cancel the policy or take action directed to that purpose, it cannot now question the policy, except upon some ground reserved in the incontestable clause, and, as suicide is not one of these grounds, the answer did not state a valid defense, and the demurrer thereto was properly sustained.

The judgment of the court below must therefore be affirmed, and it is so ordered.

OPINION ON REHEARING.

HART, C. J. In a case-note to *Mutual Life Insurance Co.* v. *Hurni Packing Co.*, 263 U. S. 167, 44 S. Ct. 90, as reported in 31 A. L. R. 102, at page 109, it is said that, where a life insurance policy provides that, after a certain definite time, it shall be incontestable, except for certain defenses, a majority of the courts hold that the death of the insured within this time does not put an end to the incontestable clause or prevent its subsequently becoming operative for the benefit of the beneficiary. The case of *Missouri State Life Insurance Co.* v. *Cranford*, 161 Ark. 602, 257 S. W. 66, 31 A. L. R. 93, is among the cases cited.

But counsel for appellants claim that the doctrine announced in the Cranford case should not apply here, because the policy sued on contained a suicide clause in which it was provided that self-destruction, while sane or insane, within one year from the date of the policy, was not a risk assumed by the company. We do not think this makes any difference. The policy contained an incontestable clause after one year, and death by

suicide was not mentioned as one of the exceptions in that clause.

This view was adopted by the Supreme Court of Alabama in *Mutual Life Insurance Co.* v. *Lovejoy,* 201 Ala. 337, 78 So. 299, L. R. A. 1918D, p. 860. In the rehearing on that case it was held that the defense of suicide is within the provision of a life insuranec policy making it incontestable after two years. In the opinion the court called attention to the fact that incontestable clauses are material and valuable provisions in a contract of life insurance. In discussing the subject the court said:

"Construing this contract as a whole, it seems that, if the insured dies within two years of its date, the insurance company may contest the cause of the death, or may set up fraud or misrepresentation in the procuring of the insurance, or any other matter that would be a defense to the action on the policy; but, if he does not die within two years from issuance of policy, and he pays all the premiums agreed to be paid, then the insurance company will not contest, or refuse, the payment of the amount agreed to be paid, on any ground whatever. It was not an agreement to pay him, his estate, or the beneficiary, that amount if he committed suicide, or was executed by virtue of the criminal law, or in any other manner contributed to his own death. The company merely agreed and bound itself that it would not litigate any of these questions, though, without the incontestable clause, they would be a defense. To say that the clause applies to all other defenses except suicide while sane, or death by wrongful, criminal act of the insured, is to read into the policy terms which are not there, and which the very language of the policy excludes."

In *Northwestern Mutual Life Insurance Co.* v. *Johnson,* 254 U. S. 96, 41 S. Ct. 47, 65 law. ed. 155, it was held that suicide of the insured, sane or insane, after the specified time, is no defense to suits on policies of life insurance which contain, respectively, a provision that if, within two years from the date of the policy, the insured, while sane or insane, shall die by his own hand, the policy

shall be void, and a provision that the policy shall be incontestable after one year from the date of issue, provided the premiums are duly paid. In discussing the subject, Mr. Justice Holmes, speaking for the court, said:

"When a clause makes a policy indisputable after one or two years, the mere evocation of a possible motive for self-slaughter is at least not more objectionable than the creation of a possible motive for murder. The object of the clause is plain and laudable—to create an absolute assurance of the benefit, as free as may be from any dispute of fact except the fact of death, and as soon as it can reasonably be done. It is said that the insurance companies now generally issue policies with such a clause. The State decisions, so far as we know, have upheld it. Unless it appears that the State concerned adopts a different attitude, we should uphold it here. * * * We are of the opinion that the provision in the first-mentioned document, avoiding the policy if the insured should die by his own hand within two years from the date, is an inverted expression of the same general intent as that of the clause in the second, making the policy incontestable after one year, and that both equally mean that suicide of the insured, insane or sane, after the specified time, shall not be a defense. It seems to us that that would be the natural interpretation of the words by the people to whom they are addressed, and that the language of each policy makes the company issuing it liable in the event that happened."

In *Supreme Lodge of Knights of Pythias* v. *Overton,* 203 Ala. 193, 82 So. 443, 16 A. L. R. 649, the Supreme Court of Alabama said that the defendant, for a consideration, having agreed in advance not to contest its liability on any other ground than those specified in the contract, it would not be heard to set up a defense and contest payments on grounds by which it had induced the contract and which it had agreed not to contest. In discussing the question the court said:

"The decision is not that suicide, while sane or intentional, or death by public execution, or while fleeing felon, is not a defense to an action on an insurance policy; but the decision is that, by a valid contract, the insurer has estopped himself from setting up these as well as any other defenses, except those mentioned in the contract. The court will not presume that such defenses exist, and the party has estopped himself from alleging or proving it."

In *Sun Life Insurance Co.* v. *Taylor,* 108 Ky. 405, 56 S. W. 668, 94 A. S. R. 383, the court said:

"By the incontestable feature of the policy the company, in effect, said it would not refuse to pay the amount of the policy, although the insured might, while sane or insane, take his own life, or if he should lose it by his own criminal action. It was not an agreement that it would pay him the amount of the policy if he committed suicide or lost his life by his own criminal action, but it was an agreement that no defense should be made on that ground if he lived and continued to pay premiums for three years."

To the same effect see *Royal Circle* v. *Achterrath,* 204 Ill. 549, 68 Mo. 492, 63 L. R. A. 452, and cases cited; and *Goodwin* v. *Provident Savings Life Assurance Society,* 97 Iowa 226, 66 N. W. 167, 32 L. R. A. 473, 59 A. S. R. 411.

The fact of suicide or not could only be established by proof, and this would bring on a contest, which is the very thing the insurance company has agreed not to do after a certain time. As Mr. Justice Holmes so aptly expressed it, after the period of time expressed in the incontestable clause has expired, there can be no dispute of fact except the fact of death, unless other conditions are imposed in the incontestable clause itself. The cause of death has, by the agreement of the parties, ceased to be an issue of fact. In short, after the period of time prescribed in the incontestable clause has expired, the insurance company cannot contest the fact of suicide.

While there are authorities to the contrary, we think the better reasoning is in accordance with the decisions of the courts above cited. The incontestable clause constitutes, as the courts generally put it, not an assurance against the results of crime, but an assurance against the hazards of litigation; and we are of the opinion that the insurance company could not contest the policy before or after the death of the insured, after the period of time prescribed in the incontestable clause had expired, except for the conditions set out in the incontestable clause itself.

Therefore the motion for rehearing will be denied.

SHERRILL *v.* STATE.

Opinion delivered May 21, 1928.

I. S. Simmons, for appellant.

H. W. Applegate, Attorney General, for appellee.

HART, C. J. Andrew Sherrill prosecutes this appeal to reverse a judgment of conviction against him for stealing cattle.

The first assignment of error is that there is a variance between the cattle as described in the indictment and the evidence in the case. The indictment charges the defendant with stealing cattle which are

specifically described as to color, earmarks and brands. The testimony for the State identified the cattle charged to have been stolen by color and brand, but the earmarks, as testified to by the owner of the cattle, differed in some respects from the earmarks as described in the indictment. We think the description of the cattle by color, marks and brands, in the testimony of the prosecuting witness, which fully correspond with the color, marks and brands described in the indictment, was a substantial compliance with the rule of this court that the descriptive allegations of the identity of stolen property as laid in the indictment must be established by proof. *Fletcher* v. *State,* 97 Ark. 1, 132 S. W. 918; and *Ridgell* v. *State,* 110 Ark. 606, 162 S. W. 773.

It is next insisted that the court erred in instructing the jury on the question of alibi. We do not deem it necessary to set out the instruction. It is substantially in the same form as the instruction given in *Ware* v. *State,* 59 Ark. 379, 27 S. W. 485. As said in that case, when the instruction is carefully considered, it does not intimate any opinion of the court upon the weight of the evidence, nor does it tend in any manner to disparage the testimony introduced by the defendant to prove an alibi. Moreover, the court fully and fairly instructed the jury upon the doctrine of reasonable doubt, and the instructions given fully and fairly presented the respective theories of the State and of the defendant to the jury. *Smith* v. *State,* 162 Ark. 458, 258 S. W. 49; and *Meadors* v. *State,* 171 Ark. 705, 285 S. W. 380.

It is also insisted that the court erred in refusing to instruct the jury that Dewey and T. D. McEntire were not one and the same person. The indictment charges the defendant with stealing cattle which were the property of "Dewey (T. D.) McEntire." The testimony of Algy Bennett shows that T. D. and Dewey McEntire were one and the same person. There is no question but what some one stole the cattle of T. D., or Dewey, McEntire. The defendant, as above stated, inter-

posed the defense of an alibi, and that was the principal issue of fact to be determined by the jury. Hence we hold that the court did not err in refusing to give the instruction asked for.

We have carefully examined the record, and find no prejudicial error in it. The evidence adduced by the State, if believed by the jury, warranted a verdict of guilty. It follows that the judgment must be affirmed.

ALBERSEN *v.* KLANKE.

Opinion delivered May 21, 1928.

J. E. Ray, for appellant.

Charles Q. Kelley and *Taylor & Taylor,* for appellee.

HART, C. J., (after stating the facts). The first ground relied upon for a reversal of the decree is that there is no prayer in the cross-complaint for damages against Charles Albersen. This was not necessary. This court is thoroughly committed to the rule that, in a complaint or cross-complaint, the statement of facts and not the prayer for relief constitutes the cause of action, and the court may grant any relief that the facts pleaded and proved may warrant. *Mason* v. *Gates,* 90 Ark. 241, 119 S. W. 70; and *Baldwin* v. *Brown,* 166 Ark. 1, 265 S. W. 976.

It is true that, in the case last cited, it was held that, where a vendor, suing to cancel a deed to his vendee for fraud, joined third persons alleged to have participated in the fraud, but asked only that her deed be canceled and for general relief, she was not entitled to a personal judgment against such third persons. The reason was that, under the issues presented in that case, the defendants against whom the personal judgment was asked were not apprised in any manner that any personal judgment would be asked against them, and that to grant

such relief was inconsistent with the relief asked in the bill.

In the case at bar the facts are essentially different. Klanke filed a cross-complaint against Albersen, and alleged specific facts which entitled him to the relief asked against Albersen. Albersen denied that he was guilty of the false representation alleged against him, and the parties specifically directed their proof to that issue. In fact, this was the only issue in the case, and the parties themselves were the principal witnesses. Hence it cannot be said that the defendant was taken by surprise, and that the relief granted by the court could not be obtained under the prayer of the cross-complaint for general relief.

Of the merits of the case but little need be said. As we have already seen, the parties to the action were the principal witnesses. Their testimony is in direct and irreconcilable conflict. According to the testimony of Fritz Klanke, Charles Albersen borrowed $2,500 from him upon representing that he would give him a first mortgage on the 160 acres of land described in the complaint. Some time after he had received the money from Klanke, Albersen gave him a quitclaim deed to the land, and Klanke accepted it, believing that he was getting a clear title to the land for the money advanced by him, instead of a first mortgage on it. It turned out that Albersen had not procured the land to be released from the mortgage to Franzen, as he had promised Klanke to do. There was a mortgage upon the land to Franzen for an amount greater than the value of the land itself. The testimony of Klanke is corroborated by that of his son, who was present when Albersen procured the money from his father. On the other hand, Albersen states in positive language that he conveyed the land to Klanke for the consideration of $2,500, which he admits he received, and the further consideration that Klanke was to assume the mortgage on the land to Franzen.

No useful purpose could be served by any further comment on the facts. The chancellor found the issue of fact in favor of Klanke, and it cannot be said in any sense that his finding is against the preponderance of the evidence. Therefore, under the settled rules of this court, the decree of the chancery court must be affirmed.

EARLE v. SHACKLEFORD.

Opinion delivered May 21, 1928.

J. R. Pugh and *Scott & Cooper,* for appellant.

S. V. Neely, for appellee.

HUMPHREYS, J. Appellee made changes and improvements in a wooden building located in the fire limits of the town of Earle, which was condemned by the city council and ordered removed within ten days, on account of being made in violation of ordinance 77 of said city, which provides that "no walls, structure, building or part thereof shall hereafter be built, enlarged or altered."

Appellee immediately brought suit to enjoin the city from removing the improvements on the alleged grounds:

First, that the work done on the old building did not amount to a new construction or addition to an old building, but, on the contrary, was only an alteration of the old building; and second, that the ordinance was void because it prohibited alteration being made in or on an old building. Appellee filed an answer, denying the material allegations in the complaint, and on the trial of the issues and testimony adduced responsive thereto, the court permanently enjoined appellant from removing the improvements, from which is this appeal.

The original building was constructed in 1909, and prior in time to the enactment of the fire ordinance. It was built for a blacksmith shop, out of one-inch boxing, with batting on the north and west sides, and without any floor or ceiling, its dimensions being 45x60 feet. At the time the new improvements were made it was in a dilapidated condition. The new improvements were made for the purpose of converting the building into a drive-in filling station and garage. The improvements consisted in constructing a new wall out of good material the entire length of the building, some fifteen feet west of the east wall. Two doors and a large number of windows were built in the new wall. The old east wall was then torn down, leaving a sufficient number of 2x4 supports standing to support the roof until brick columns could be erected to support same. The brick columns had not been erected at the time the new improvements were condemned and ordered removed, but their construction was contemplated. The old north and south walls were also torn down back west to the new wall. By tearing these old walls down the new wall containing the doors and windows became the front or east wall of the house, leaving an open driveway between the new wall and the east row of columns to be constructed to support the roof over the driveway. Three rooms were then constructed in the west part of the building by constructing partition walls therein. The original building consisted of one room without floor or ceiling. As reconstructed it con-

sisted of three rooms, with windows and doors, and a covered driveway of considerable width the entire length of the building. Our conclusion from the pictures, plats and testimony is that the old building, formerly used for a blacksmith shop, has been converted into practically a new building to be used for a drive-in filling station, and, to all intents and purposes, is a new and different building from the first or old one.

Under authority granted to municipal corporations by the Legislature, they have power to pass fire protection ordinances by preventing the erection of any building or addition to any building in fire zone districts, unless the outer walls thereof be made of brick or mortar * * *, and to provide for the removal of any building or addition to any building erected contrary to such prohibition. Section 7544, Crawford & Moses' Digest. In construing said section of the Digest this court ruled that it contained no authority to prevent the repairing of houses constructed prior to the passage of the ordinance, but that it did confer authority upon municipalities to prevent the building of wooden houses and additions to such houses. *Incorporated Town of Paris* v. *Hall,* 131 Ark. 104, 198 S. W. 705. The ordinance in question, passed under the authority conferred by the act, not only provided against the construction of wooden buildings but against the enlargement and alteration of old buildings within the fire limits.

Appellant attacks the validity of the ordinance on the ground it inhibits the alteration of old buildings. We think the word "alteration" used in the ordinance was used in the sense that an old building should not be changed in such a way as to convert it into a new and different structure. When used in this sense, it is within the power conferred, and is not a void ordinance. The evidence in the instant case reflects that this old building was altered in such a way as to convert it into practically a new and different structure from the original one. The

trial court found otherwise, but we think the finding was contrary to the weight of the evidence.

On account of the error indicated the decree is reversed, and the cause is remanded with direction to dismiss appellee's complaint for the want of equity.

SHARP *v.* BOONEVILLE.

Opinion delivered May 21, 1928.

Evans & Evans, for appellant.

R. S. Dunn, for appellee.

HUMPHREYS, J. Appellant was convicted in the mayor's court of Booneville, Arkansas, and again on appeal in the circuit court of Logan County, Southern District, of having in his possession or transporting alcohol or intoxicating liquors, in Booneville, contrary to ordinance

No. 150 of said city, and, as a punishment therefor, was adjudged to pay a fine of $100, from which is this appeal.

Two assignments of error are relied upon and urged by appellant for a reversal of the judgment, viz: (1) That the court erred in reading to the jury an ordinance of the city of Booneville, which he now contends was not introduced in evidence. (2) That the court erred in holding that the ordinance of the city of Booneville which the court read to the jury, under which the defendant was convicted, is inconsistent with the State law.

(1). According to the record, the ordinance in question was introduced on request of the city attorney, by handing the book containing same to the court and calling attention to the substance thereof, in the presence of appellant and his attorney, without objection and exception on their part. By failing to object and except to the manner in which the ordinance was introduced in evidence, appellant waived the formal introduction thereof in the manner provided by § 7497 of Crawford & Moses' Digest. Even though the ordinance had not been introduced at all, the judgment could not be reversed on that ground by this court, as the mayor had jurisdiction as a justice of the peace, and the circuit court jurisdiction on appeal from the mayor's court to convict appellant for possessing or transporting alcohol, under the State law. *Fly* v. *Fort Smith,* 165 Ark. 392, 264 S. W. 840.

(2). It is unnecessary to consider or discuss the assignment of error to the effect that the ordinance is in conflict with the State law against possessing or transporting alcohol or intoxicating liquors by failing to exempt ministers, doctors, druggists and scientists under certain conditions from the provisions of the ordinance, as this court ruled in the case of *Marianna* v. *Vincent,* 68 Ark. 244, 58 S. W. 251, which was cited and affirmed in the case of *Fly* v. *Fort Smith, supra,* that, even though an ordinance were void under which an accused was tried, the conviction must stand if the crime charged was covered by a valid State law, upon the ground that the mayor had the same jurisdiction as a justice of the peace.

No error appearing, the judgment is affirmed.

TUGGLE *v.* TRIBBLE.

Opinion delivered May 21, 1928.

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[redacted]

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C. T. Cotham and *George P. Whittington,* for appellant.

Murphy & Wood, for appellee.

HART, C. J., (after stating the facts). No motion for a new trial was filed in the circuit court, and, under our rules of practice, we can only consider errors appearing on the face of the record. *Burns* v. *Harrington,* 162 Ark. 162, 257 S. W. 729; and *Miller* v. *Tatum,* 170 Ark. 152, 279 S. W. 1002. Counsel for appellants recognize this rule, but rely for reversal of the judgment on certain errors which they claim appear on the face of the record.

The method of procedure adopted by A. H. Tribble and other property owners in petitioning for the alteration of the public road was in accordance with the provisions of act 611 of the Acts of 1923. This act amends act 422 of Acts of 1911, relative to the power of the county court in making changes in public roads. Acts of 1923, page 490. The act of 1911 just referred to is § 5249 of Crawford & Moses' Digest. There is no substantial difference between the act of 1923 and the act of 1911 above referred to, relative to the proceedings in

changing and altering public roads. The act of 1923, under which the present proceeding was had, is more comprehensive, and provides for additional procedure in the matter, but is substantially the same as the provisions of § 5249 of Crawford & Moses' Digest. Hence our decisions construing that section are equally applicable to the provisions of the act of 1923.

It is earnestly insisted by counsel for appellants that the court erred in not following the provisions of § 5247 of Crawford & Moses' Digest relative to the vacation of public roads, instead of the provisions of the statute relative to altering or changing public roads. Section 5247 of Crawford & Moses' Digest is part of the act of March 23, 1871, and relates solely to the method of procedure to be followed where a county road or any part thereof is to be vacated because considered useless. We have held that the two acts operate in different fields and were enacted to serve wholly different purposes. *Hill* v. *McClintock,* 175 Ark. 1059, 1 S. W. (new series) 564. In that case we quoted with approval the distinction made by the Court of Appeals of Kentucky between the alteration and the discontinuance of a public highway. In the case where the road is vacated it is abolished altogether, and in the case of its alteration the road is kept up, and leads in the same general direction, although there may be some change in the route. In the case last cited we held that the alteration of a public road was accomplished by a distinct exercise of discretion from that of vacating an existing road or a part thereof. In the very nature of things an application for an alteration of a public road requires a change in a part of the road, but the matter should be presented to the court as one application. The road is the same, and does not open up a new route of travel or abandon an existing one. Every alteration may involve to some extent the discontinuance of a part of the old highways and the laying out of some part of a new highway, but such laying out and discontinuance are the incidents of an alteration, and are not

independent matters. *People* v. *Jones,* 63 N. Y. 306; *Green* v. *Loudenslager,* 54 N. J. L. 478, 24 Atl. 367; and 29 C. J., § 198, on page 503, and § 224, on page 516. Hence we are of the opinion that the court properly followed the act relative to changing or altering public roads, instead of the act providing for the vacating of a public road or a part thereof when it shall be considered useless.

It is next insisted that the court erred in following the provisions of act 611 of the Acts of 1923, above referred to. It is pointed out that the act under consideration is a special act, and it is claimed that the notice required by the Constitution of the intention to apply for the passage thereof was not given. The act was passed at the General Session of 1923, and was approved on March 23, 1923. Hence, under the settled rules of this court, it will be conclusively presumed by the court that the notice required by the Constitution was given. *Davis* v. *Gaines,* 48 Ark. 370, 3 S. W. 184; *St. Louis Southwestern Ry. Co.* v. *State,* 97 Ark. 473, 134 S. W. 970; and *Booe* v. *Road Improvement District,* 141 Ark. 140, 216 S. W. 500.

It is next insisted that the act was unconstitutional because it was in violation of article 5, § 24, of the Constitution, which provides, among other things, that the General Assembly shall not pass any local or special law vacating roads, streets or alleys. We do not consider that this provision of the Constitution was violated, because it was evidently designed to prevent the Legislature from passing an act whose direct purpose and effect was to vacate a road, street or alley. The act in question was simply enacted for the purpose of prescribing the method of procedure to be followed by the county courts in certain counties in changing or altering public roads. In fact, the act states that it was simply designed to provide for additional procedure in the matter of changing or altering public roads. The adoption of a method of procedure to be followed by the county court in changing public roads in certain counties does not in

any sense offend the provision of the Constitution just referred to.

It is next contended that the county court had no right to vacate a suburban highway which had been dedicated to the public, and that D. M. Tuggle and other abutting landowners had a vested interest in the matter, because they had bought property relying upon the fact that the road in front of their property would always be a public road. If this were true, there could never be any change in an existing highway, because doubtless all abutting property owners would claim that they had bought their property relying upon the fact that it was abutting upon a public easement, and that the road could never be discontinued or changed.

Of course the county court should not change or alter a public highway unless the public convenience or necessity requires such change. But we cannot review the discretion of the county court in this respect, because no motion for a new trial was filed in the circuit court, and this bars any inquiry on appeal into the question of fact whether or not the county court acted under the testimony as the public convenience or necessity would require.

In this connection it may be said that there can be no change of an existing highway that does not cause some private inconvenience, and, in that sense, injury to the abutting property owners, who have adapted themselves to the existing order of things and have purchased property on a highway which they believed would never be changed. There is no question presented in the record that appellants have been entirely cut off from any public highway by the proposed change in the public road in question.

We pretermit any decision on the question whether or not a property owner would be entitled to damages if the highway should be changed so as to entirely cut him off from access to any public road. In this connection it may be said that no provision is made in the statute

for damages in such a case, but we do not pass upon the question whether an action for damages would lie where a property owner is injured by being entirely cut off from a public road so that it might be said that his property was taken or damaged for public use, within the meaning of our Constitution, without providing adequate compensation therefor. The authorities on this question are conflicting, and we do not consider the question at all presented by the face of the record in the present case.

Finally, it is insisted that the judgment of the circuit court is at material variance with that of the county court. The case was appealed and tried *de novo* in the circuit court. Of course, the circuit court could not try an entirely different issue or a substantially different one from that tried in the county court. We do not think, however, that this was done in the circuit court. The matter presented and tried by it was in all essential respects the same as that determined by the county court; and, while the judgment of the circuit court differed in some respects from that of the county court, it did not try an issue which was not raised by the petition and remonstrance filed in the county court.

The result of our views is that the circuit court was correct in its judgment, and it will therefore be affirmed.

NAKDIMEN *v.* FIRST NATIONAL BANK.

Opinion delivered May 21, 1928.

James B. McDonough, Jr., and *James B. McDonough*, for appellant.

Daily & Woods, for appellee.

WOOD, J. This is an action instituted in the circuit court of Sebastian County by the First National Bank and the Merchants' National Bank of Fort Smith, Arkansas, against I. H. Nakdimen. The plaintiffs alleged, in substance, that they are national banks; that Nakdimen is the president of the City National Bank of the city of Fort Smith; that, on or about December 21, 1927, the officers of the Arkansas Valley Bank, another bank at Fort Smith, reported to the plaintiffs and to the City National Bank that the Arkansas Valley Bank would close its doors unless some arrangements could be made to pay its depositors in full, and offered to the plaintiffs and to the City National Bank all of the assets of the Arkansas Valley Bank and, in addition, the sum of $70,000, provided the three banks mentioned would pay the depositors and the valid debts of the Arkansas Valley Bank; that the City National Bank declined to enter into such an agreement, but I. H. Nakdimen agreed that he would personally pay the plaintiffs the sum of $5,000 if plaintiffs would accept the offer of the Arkansas Valley Bank; that the plaintiffs accepted the offer of Nakdimen, and, in consideration of his promise, agreed to pay all the depositors of the Arkansas Valley Bank in full and to assume and pay all other valid debts, if any, of the Arkansas Valley Bank; that the Arkansas Valley Bank had conveyed to the plaintiffs all its assets, and the directors of the Arkansas Valley Bank had paid to the plaintiffs the sum of $70,000; that the plaintiffs had performed each and every one of the covenants of their contract with Nakdimen, and that he had wholly failed to pay the plaintiffs the sum of $5,000. The plaintiffs prayed judgment for such sum, with interest due thereon at the date of the judgment.

The defendant, in his answer, admitted the organization and business status of plaintiffs, as set up in the complaint, and admitted that he was the president of the City National Bank at Fort Smith, Arkansas. He denied specifically all the other material allegations of the com-

plaint, and further denied that there was any consideration passing from the plaintiffs to the defendant, or to any one else, whereby the defendant obligated himself to pay the plaintiffs, or any one else, any sum of money. The defendant further denied that any covenant was made by the plaintiffs to the defendant in any contract, and denied that any contract was made in writing, or otherwise, whereby the defendant undertook to become liable for the debts, default, or other obligation of either of the plaintiffs, or to the Arkansas Valley Bank or its officers or directors, and denied that there was any consideration whatever for the alleged agreement between the plaintiffs and the defendant.

The issues of fact were submitted to a jury, and the testimony was substantially as follows:

W. J. Echols testified that he had lived in Fort Smith forty-six years, and had been president of the Merchants' National Bank about twenty years. He was called by Hugh Branson, president of the Arkansas Valley Bank, on December 21, 1927, to attend a meeting of the directors of that bank. There were present at that meeting the directors of that bank and John C. Gardner, A. M. Sicard, I. H. Nakdimen, and the witness. The president of the Arkansas Valley Bank announced that, on account of the recent defalcation of one of its officers in the sum of about $25,000, and whose bond was $15,000, and on top of another misfortune that the Valley Bank had had, they had decided to close the Valley Bank, unless some arrangement could be made for taking it over. The directors of the Valley Bank offered $70,000. Mr. Nakdimen said that he would gladly take over the bank if he had room, but that his bank was so small that he could not do it, and suggested that one or the other of the plaintiffs take it over. The feasibility of the three banks taking it over and paying the depositors and the debts in proportion to their respective resources, was discussed. Mr. Nakdimen stated that he would not do that. Witness asked Mr. Sicard if he

would take it over for $10,000. He stated that he would not, but would give witness $10,000 to take it over. Nakdimen said he would give $5,000 if witness would take it over, and if witness' loss was more than that he would give $1,000 more, and give his personal check for it. Witness asked Nakdimen if he would hold his proposition open in case he took the bank over, and Nakdimen stated that he would. Several of the officers of the plaintiffs went over the paper of the Valley Bank, and the losses were apparently so great—so much paper that they did not know anything about—they could not form a very definite conclusion as to what the losses might be; they might be $50,000 or over $50,000—they could not tell.

A meeting of the citizens was called that night in the room of the Arkansas Valley Trust Company. Mr. Nakdimen was present at that meeting. Witness further testified as follows: "I stated that the Arkansas Valley Bank would close the next morning, unless arrangements were made to take it over and pay the depositors and other just debts. I stated that they would turn over to the Merchants' National Bank all their assets; that the directors would pay personally $70,000; that Mr. Nakdimen had agreed to donate $5,000; that the First National and the Merchants' National Banks had agreed to lose $25,000, including the $5,000 that Mr. Nakdimen would give, before the citizens would be called upon to give anything; that if the citizens, subject to these payments, would underwrite a bond for $40,000, guaranteeing us against loss to that extent in excess of the assets of the bank and the $70,000 paid by the directors and the $25,000 the banks would lose, we would take it over and pay the depositors of the bank. It was a splendid meeting, and saved a very serious situation. I made the statement twice, because there were about 25 or 30 that came in at first and probably 15 later. Mr. Nakdimen was present when I made the statement both times, and when the bond was being written up I turned to him and said, 'You

agreed to give $5,000, and in addition to that you agreed to pay another $1,000 if the losses were greater than we expected,' and he subsequently signed for $1,000. Witness further testified that Nakdimen did not deny that he had agreed to pay $5,000 to the plaintiffs under the conditions as above stated. The bond for $40,000 was signed by some that night and by others the next day.

The Arkansas Valley Bank turned over to the First National and Merchants' National Banks all the assets of the Arkansas Valley Bank under the following agreement:

"This agreement this day entered into by and between Arkansas Valley Bank of Fort Smith, party of the first part, and Merchants' National Bank of Fort Smith and First National Bank of Fort Smith, parties of the second part:

"Arkansas Valley Bank, for valuable consideration, receipt of which is hereby acknowledged, hereby sells, assigns, transfers, sets over and delivers unto the First National Bank of Fort Smith and the Merchants' National Bank of Fort Smith all of its assets, both real and personal, and wheresoever located, and it hereby agrees to execute such other and formal deeds, transfers, assignments and indorsements as may be necessary. In consideration of said sale and transfer, and in consideration of other valuable considerations and agreements moving to them from individuals, said Merchants' National Bank of Fort Smith and First National Bank of Fort Smith hereby agree with the said Arkansas Valley Bank to pay all valid debts of said Arkansas Valley Bank.

"In testimony whereof Arkansas Valley Bank has, by order of its board of directors, caused these presents to be executed by its president, attested by its cashier, and corporate seal; and First National Bank of Fort Smith has, by order of its board of directors, caused these presents to be executed by its president; and Merchants' National Bank of Fort Smith has, by order of

its board of directors, caused these presents to be executed by its president, all in triplicate, this 22d day of December, 1926.

(Signed) "Arkansas Valley Bank,
"By Hugh Branson, its president.
"Attest: G. H. Sexton, cashier.
"First National Bank,
"By A. N. Sicard, its president.
"Merchants' National Bank,
"By W. J. Echols, its president."
(Seal of Arkansas Valley Bank).

There was also executed the following instrument:

"Whereas the Arkansas Valley Bank has, concurrently with the execution of this agreement, transferred all of its assets of every kind, shape, form, manner and description, to the First National Bank and Merchants' National Bank of Fort Smith, and has placed John C. Gardner as liquidating agent for said First National Bank and said Merchants' National Bank in possession of said assets; and whereas, concurrently with the execution of this agreement, the directors of said Arkansas Valley Bank have paid to said First National Bank and said Merchants' National Bank the sum of $70,000; and whereas the First National Bank and the Merchants' National Bank, in consideration of said transfer of said assets, said payment of $70,000, and the execution by us and the delivery to them of this agreement, have agreed to pay in full all the valid debts of said Arkansas Valley Bank (including deposits).

"Now therefore each of us severally, but not one for the other, agree that, in case the net proceeds received and collected by said two banks from the assets so transferred, plus said $70,000, plus an additional $25,000, the risk of which said two banks assume, fails to pay said valid debts (including depositors) of the Arkansas Valley Bank, then that we will severally, but not one for the other, pay the said First National Bank and Merchants' National Bank that proportion of the amount

set opposite our respective signatures that said sum so set opposite our respective signatures bears to the total amount paid out by said two banks on debts of said Arkansas Valley Bank, in excess of the following: the net proceeds received and collected by said two banks from the assets so transferred, plus $70,000, plus $25,000; provided, that in no event shall any one of us be liable for any amount in excess of the amount by us severally set opposite our respective signatures.

"Dated this 22d day of December, 1926."

Then follow the signatures and the amounts set opposite their respective names. The last name signed is that of I. H. Nakdimen, and set opposite his name is the notation, "$1,000, and no more."

The bond was in two parts, both being worded precisely the same, the amount of obligation in the first part being $42,500 and in the second part $9,500. Concurrent with the execution of the bond, the Merchants' National Bank and the First National Bank signed the following statement:

"We agree that the signers of the obligation, copy of which is hereto attached, will not be required to pay to us in the aggregate in excess of $40,000."

The witness continued his testimony, saying that the additional signatures over $40,000 were obtained to minimize the loss of any one who signed the bond. The next day witness called Mr. Nakdimen over the 'phone and asked him to pay the $5,000, which he declined to do. Hence this action against him.

Witness was asked the following: "Q. Did Mr. Nakdimen make a statement in the first meeting that he would pay in the event of a loss? A. He said he would pay $5,000, whether we lost or gained, and he said that he would pay $1,000 more if we lost more than we expected. Q. How did he say he would pay the $5,000, in cash, or how? A. He said that he would give us his personal check."

On cross-examination the witness stated, among other things, that, about sixty days before the Valley

Bank was taken over by the plaintiffs, witness' bank had been requested by the president of the Valley Bank to take over the assets of that bank and liquidate them. Witness made an examination of that bank's assets. Its deposits at that time were approximately three-fourths of a million. After examining a list of the notes and other assets, which he had under consideration for probably a week, witness notified the president of the Valley Bank that he did not care to liquidate that bank. It was a private matter, and witness did not discuss it with any one. Just after the meeting on December 22, 1926, there appeared on December 23, 1926, in the Southwest American, a daily newspaper published in Fort Smith, a statement which reads in part as follows:

"W. J. Echols, president of the Merchants' National Bank, in a statement in which A. N. Sicard, head of the First National Bank, concurred, declared Wednesday night: 'There has been another serious defalcation in the Arkansas Valley Bank, in the clerical department. This, coming on the heels of the previous defalcation, caused the directors to realize that they could not hope to continue the bank with the full confidence of the public. Realizing that a run would be made on the Arkansas Valley Bank, its directors called the bankers of Fort Smith into consultation with them as to the means of having the depositors paid in full, if possible. In the event this could not be done, it was felt that it would be necessary to close the bank at once, in order that no preference might be shown depositors who might call first for their money. After several days of consultation with the First and Merchants' National Banks it was arranged to pay the depositors in full. John C. Gardner was chosen to represent the First and Merchants' National Banks and take charge of the Arkansas Valley Bank and pay the depositors as promptly as their accounts could be balanced. The City National Bank contributed a fund of $5,000 in order to minimize to this extent any possible loss that the First and Merchants' National Banks might

sustain in taking over the assets of the Arkansas Valley Bank and in paying its depositors. The directors of the Arkansas Valley Bank contributed a liberal fund in cash to make it possible for the First and Merchants' Banks' to liquidate its affairs. The leading business men of Fort Smith have also agreed to hold the First and Merchants' Banks harmless to the extent of $40,000 in the event they sustain any loss in excess of $25,000.' "

Witness stated that the statement was erroneous in that it stated that the City National Bank had contributed $5,000; that it had not contributed $5,000; that Mr. Nakdimen agreed to. The statement in the newspaper was not written out and signed by witness. Witness was just talking to a reporter. After the controversy arose, witness wrote out a corrected statement and had it published.

Mr. A. N. Sicard testified for the plaintiffs. We will not set out his testimony in detail, as it corroborates substantially the testimony of the witness Echols. In regard to what Nakdimen said on the night that he and Echols and witness were consulting about the liquidation of the Valley Bank, witness testified as follows: "Nakdimen stated that if we would take the Arkansas Valley Bank over and pay the depositors, he would pay $5,000, and would give his personal check. He stated that he wanted his liability fixed. The amount was not fixed. Of course, the $5,000 was supposed to cover any loss that might be sustained."

Witness was asked the following question: "If you sustained any loss, he would give it—that is right? A. Yes sir."

Speaking of the meeting of witness, Echols, and the citizens held in the Arkansas Valley Trust Company's building on December 21, 1926, witness further testified as follows: "We felt that we would be willing to stand a loss of $25,000, including the $5,000 we expected to get from Mr. Nakdimen, if the citizens would raise a bond of $40,000 to protect us in that amount, guaranteeing us

against any further loss, and at that meeting that bond was signed up, and Mr. Gardner was selected as liquidating agent and placed in charge of the bank the next morning, and there was placed to his credit by the First and Merchants' National Banks the sum of $750,000 to pay off the depositors of the Arkansas Valley Bank."

On cross-examination the witness stated that the Arkansas Valley Bank at that time had about $750,000 in deposits. The liquidating agent balanced the accounts of the depositors and gave them a check on witness' bank or the Merchants' Bank for the money, which they deposited wherever they pleased.

During the examination of this witness he identified a letter dated December 28, 1926, addressed to the First National and the Merchants' National Banks, which the plaintiffs offered in evidence. The attorney for the defendant objected to its introduction, whereupon one of the attorneys for the plaintiffs stated: "The purpose of it is to show that the two banks were not to profit by the conveyance made to them, but were assuming a loss, if there were any, and not to profit by the arrangement made, and to show how it is to be held." The court would not permit the letter to be introduced in evidence, but allowed the witness, over the objection of appellant, to testify that the agreement between the Valley Bank and the First and Merchants' National Banks, with reference to the conveyance of the assets of the Valley Bank, was as follows: "After the debts of the bank were paid, any remaining assets were to be turned back to the directors, first, who had advanced $70,000, and, should there be any left over, it was to go to the stockholders of the Arkansas Valley Bank."

Six other witnesses testified for the plaintiffs. Their testimony corroborates substantially the testimony of Echols concerning the statement made by Echols at the meeting of the citizens held at the building of the Arkansas Valley Trust Company, to the effect that he stated openly at that meeting to the persons there assembled,

at which meeting I. H. Nakdimen was present, that, to prevent the closing of the Arkansas Valley Bank the next morning, the Merchants' and First National Banks had agreed that they would lose $25,000, including the $5,000 that Nakdimen would give, before the citizens would be called upon to give anything; that the arrangement was that the Merchants' and First National Banks were to give $10,000 each and Mr. Nakdimen would give $5,000 to have the Merchants' and First National Banks take over the assets and pay the depositors and all valid debts of the Valley Bank; that Echols, in making a statement, turned to Nakdimen and asked him to join with them in taking over the Valley Bank, and that he declined to do so, stating that he wanted to know what his actual loss would be. One of the witnesses, who went the next morning to obtain the signature of Nakdimen to the bond, testified that he told Nakdimen that Echols had told him that Nakdimen would give $5,000, win or lose; that in reply Nakdimen said, "I did, and would have, but when they called the public in to take care of their losses, I didn't feel obligated to do so." Witness then said to Nakdimen, "You should have spoken up," whereupon Nakdimen replied, "I did not say anything—they did all the talking. It was not my place to talk—it was their meeting."

Another witness testified that Echols stated that the two banks were to lose $10,000 each before the bond was called on for anything. Echols stated that Nakdimen proposed to pay $5,000 to the other banks to save the failure and for taking the Valley Bank over; that the two other banks were to stand a loss of $10,000 each if there was that much, before the bond would come in, but that Echols did not say that they gave anything. Witness did not hear all that was said at the meeting.

Another witness stated that Echols said at the meeting that any loss, after the bond had been exhausted, would be borne by the Merchants' and First National Banks. Another one of the witnesses stated that Echols

stated that Nakdimen had agreed to pay $5,000 if the First National Bank would take over the assets of the bank, and he further stated that the First National and Merchants' National Banks were willing to lose $10,000 each, and not over that, because, in his opinion, the loss would be more. This witness further stated that, shortly after the above transaction, he had a conversation with Nakdimen, in a Pullman coming from St. Louis, in which conversation Nakdimen stated that he had not agreed to pay the $5,000 unless there was a real loss in the transaction. Witness asked Nakdimen why he did not correct Echols at the meeting, and Nakdimen replied that he didn't wish to break up the meeting.

Another witness testified that Echols stated at the meeting that the City National Bank did not want to join with the other two banks in the liquidation of the Arkansas Valley Bank. This witness was asked whether Echols said anything about what Nakdimen personally had agreed to do, and the witness answered, "Well, as I remember it, the First National and the Merchants' National Banks were to pay $10,000 each and Mr. Nakdimen $5,000." Witness did not know whether this proposition was conditioned on loss or not.

Fagan Bourland testified as a witness for the defendant. He was present at the meeting of the citizens at the building of the Arkansas Valley Trust Company. He did not remember who made the statement, but was of the opinion that it was Mr. Echols, who stated that the stockholders were to put up $70,000 and the three banks were to put up $25,000. The two larger banks, the First National and the Merchants' National, were to put up $10,000 each and the City National $5,000. That this $25,000 from the banks was to be used to indemnify the depositors after the $70,000 subscribed by the stockholders was exhausted. Witness was under the impression at the meeting that the three banks together were to take over the assets and pay the depositors of the Arkansas Valley Bank, and stand a loss.

I. H. Nakdimen, the defendant, testified that he was president of the City National Bank; that he was called by Branson, president of the Arkansas Valley Bank, to a meeting at which the affairs of the Arkansas Valley Bank were discussed. He was shown a piece of paper purporting to be a confession of the bookkeeper. After reading it, he remarked that $30,000 would not break the bank. He was told that the bookkeeper had a bond of $25,000 and had $4,000 in the bank, and witness stated that that was enought to pay the $30,000. Witness said to Echols, "Why don't you buy it?" and Echols said to him, "Why don't you buy it?" Witness finally said to Echols that he would give $3,000 towards the loss. When Echols asked witness if witness would buy it, he replied, "No." Then Sicard asked Echols, "Why don't you buy it?" Echols asked Sicard, "Would you give $20,000?" Sicard replied, "No, I will give $10,000," whereupon witness said, "I will give $5,000." Sicard asked Echols if he would be included in the $25,000, and Echols said, "No." Witness offered to give $20,000 for the deposits, but his offer was ignored. Witness declined to take any of the notes or paper. Finally, after further discussion and conversation, witness said, "I will give $5,000," meaning that much toward the loss. Witness' offer was rejected. Witness further testified that he was present at the later meeting, Wednesday night, at which Echols made a statement. Witness did not like the statement, but did not contradict Echols, because witness was afraid that he would get in a row and that the Arkansas Valley Bank would be closed. The statement was made that the City National Bank would give $5,000, and witness stated that the bank would give $5,000 and that he would give personally an additional $1,000. Witness did not refuse to pay the $5,000 only until they showed witness a loss. At the meeting Echols and Sicard were representing their respective banks and witness was representing the City National Bank. Witness stated at the meeting that he was willing to give $5,000, not

for himself, but for the bank. He denied that he had told Echols that he would pay $5,000 personally, whether there was a loss or not.

On cross-examination witness stated that at the first meeting, speaking for the City National Bank, he refused to go in with the First and Merchants' National Banks to pay off the depositors of the Valley Bank. On redirect examination witness stated that he didn't know who had prepared the contracts and bond, but he signed the bond the next day, or several days thereafter.

At the close of the testimony the plaintiffs asked the court to instruct the jury as follows:

"1. In this case you are called upon to decide one single issue, which is, did I. H. Nakdimen agree to pay $5,000 to the Merchants' National Bank and the First National Bank, in consideration of these two banks agreeing to pay in full the deposits and other valid debts of the Arkansas Valley Bank? If you find from a preponderance of the evidence that I. H. Nakdimen made such an agreement, then your verdict will be for the plaintiff for $5,000, with interest on such amount at six per cent. from the date that demand was made upon him for payment. If you find that I. H. Nakdimen made no such agreement, your verdict will be for the defendant.

"2. The written agreement of the First National Bank and Merchants' Bank to pay the valid debts of the Arkansas Valley Bank was sufficient consideration to support a promise of I. H. Nakdimen to pay $5,000, if you find that I. H. Nakdimen made such promise."

The defendant objected generally to the giving of each of the above prayers for instructions, and excepted to the ruling of the court granting same. No specific objection or exception was saved.

The court granted the following prayers for instruction at the instance of the defendant:

"1. If the defendant, I. H. Nakdimen, was not representing himself personally in any negotiations relating to the taking over of the Arkansas Valley Bank,

and if his negotiations were made for and on behalf of the City National Bank, the jury will find a verdict for the defendant."

"6. If the plaintiffs and the defendant entered into a contract whereby the defendant agreed to pay to the plaintiffs the sum of $5,000, and if the agreement was that said sum was to be paid the plaintiffs only in the event of loss to the plaintiffs by taking over the Arkansas Valley Bank, then and in that event the jury will find for the defendant.

"6½. In order to make a contract binding there must be a consideration. To be a consideration, there must be a benefit to the party promising or a loss or detriment to the party to whom the promise is made."

The court refused to grant the following prayers for instruction presented by the defendant:

"1. The court instructs the jury to find the issues for the defendant."

"3. If the jury find that the defendant, I. H. Nakdimen, was not representing the City National Bank in said negotiations, and was representing himself, then and in that event the jury will consider the instructions given below in order to ascertain whether the defendant is liable to the plaintiffs or not.

"4. If the plaintiffs were contemplating the taking over of the Arkansas Valley Bank, and if the representatives of the plaintiffs, having authority so to do, entered into negotiations with I. H. Nakdimen, and if the plaintiffs and the defendant entered into a contract whereby the defendant agreed to pay the plaintiffs the sum of $5,000, and if said contract was not in writing, the jury will find for the defendant.

"5. In order to make a contract binding, there must be a consideration. To be a consideration, there must be a benefit to the party promising or a loss or detriment to the party to whom the promise is made. Benefit as thus employed means that the promisor has, in return for his promise, acquired some legal right to

which he would not otherwise have been entitled, and the word 'detriment' means that the promisee has, in return for the promise, forborne some legal right which he otherwise would have been entitled to exercise. Unless there was a consideration existing in this alleged contract as thus defined, the jury will find for the defendant."

"7. If the plaintiffs and the defendant entered into an agreement such as that set forth in the complaint, and if in that agreement the defendant undertook and agreed with plaintiffs to pay to them the sum of $5,000, whether they suffered a loss or not, and if the consideration for that agreement on the part of the defendant was a benefit, if there was one, resulting to the defendant, the same as to all other citizens in Fort Smith, arising from the taking over of the Arkansas Valley Bank and thus avoiding the failure of that bank, the court instructs the jury that such benefit, even if it existed to the defendant, is not a benefit within the meaning of the law which may support a contract, and in that event the jury will find for the defendant.

"8. A benefit such as will support a contract must be either a benefit to the defendant or a detriment to the plaintiffs. The fact, if it be a fact, that plaintiffs took over the Arkansas Valley Bank, is not alone sufficient to be a detriment within the meaning of the law, and if the plaintiffs forbore no legal right or gave up no legal right, then the said taking over would not be such a detriment as will support a contract."

The defendant duly excepted to the ruling of the court in refusing to grant each of the above prayers for instructions.

The jury returned a verdict in favor of the plaintiffs in the sum of $5,000, with interest from the date of demand. The court rendered judgment in favor of the plaintiffs against the defendant in the sum of $5,250, from which is this appeal.

1. The appellant contends that the complaint does not state facts sufficient to constitute a cause of action. There was no separate demurrer by the appellant to the allegations of the complaint, but in his answer the appellant denied that there were "any covenants of any kind between the plaintiffs herein and this defendant." Learned counsel for the appellant contend that there were no facts alleged in the complaint showing a return promise made by the plaintiffs to the defendant. Therefore they insist that appellant has not waived the objection that the complaint does not state facts sufficient to constitute a cause of action, although there was no separate demurrer and no demurrer embodied in the appellant's answer to the allegations of the complaint.

We agree with counsel that, if the allegations of the complaint do not state facts sufficient to constitute a cause of action, the appellant has not waived such objection by failing to file a separate demurrer or by failing to demur to the complaint in his answer. Under § 1189 of C. & M. Digest one of the grounds of demurrer is "that the complaint does not state facts sufficient to constitute a cause of action;" and § 1192, C. & M. Digest, provides that "when any of the matters enumerated in § 1189 do not appear upon the face of the complaint, the objection may be taken by answer. If no such objection is taken, either by demurrer or answer, the defendant shall be deemed to have waived same, except only * * * the objection that the complaint does not state facts sufficient to constitute a cause of action." As we have stated above, the appellant in his answer denied that there were any covenants between the plaintiff herein and this defendant. Therefore, if counsel be correct in their contention that the complaint does not allege any facts sufficient to show a return promise made by the appellees to the appellant in consideration of appellant's promise to pay them $5,000, it is certain that the appellant has not waived the defense of failure upon the part of the appellees to state facts constituting a cause of action in their com-

plaint. Because he has specifically raised that issue in his answer, and, even if he had not so raised it, such issue is not waived under the express provisions of the statute *supra.*

But, after a careful consideration of the allegations of the complaint, we cannot concur in the view of counsel for the appellant, that the allegations of the complaint do not state facts sufficient to show that the appellees made a return promise to the appellant in consideration of his promise to pay them $5,000. Recurring to the allegations of the complaint, without again setting them out in detail, it will be observed that, after setting forth that the appellant offered and agreed that he would pay the appellees $5,000 if appellees would agree to pay the depositors and other valid debts of the Arkansas Valley Bank, the complaint further sets forth that the "First National Bank and the Merchants' National Bank accepted the offer so made by the said I. H. Nakdimen, * * * and the First National Bank and the Merchants' National Bank, for and in consideration of the promise and agreement made by the said I. H. Nakdimen, *agreed to pay all of the depositors of said Arkansas Valley Bank in full and agreed to assume and pay all other valid debts, if any, of said Arkansas Valley Bank;* that the First National Bank and the Merchants' National Bank have performed each and every one of the covenants of their contract made with the said I. H. Nakdimen on their part to be performed."

It occurs to us that the above allegations not only allege facts sufficient to show a return promise on the part of the appellees to do certain acts in consideration of appellant's promise, but the allegations are sufficient to show that the appellees had fulfilled the promise made by them to the appellant. Assuming, as they do, that the allegations of the complaint do not state facts sufficient to show a return promise on the part of the appellees for the offer or promise on the part of appellant to pay to them the sum of $5,000 upon certain conditions as a con-

sideration of appellant's promies or offer, counsel for appellant cite us to a number of our cases. Under the doctrine of these cases they insist there was no mutuality of obligation and no consideration to support the promise of appellant upon which this action was founded. See *Eustis* v. *Meytrott,* 100 Ark. 510, 140 S. W. 590; *Elmore* v. *Snow,* 102 Ark. 592, 146 S. W. 476; *Feldman* v. *Fox,* 112 Ark. 223, 164 S. W. 766; *Baucum* v. *Waters,* 125 Ark. 305, 188 S. W. 802. But, since we have concluded that the complaint does allege facts sufficient to show a return promise on the part of the appellees for the promise made by the appellant and as a consideration for his promise, it follows that the above authorities have no application.

Counsel urge that the case of *Eustis* v. *Meytrott, supra,* is controlling on the question under consideration. That case was determined on general demurrer by the defendant to the plaintiff's complaint. The complaint in that case set forth at great length the promise of the defendant upon which the action was instituted and the circumstances under which the promise was made, and the acts performed by the plaintiff, superinduced, as he alleged, by the promise of the defendant. But it is not alleged in the complaint *that the plaintiff accepted the offer of the defendant; nor is it alleged that the plaintiff, in consideration of the promise and agreement of the defendant, agreed in return to do anything in consideration for such promise on the part of the defendant.* In the case at bar, the complaint, after setting forth the promise of the defendant, alleged that "the plaintiff accepted the offer so made by the said I. H. Nakdimen, and, * * * in consideration of the promise and agreement made by the said I. H. Nakdimen, agreed to pay all the depositors of the said Arkansas Valley Bank in full, and agreed to assume and pay all other valid debts," etc.

The case of *Baucum* v. *Waters, supra,* was determined on the facts, which showed no mutuality of obligation. Likewise the other cases mentioned above are

wholly differentiated from the case at bar on the facts, and we need not review them.

We are dealing now with the sufficiency of the allegations of the complaint to constitute a cause of action. The appellees set out in their complaint the promise of appellant, stating the facts constituting such promise, and alleged that such promise was made upon the condition or consideration that appellees would perform certain acts, and set forth what those certain acts were, and further alleged that the appellees accepted the promise of appellants and agreed on their part to perform those acts, and had performed the same. Appellees thus stated facts showing a contract between the appellees and the appellant sufficient, if proved, and if violated by appellant, to constitute a cause of action in favor of appellees. To be sure, the condition set forth in the complaint to be performed by the appellees as the consideration for the promise on the part of appellant, is a condition precedent which must be performed by the appellees before their cause of action against the appellant accrued. In their complaint the appellees set up the condition, and alleged that "they have performed each and every one of the covenants of their contract made with the said I. H. Nakdimen on their part to be performed." This was sufficient. It was not essential that they set forth the specific acts which constitute a performance of the condition precedent to recovery on their part. These, where performance was controverted, were matters of proof. Section 1227, C. & M. Digest; *Kirshman* v. *Tuffli Bros.*, 92 Ark. 111, 122 S. W. 239.

2. One of the grounds urged for reversal is "that the agreement of the plaintiff banks to lose $10,000 each was *ultra vires*, illegal, and absolutely void, and cannot be a consideration to support any promise of I. H. Nakdimen." Section 5136, ch. 1, p. 993, Revised Statutes of the U. S., pertaining to the organization and powers of national banks, among other things provides;

"It (a national bank) shall have power: 7. To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title."

It is thoroughly settled that a national bank, under the above statute, has no authority, either in express terms or by implication, to lend its credit to a third person solely for his benefit, by becoming a surety, indorser, or guarantor for him. Such acts are *ultra vires* and void, and no rights grow out of them that will bind such banks by estoppel. *Merchants' Bank of Valdosta* v. *Baird,* 160 Fed. 642; *Farmers' & Miners' Bank* v. *Bluefield National Bank,* 11 Fed. (2d.) 83; *Commercial National Bank* v. *Pierrie,* 82 Fed. 799; *Bowen* v. *Needles National Bank,* 87 Fed. 430; *Id.* 94 Fed. 925; *Seligman* v. *Charlottesville National Bank,* 21 Federal Cases, No. 12642, p. 1036. Counsel for appellant cite and rely upon the above doctrine announced in these cases. See also *First National Bank of Leslie* v. *Stokes,* 134 Ark. 368, 373, 203 S. W. 1026, and cases there cited. But the facts of this record, as shown by the testimony and as the jury might have found, and did find, them, make the doctrine as above announced wholly inapplicable.

It would unduly extend this opinion to discuss the facts in detail, which have been already sufficiently set forth. To sustain their contention that the contract of the appellees with the Valley Bank, which was the consideration for, and out of which arose, the contract between the appellees and the appellant, was *ultra vires*, counsel for appellant assume and argue that the uncontradicted testimony shows that the appellees agreed unequivocally to lose the sum of $25,000 in taking over the assets and

paying the depositors and valid debts of the Arkansas Valley Bank before Nakdimen would, or could, be called on by them to comply with his promise to pay them $5,000. It is unquestionably true that, when the appellees and the appellant responded to the S. O. S. call of the president of the Valley Bank and met in consultation concerning its affairs, all contemplated that there might be a loss to the bank or banks taking over the assets of the Valley Bank and discharging its obligations in a sum reaching from fifty thousand to one hundred and fifty thousand dollars. But no one knew certainly what the amount of the loss, if any, would be. To prevent the far-reaching, disastrous and embarrassing consequences which the failure of a large banking institution necessarily causes in the financial and business life of any community where the same is located, the appellees and the appellant expressed a willingness, each of them, to incur a loss, if it involved a loss, to take over the assets of the distressed bank and discharge its obligations. The appellees and the appellant did not know absolutely that there would be a loss, or, if a loss, the amount of such loss, but each was willing to contribute something to the one which might assume the risk by taking over the assets of the Valley Bank and paying its depositors and valid debts. These were the general circumstances which superinduced the contract entered into between the appellant and the appellees and the contract between the appellees and the Valley Bank. The appellees did not agree with the appellant that they would certainly lose $25,000 before they called on him to pay the $5,000 which he offered and promised to pay in the event they took over the Valley Bank and furnished the necessary funds to discharge its obligations. They agreed with the appellant that they would take over the assets of the Valley Bank and pay into such bank the money necessary to discharge its obligations and assume the risk of whatever loss, if any, might be involved in the transaction. The testimony, in its final analysis, justified the jury in

finding that the appellant, in consideration that the appellees would put up their money and assume such risk, and thus prevent the threatened disaster to the whole business community, promised that he would pay to them the sum of $5,000. In the circumstances the promise of each to the others was a sufficient consideration, when acted upon by any one of them, to bind the others.

The provisions of the written contract between the appellees and the Valley Bank and the bond do not reveal any *ultra vires* act on the part of the appellees. On the contrary, we are convinced that the provisions of these instruments and the oral testimony adduced on the issues involved show that the contract between the appellees and the Valley Bank was not in violation of the act of Congress *supra,* but was one which the appellees were fully authorized to make in the exercise of the ordinary powers of a banking corporation under the Federal statute.

The doctrine applicable to the facts of this record is announced in the case of *Schofield* v. *National Bank,* 97 Fed. 282, and expressed in syl. No. 3, as follows:

"A contract by a national bank to assume and pay the liabilities of another bank in consideration of the transfer to it by the other bank of its office furniture and lease and its cash and cash assets, and the further assignment to a trustee for its benefit of bills receivable and securities, is not *ultra vires,* but is within its powers conferred by statute to conduct a general banking business." See also *George* v. *Wallace,* 135 Fed. 286; *Wyman* v. *Wallace,* 201 U. S. 230, 26 S. Ct. 495.

3. What we have already stated shows that the jury were justified in finding that there was a consideration for the contract and a performance thereof on the part of the appellees, inasmuch as the testimony showed that the appellees had performed their part of the contract by paying the money to the Valley Bank necessary to pay its depositors and valid debts. The appellees thus

discharged their promise to the appellant, which furnished the consideration moving from the appellees to the appellant, and which bound the appellant to perform his promise to the appellees. See *Nothwang* v. *Harrison*, 126 Ark. 552, 191 S. W. 2.

4. We have considered the objections to the rulings of the court in granting and refusing prayers for instructions and in the admission and exclusion of testimony. We do not find any reversible error in these rulings. The issues of fact were submitted under instructions at the instance of the appellees as well as the appellant, which were free from errors prejudicial to the appellant.

Instruction No. 1, given at the instance of the appellees, was erroneous because it directed the jury to return a verdict for the plaintiffs, if they found that the defendant agreed to pay the plaintiffs the sum of $5,000 without reference to whether plaintiffs had performed the contract on their part. But this error was not prejudicial, for the reason that the undisputed evidence proved that plaintiffs, appellees, had performed the contract on their part. The court correctly defined and declared what was necessary to constitute a consideration, and correctly submitted to the jury the issue as to whether the contract contemplated that there should be proved a loss by appellees before they were entitled to recover. The court ruled correctly in refusing appellant's prayers for instructions on his plea of the statute of frauds, because the testimony did not justify the submission of such issue. The undisputed facts proved an original undertaking by appellant to pay appellees $5,000. It was not a collateral agreement on his part to pay the debts of another.

There was testimony to sustain the verdict. On the whole case, we conclude that the issues have been fairly tried and that the judgment is correct. It is therefore affirmed.

FITZHUGH *v.* FIRST NATIONAL BANK OF BATESVILLE.

Opinion delivered May 21, 1928.

Ernest Neill and *S. M. Casey,* for appellant.

Cole & Poindexter, for appellee.

SMITH, J. Appellants filed suit against the First National Bank of Batesville, and for their cause of action alleged the following facts:

They were sureties on the official bond of William J. DeCamp, as sheriff and collector of Independence County. On the 30th day of December, 1926, the accounts of the said DeCamp as collector were being examined and audited by the commissioners of accounts of Independence County, and it appeared certain at the time that the said DeCamp was short in his accounts in a considerable sum, and, as his term of office expired December 31, 1926, it was necessary for him to make some arrangement satisfactory to the county regarding said shortage. At that time DeCamp had not filed his final settlement with the county as collector, and did not have his final report ready to file. The commissioners of accounts, the prosecuting attorney and the county judge required that said DeCamp make some provision that would insure the county in collecting said shortage when the amount thereof was finally determined, and thereupon DeCamp gave to J. A. Kennard, one of the commissioners of accounts, a check signed by him, drawn upon the defendant bank, in blank, payable to the said Kennard, agent for Wm. J. DeCamp, to cover the amount that the said DeCamp might later be found to owe Independence County for or on account as collector of delinquent personal taxes, and assured Kennard that he had the money in the bank to pay said check for such amount as might be inserted therein. That the said Kennard presented said check to the defendant bank and requested it to guarantee the payment of said check when later presented, and the defendant bank thereupon executed to Kennard the following agreement:

"Whereas, Wm. J. DeCamp, sheriff and collector, Independence County, Arkansas, has represented to us that he, as such official, is now due to make settlement of certain delinquent personal taxes collected by him for the years 1924 and 1925, together with other amounts checked

by commissioners of accounts, now in session, and charged against him; and he not having time to make his report and settlement covering same before the close of his term of office, December 31, 1926; and said Wm. J. DeCamp, advising that he had employed J. A. Kennard to make up, report and make settlement with the proper officials authorized to receive and receipt for such sums or amounts as may be found due to be paid by said W. J. DeCamp, as sheriff and collector for said years, and asked that the First National Bank honor his (W. J. DeCamp's) check for the amount filled in by said J. A. Kennard upon blank check given this date to said Kennard bearing signature of said Wm. J. DeCamp, not to exceed $3,500; therefore, as assistance to the carrying out the foregoing request and agreement, we, the First National Bank of Batesville, Arkansas, do hereby agree to honor such check upon presentation and filing with us of a certified copy of such report and settlement, and also the costs of preparing same, check not to exceed $3,500. (Signed) John Q. Wolf, cashier.'

"That the county authorities and plaintiffs, as sureties upon DeCamp's bond, relied upon this signed agreement of the defendant bank that it would pay the check of DeCamp on account of his shortage in any amount not exceeding $3,500, upon presentation of a certified copy of the settlement made up by Kennard, as stated in the agreement, and thereafter, resting secure in the belief that they would not be required to pay anything to the county as sureties of DeCamp, unless the shortage exceeded $3,500, these plaintiffs, sureties, took no steps to protect themselves from such liability and made no effort to obtain any security from the said DeCamp to protect themselves as his bondsmen, which they could and otherwise would have taken.

"That, after the completion of the audit and the amount of the shortage was determined, a judgment was rendered therefor by the county court, and the county judge, on May 10, 1927, caused the check to be presented

to the defendant bank, signed by DeCamp, filled out for $3,500, accompanied by a certified copy of the report and settlement made up by Kennard, as stipulated in the agreement made by the defendant bank, showing an indebtedness due Independence County of more than $3,500 for delinquent personal taxes collected by DeCamp, and demanded payment of the check. The check as presented was dated May 10, 1927, was payable to J. A. Kennard, agent for W. J. DeCamp, and was indorsed "'J. A. Kennard, agent for W. J. DeCamp.' This demand for payment was refused, and the cashier of the bank made the following indorsement on the back of the check: 'Payment stopped by due written notice by W. J. DeCamp.''

Thereafter, on account of the refusal of the bank to pay said check, the plaintiffs, as sureties on DeCamp's official bond, were required to pay to Independence County the sum of $3,530.54, that sum being the amount of the shortage.

Plaintiffs alleged that, by reason of such payment to the county, they became and are subrogated to all the rights and remedies of the county against the bank on account of its agreement and promise to pay the check of DeCamp, as set out above. Wherefore they prayed judgment against the bank for $3,500.

The defendant bank filed a demurrer to the complaint, which was sustained, and, plaintiffs standing on the complaint, the same was dismissed, and this appeal is from that decree.

We think the complaint stated a cause of action, and that the court was in error in sustaining the demurrer. The agreement signed by the bank in regard to the payment of the check was, in legal effect, a certification thereof in a sum not exceeding $3,500, and making the same payable to the holder thereof upon the presentation to the bank of the report of Kennard showing the amount of the shortage.

In the recent case of *Causey* v. *Eiland,* 175 Ark. 929, 1 S. W. (2d.) 1008, it was held that the certification

of a check constitutes a new contract between the holder and the certifying bank, whereby funds of the drawer are, in legal contemplation, withdrawn from his credit and appropriated to the payment of the check, and the bank becomes the debtor of the holder, and absolutely liable to pay the check when presented for payment.

It is true plaintiffs were not mentioned in this agreement, but it is also true that the purpose of the agreement was to pay the shortage of DeCamp in a sum not exceeding $3,500, and the refusal of the bank to perform this agreement made it necessary for the plaintiff sureties to pay this sum, in addition to the excess above it, to discharge their liability as sureties on DeCamp's bond. The county was the beneficiary of this agreement, but it received the benefit thereof when the sureties paid the shortage to the county.

In the case of *Carroll County Bank* v. *Rhodes,* 69 Ark. 43, 63 S. W. 68, it was held that the sureties of a county collector, who paid to the State a sum of money misapplied by the collector to the payment of a debt due by him to a bank, will be subrogated to the State's right of recourse against the bank. To the same effect see also *Boone County Bank* v. *Byrum,* 68 Ark. 71, 56 S. W. 532.

In the case of *Wilson* v. *White,* 82 Ark. 407, 102 S. W. 201, 12 Ann. Cas. 378, a sheriff took a bond as security for a fine and costs in a criminal case which did not conform to the requirements of the statute in that behalf (§ 3278, C. & M. Digest), and it was held that the sheriff was not acquitted of his liability for the fine and costs, as he would have been had the bond taken by him conformed to the statute, and he was required to pay to the county the amount of the fine and costs; but it was also held that, in making this payment, he was not a volunteer, and that he became subrogated to the rights of the county in the bond, and a judgment in favor of the sheriff against the surety on the bond, which was not a statutory bond, because of its failure to conform to the statute, was affirmed.

In the case of *Bank of Midland* v. *Harris,* 114 Ark. 344, 170 S. W. 67, Ann. Cas. 1916B, 1255, it was held (to quote a syllabus) that "the county officer who pays to the county money due the county in the regular course of his settlement with the county, is subrogated to the right of the county against the stockholders of a bank refusing to turn over to him county funds deposited therein."

We conclude therefore that the plaintiffs are entitled to be subrogated to any right the county may have had in this certified check.

Appellee insists that the demurrer was properly sustained for the reason that Independence County was not made a party to this suit. This contention may be answered by saying that appellee filed only a general demurrer, and the statute provides (§ 1190, C. & M. Digest) that the demurrer shall distinctly specify the grounds of objection to the complaint, and, unless it does, it shall be regarded as objecting only that the complaint does not state facts sufficient to constitute a cause of action. *Murphy* v. *Myar,* 95 Ark. 32, 128 S. W. 359, Ann. Cas. 1912A, 573; *Tomlinson Chair Mfg. Co.* v. *Joppa Mattress Co.,* 122 Ark. 566, 184 S. W. 32; *Creamery Package Mfg. Co.* v. *Wilhite,* 149 Ark. 576, 233 S. W. 710.

Appellee also insists that the complaint fails to show any cause of action in favor of the county on the check, for the reason that it was payable to the agent of the drawer, and was therefore, in effect, a check payable to the drawer himself, and also that the complaint does not allege the performance of the conditions under which the bank agreed to honor the check.

We think the allegations of the complaint sufficiently recite facts to make it appear that, although Kennard was the agent of DeCamp, the check was not to be collected for DeCamp's account, other than that the proceeds of the check, when collected, should be applied to the discharge of an obligation for which DeCamp was primarily liable, and in this sense only was the payee the agent of the drawer.

It is also true, as appellee insists, that the check was dated some months later than the agreement; but we think the agreement contemplated this, as the check was to remain unfilled as to amount until the amount of the shortage had been ascertained.

It is true also, as appellee insists, that the check was not payable to the plaintiffs, was not indorsed to them, and was not indorsed by them or by the county; but the agreement did not so contemplate. Kennard was constituted as agent, not only for DeCamp but for all parties concerned, and the agreement contemplated that Kennard should collect the money from the bank on the check and should see to the application of its proceeds.

It is finally insisted that the complaint does not allege that the report of the audit as made by Kennard shows that the cost of the audit had been paid. We are of the opinion that this is an immaterial allegation, as the obligation of the bank was to honor the check for a sum not exceeding $3,500, although a part of that amount was for the cost of the report, and the allegations of the complaint are that the plaintiffs paid on account of the shortage a sum greater than the amount for which the bank had agreed to honor the check.

We conclude therefore that the court was in error in sustaining the demurrer, and the decree will therefore be reversed, and the cause remanded with directions to overrule it.

[redacted]

KIRKPATRICK *v.* AMERICAN RAILWAY EXPRESS COMPANY.

Opinion delivered May 21, 1928.

[redacted]

Tom F. Digby, for appellant.

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

SMITH, J. Appellant brought this suit for damages to compensate an injury which he alleged was sustained

by him through the negligence of a fellow-servant of the defendant express company while he and his fellow-servant were engaged in loading express into a motor truck. His testimony was to the effect that, while he was in a stooping position through placing an express package in the truck, his fellow-servant negligently permitted a rod or shaft of iron, which had been shipped by express and was being placed in the truck for delivery, to strike him across the back. The testimony on the part of the defendant express company was to the effect that appellant had not been struck at all, and that, if appellant was struck, the blow was a slight one, and did not cause the sickness and loss of time of which appellant later complained.

There was a trial before a jury, and a verdict and judgment in favor of the defendant, from which is this appeal.

The instructions given at the trial are not set out in the brief of counsel for appellant, but he does set out an instruction numbered 3, which was given over his objection. This instruction reads as follows:

"You are instructed that the burden of proof in this case is on the plaintiff to establish his right to recover by a preponderance or a greater weight of the evidence. In the beginning of the trial the law assumes that the defendants were not guilty of any negligence with respect to the cause of the alleged injury received by the plaintiff, if you find that he did in fact receive an injury. This presumption attaches and extends throughout the trial in favor of the defendants, unless it is overcome by evidence to the contrary. If you find that the greater weight of the same is in favor of the defendants, or if you find that it is evenly balanced, then in either event your verdict will be for the defendants."

Only a general objection was made to this instruction at the trial, and the objection now urged against it is that appellant, "at the time of his injury, was in a place where he had the right to be, and that this place was safe

until made dangerous by the negligence of the fellow-servant, and the platform from which the piece of shafting was being loaded into the truck was under the exclusive control and management of the defendant, and the accident would not have occurred in the usual and ordinary method of its handling without negligence, and the fact that the accident occurred, if it did occur, would raise the presumption of negligence, and the doctrine of *res ipsa loquitur* applies."

We think counsel is mistaken in the objection made to the instruction, as the doctrine of *res ipsa loquitur* does not apply to the facts of this case. If that doctrine applied here, it would apply in any case where a servant was injured through the negligence of a fellow-servant, and the doctrine has never been so broadly applied.

In the case of *Chiles* v. *Fort Smith Commission Co.*, 139 Ark. 489, 216 S. W. 11, 8 A. L. R. 493, we quoted with approval from the chapter on Negligence in 20 R. C. L., § 156, as follows:

"More precisely, the doctrine *res ipsa loquitur* asserts that, whenever a thing which produced an injury is shown to have been under the control and management of the defendant, and the occurrence is such as, in the ordinary course of events, does not happen if due care has been exercised, the fact of injury itself will be deemed to afford sufficient evidence to support a recovery, in the absence of any explanation by the defendant tending to show that the injury was not due to his want of care. * * * The presumption of negligence herein considered is, of course, a rebuttable presumption. It imports merely that the plaintiff has made out a *prima facie* case which entitles him to a favorable finding unless the defendant introduces evidence to meet and offset its effect. And, of course, where all the facts attending the injury are disclosed by the evidence, and nothing is left to inference, no presumption can be indulged—the doctrine *res ipsa loquitur* has no application."

Here appellant detailed all the circumstances attending his alleged injury, and these, in so far as they tended to show negligence on the part of the fellow-servant, were denied by the latter. There was therefore nothing left to inference, and no presumption could be indulged, and the doctrine *res ipsa loquitur* therefore has no application. Moreover, it is said in the Chiles case, *supra,* that "this doctrine (*res ipsa loquitur*) does not dispense with the requirement that the party who alleges negligence must prove the fact, but relates only to the mode of proving it."

The instruction is in a form not to be approved, as it appears to be argumentative, but that objection was not made to it; but it is not inherently erroneous.

The burden of proof was on the plaintiff to establish his right to recover by a preponderance or greater weight of the evidence, and this burden was on him though the doctrine *res ipsa loquitur* applied, although the application of that doctrine in a proper case might enable him to discharge the burden of proof resting upon the plaintiff. The burden of showing a right to recover rests upon the plaintiff in the whole case, and there can be no recovery unless that burden has been discharged.

Strictly speaking, the instruction makes the burden of showing negligence analogous to the presumption of innocence which attends one accused of crime, and in this respect it is not correct, but this is a defect which should have been raised by a specific objection.

The plaintiff's burden in suits of this character is not that of overcoming a presumption of law, like that of innocence in a criminal trial, but is rather that of establishing affirmatively a state of facts which, if true, warrants the finding that one has been injured through the negligence of another under applicable principles of law governing the particular case, and, if that burden is not discharged, the plaintiff has simply failed to make such a case as the law requires him to make before recovering a judgment for damages.

We conclude, in view of the absence of a specific objection, that the instruction, while objectionable in form, was not prejudicial in fact.

The testimony shows very clearly that, at about the time of plaintiff's alleged injury, he became very ill, and for some months was unable to perform manual labor. But, as we have said, it was the theory of defendant that appellant's illness was not occasioned by his alleged injury.

It appears that appellant carried a policy in the Continental Casualty Company, which insured him against accidental injuries, and which provided certain sick benefits in case of disability through illness. Appellant became ill about the 22d of December, 1925, and it is on this date that he claims to have been injured by the negligence of his fellow-servant. He was compelled to give up his employment, and, having been an enlisted man during the World War, he was admitted as a patient in one of the veterans' hospitals in Oklahoma, where he went for treatment, but, before going there, he had received treatment from local physicians in Stuttgart, the place of his employment by defendant and of his alleged injury.

Appellant presented a claim to the insurance company under his policy, which was not allowed, and he finally employed an attorney to bring a suit on the policy, which was later compromised by the payment of $250. Defendant offered in evidence the complaint filed in that case and the proof submitted to the insurance company in support of the claim for sick benefits. The complaint against the insurance company alleged that the insured became ill and unable to work, and prayed judgment for the amount of the sick benefits, but contained no allegations in regard to an injury, although the policy sued on specifically covered accidental injuries.

The admission of this complaint in evidence is assigned as error. But we think no error was committed in its admission. Appellant admitted that the

filing of the complaint was authorized by him, and was based upon information furnished by him to the attorney who prepared it. As was said in the case of *Taylor* v. *Evans,* 102 Ark. 640, 145 S. W. 564: "It was competent, for the purpose of proving an admission on the part of the plaintiff, and also for the purpose of impeaching him, to read the complaint in evidence, or to prove by him, on cross-examination, that he had made allegations in the original complaint inconsistent with his present contention." See also the recent case of *Greer* v. *Davis, ante,* p. 55, where the authorities on the admissibility of pleadings as declarations against interest or by way of impeachment were considered.

After appellant's discharge from the hospital, he wrote the superintendent of the express company two letters, in which he asked to be reinstated as an employee, in both of which he discussed his physical condition, but he did not refer in either letter to his alleged injury. In one of these letters he wrote, under date of March 17, 1926: "I have improved a bit, and I feel that about the first of April I could do some kind of light work, as I could not say if I will be able to continue to work at truck delivery any more, from what the doctors told me. You can go to the Veterans' Bureau, when my files get there from the hospital, and learn from them more than I can tell you."

After the institution of this suit the defendant took the deposition of R. I. Betty, who was the chief claim adjuster of the insurance company, and that official made exhibits to his deposition the correspondence which the company had with appellant and the reports of the physicians who had attended appellant. In the agreement to take these depositions it was stipulated that "all formality in the taking, transcribing and forwarding of said depositions is hereby waived. The right to except to all evidence adduced for incompetency, irrelevancy and immateriality is expressly reserved."

No exception to these depositions was filed before the trial, as required by §§ 4248 and 4249, C. & M. Digest, but, when they were offered in evidence at the trial, appellant objected to their admission upon the ground that "the evidence in the deposition is irrelevant, collateral to the issues, and immaterial."

No objection was made to the exhibits to Betty's deposition upon the ground that they contained hearsay testimony, and much of the testimony was not irrelevant, collateral to the issues, nor immaterial.

In the case of *Jarvis* v. *Andrews,* 80 Ark. 277, 96 S. W. 1064, it was said: "There was an objection to the reading of the deposition, but that was a general objection to all of it; and if any part of the evidence was admissible, the objection falls." It was there also held (to quote a syllabus), that "a general exception to two depositions is insufficient to point out the objection that one of them contains hearsay testimony."

It must be confessed that the depositions contain hearsay testimony, but that objection was not made. It may also be said that the depositions which contained the reports of the doctors on the condition of appellant and the cause thereof, contained statements which would have been inadmissible as privileged under § 4149, C. & M. Digest, had that right not been waived in the letter to the superintendent of the express company directing that officer to secure this information. Moreover, that objection was not made to the testimony.

Among the exhibits to the deposition of Betty were the claimant's preliminary notices of illness, in which he was required to state in detail the cause and extent of his disability, and in neither did he mention his alleged injury. The reports of the doctors were to the effect that appellant had suffered from influenza, chronic colitis, and stone in the kidney.

There was offered in evidence, over appellant's objection, the draft of the insurance company for $250 in full settlement of all claims against the company for

appellant's illness and consequent loss of time. This document was offered in evidence as a part of the defendant's proof that appellant had made no contention that his alleged injury had anything to do with his illness, thereby contradicting the testimony given by him at the trial. It was not competent for any other purpose, but, inasmuch as the instructions have not been abstracted, it must be conclusively presumed that the instructions given limited the jury's consideration of this document to the only purpose for which it was admissible.

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

S. E. LUX JR. MERCANTILE COMPANY *v.* JONES.

Opinion delivered May 21, 1928.

J. E. Gregson and *John W. Nance,* for appellant.

C. A. Fuller, for appellee.

SMITH, J. Separate suits were brought by appellees against appellant, which were by consent consolidated and tried before the court, without the intervention of a jury, as a single suit. The trial court made an elaborate finding of fact, which states the issues, and from which we copy as follows:

The S. E. Lux Jr. Mercantile Company operates a mercantile business in Topeka, Kansas, and in that connection buys and sells canned tomatoes in carload lots. On March 30, 1927, the mercantile company purchased 5,000 cases of canned tomatoes from H. H. Wampler, trading as the Fort Smith Canning Company, by a contract in writing, to be delivered when directed, but within ninety days, and paid therefor by an acceptance draft, which was duly accepted on April 9, 1927, and later paid; that, in order to perform his contract with the mercantile company, Wampler commenced negotiations with the plaintiffs about May 1, 1927, for 3,000 cases of tomatoes, the same to be paid for before delivery; that on May 14, 1927, P. F. Schilling, the secretary and treasurer of the mercantile company, went to Fort Smith to ascertain why the Fort Smith Canning Company had not made delivery of the tomatoes, and there learned that the latter company had no tomatoes for shipment. Schilling then visited the plaintiffs to see about tomatoes which Wampler claimed to have bought from plaintiffs for shipment to the mercantile company, and was informed by the plaintiffs that no tomatoes would be sold and delivered to Wampler until payment therefor was first made. The following Sunday Wampler appeared, and gave plaintiffs checks covering the purchase price of the tomatoes, but plaintiffs advised Wampler that the tomatoes could not be shipped until the checks had been paid.

Plaintiffs had been furnished labels which the mercantile company desired placed on the tomatoes, and which had been placed on them, and the tomatoes were

loaded in cars of the Missouri & North Arkansas Railroad Company, but it was agreed that bills of lading would not be taken out until the checks were paid or it was ascertained that they would be paid.

After giving the checks to plaintiffs, Wampler, without the knowledge or consent of the plaintiffs, obtained bills of lading, and ordered the tomatoes shipped. The following day, which was Monday, plaintiffs telephoned the bank on which Wampler's checks were drawn, and were advised by the bank that the checks were worthless. Plaintiffs thereupon went to the railroad station agent and advised him that the tomatoes must not be shipped, and were informed by the agent that the tomatoes had already been shipped and bills of lading issued therefor. A representative of the plaintiffs hurriedly consulted an attorney, who brought separate attachment suits for each of the plaintiffs, and the cars containing the tomatoes were located at Eureka Junction, and the attachments were levied upon them and the cars were reshipped to Berryville, where they had been loaded, and were there unloaded.

Before the cases were called for trial the plaintiffs amended their complaints, and recited in detail the facts above summarized, and alleged that the possession of the tomatoes had been fraudulently obtained from them. They alleged their ownership of the tomatoes, and prayed judgment for the possession thereof. As thus amended the complaint contained two counts, one in attachment and the other in replevin. A demurrer to the first count was filed and sustained upon the ground that the tomatoes at the time of the institution of the suit were in transit in interstate commerce under through bills of lading.

The judgment of the court also found the fact to be that Schilling had attempted to persuade plaintiffs to consent to the shipment of the tomatoes before the issuance of the bills of lading, upon the representation that Wampler would pay, but that plaintiffs had declined to

consent to the shipment until they were first fully paid for their tomatoes. The court expressly found the fact to be that the consignee, the mercantile company, was not an innocent purchaser of the tomatoes.

The testimony fully sustained all the findings of fact herein stated, and, in view of the fact that the mercantile company paid plaintiffs nothing for the tomatoes, but received them in consideration of advances previously made to Wampler, it was not an innocent purchaser of the tomatoes. *Hamilton* v. *Rankin,* 108 Ark. 552, 158 S. W. 496.

The court further found that the bills of lading issued by the railroad company, which were produced at the trial, were returned to it.

Judgment was rendered by the court in favor of the plaintiffs for the possession of the tomatoes, and from this judgment only the mercantile company has appealed.

For the reversal of the judgment of the court below it is earnestly insisted that by attaching the tomatoes the plaintiffs had ratified the sale thereof, and could not later amend their complaint to sue in replevin, although it had been agreed that the title to the tomatoes should not pass until they were fully paid for.

Appellant is correct in its contention that a vendor who has made a conditional sale, by which the title to the property sold is reserved until the purchase price has been fully paid, may waive the reservation of the title and sue for the purchase price, and, when this election has been deliberately made, he cannot thereafter reassert his title. *Baker* v. *Brown Shoe Co.,* 78 Ark. 501, 95 S. W. 808. We are of the opinion, however, that there was no such election in this case, because, before the trial, the plaintiffs amended their complaint and alleged their title to the tomatoes and their right to the possession thereof, and the cause was tried upon that issue. Under the cause tried by the court the plaintiffs did not pray for judgment for the amount of the purchase money.

It was shown that, when the attorney who prepared the original complaints was more fully advised as to the facts, he amended the complaints and prayed for the recovery of the possession of the tomatoes. The demurrer to the original complaint was sustained, and no objection was or is made to that action.

In legal effect the suit in attachment was abated and one in replevin was substituted.

In the case of *Craig* v. *Meriwether,* 84 Ark. 298, 105 S. W. 585, it was said:

"Nor were appellees estopped, on account of having instituted a suit at law against Law and Bunn, to seek a foreclosure in equity. That was not assuming an inconsistent position. They had the right to sue at law on the notes, without waiving their mortgage lien. *Whitmore* v. *Tatum,* 54 Ark. 457, 16 S. W. 198; *Rice* v. *Wilburn,* 31 Ark. 108. It is only where one of two or more inconsistent remedies is pursued that the election to pursue the one is an abandonment of the other. Besides, when appellees instituted the suit at law they did so in ignorance of a material fact concerning the matter, viz., that there had been no appraisement of the land. They were not bound by any election made in ignorance of material facts. *White* v. *Beal & Fletcher Gro. Co.,* 65 Ark. 278, 45 S. W. 1060; *Dudley E. Jones Co.* v. *Daniel,* 67 Ark. 206, 53 S. W. 890."

In the chapter on Sales, in 23 R. C. L., § 211, page 1388, it is said:

"The acceptance of the buyer's check is not regarded as payment, but only as conditional payment, and, if the check is dishonored on due presentation, the seller's right to reclaim the property is not lost. It has been held that the fact that the seller, on the dishonor of a check so given, improvidently sues out an attachment against the buyer, such proceeding, however, being promptly dismissed without the accrual of any benefit to the seller or injury to the buyer, will not constitute such an election of remedies as will preclude him from reclaiming possession."

See also chapter on Election of Remedies, in 20 C. J., § 26, page 35; *Belding* v. *Whittington,* 154 Ark. 561, 243 S. W. 808, 26 A. L. R. 107.

By § 1077, C. & M. Digest, it is provided that "the plaintiff may strike from his complaint any cause of action at any time before the final submission of the case to the jury or to the court, where the trial is by the court."

The portion of the complaint praying judgment for the debt was stricken out before the final submission of the cause, and we think there was no such election to sue for the purchase price as precluded the plaintiffs from praying judgment for the possession of the tomatoes.

It must be remembered that our Code of Civil Procedure, as interpreted by this court, is most liberal in the matter of permitting such amendments of pleadings as are necessary to present the questions in issue for submission on their merits.

It is finally insisted that neither a suit in attachment nor one in replevin would lie, because, at the time of the institution of the suit, the tomatoes were in transit in interstate commerce, under bills of lading covering a through shipment. But it will be remembered that this shipment was unauthorized, and was wrongful. The consignor had no authority to make the shipment, and the consignee had no right to the possession of the goods in transit. The true owners of the tomatoes were entitled to retake them wherever they found them. No right existed on the part of the consignor or the consignee to demand that the wrongful shipment be consummated. The case made by the pleadings as submitted to the court was that of the true owners of property seeking to recover the possession thereof from one who, through the fraud of another, had obtained the possession thereof.

By § 8604, U. S. Compiled Statutes 1916 (vol. 8, title "Interstate and Foreign Commerce," p. 9316), it is provided that: "If goods are delivered to a carrier by the owner, or by a person whose act in conveying the title

to them to a purchaser for value in good faith would bind the owner, and an order bill is issued for them, they cannot thereafter, while in the possession of the carrier, be attached by garnishment or otherwise, or be levied upon under an execution, unless the bill be first surrendered to the carrier or its negotiation enjoined. The carrier shall in no such case be compelled to deliver the actual possession of the goods until the bill is surrendered to him or impounded by the court."

It is insisted that under this statute the tomatoes were not subject to seizure under either the writ of attachment or the order of delivery. This statute does not apply, however, for the reason that the goods were not delivered to the carrier by the owner nor by a person whose act in conveying the title to them to a purchaser for value in good faith would bind the owner. The consignor was without authority to ship and the consignee was without authority to receive. Neither acted for the owner, and both were without authority to do so.

The judgment of the court below appears to be correct, and it is therefore affirmed.

POLLOCK *v.* HAMM.

Opinion delivered May 21, 1928.

Daily & Woods, for appellant.

Pryor, Miles & Pryor, for appellee.

HUMPHREYS, J. Appellee, a young woman twenty-six years of age, and an employee of the First National Bank, while on her way to lunch was run over and injured at the intersection of North E and 17th Streets, in the city of Fort Smith, by an automobile truck owned

by appellants, which was being driven by a negro, Ike Zackery, while delivering goods for them.

Appellee got off an east-bound street car, when it stopped at the intersection of said streets in a residential portion of the city, and, in accordance with a general custom, passed north in front of the street-car in the direction of her home. This action on her part was contrary to the traffic ordinance of the city, which required pedestrians, after alighting from street cars, to proceed to the right-hand curb of the street. When starting to get off the car, appellee looked west, and, as she alighted, east, to see whether any automobiles were approaching from either direction, but did not observe this truck, or any other.

The testimony introduced by appellee tended to show that, just after she passed beyond the line of the street car, she was struck by the truck, which approached rapidly, without warning, from the east on E Street and on the left or north side of the standing street car, and she was hurled to the gutter.

The testimony introduced by appellants tended to show that the truck slowly approached the street car to the rear and left-hand side thereof, and that appellee passed in front of the street car and east, to a distance of about twenty-five feet, and, while hurriedly crossing Seventeenth Street, between the street-car tracks, sprang in front of and was struck by the truck, which the driver had turned to the south around the street car, in an effort to get on the right-hand or south side of Seventeenth Street. This action on the part of the driver of the truck was contrary to the traffic ordinance of the city, as well as the State traffic law, which prohibited drivers of motor vehicles from overtaking and passing any street car proceeding in the same direction when the street car had stopped and when a traversable portion of the highway existed on the right of said street car, and which restricted the speed at which drivers might drive motor vehicles, and which required them to stop in ten feet in

the rear of street cars when they had stopped, until alighting passengers could reach the adjacent sidewalk.

As a result of the collision appellee was removed to a hospital in an unconscious condition, where she was compelled to remain three or four weeks for treatment. An X-ray examination developed that one of her toes was broken, one of her shoulders slightly fractured, and her pelvis fractured on one side. She also received a number of cuts and bruises. Her hips and thigh were placed in a plaster of paris cast. She suffered a great deal, and still suffers. The result was a tilted pelvis, which caused the shortening of three-fourths of an inch of one limb and the probable interference with or prevention of the normal process of child-bearing.

Appellee brought suit against appellants in the circuit court of Sebastian County, Fort Smith District, to recover damages for the injuries, alleging that she received them on account of the negligent operation of the truck by their driver.

Appellants filed an answer to the complaint, denying negligence on the part of their driver in operating the truck, and interposing the further defense of contributory negligence on the part of appellee.

The cause was submitted upon the issues joined by the pleadings, the testimony adduced by the parties responsive thereto and the instructions of the court, which resulted in a verdict and consequent judgment in favor of appellee for $10,000, from which is this appeal.

Appellants' first contention for a reversal of the judgment is that the verdict was excessive. According to the weight of the evidence, appellee's injury to the pelvis is permanent, the tilted position thereof resulting in a shortening of one of the limbs and producing a condition which may interfere, and probably will, with the normal process of child-bearing. In view of the extent and permanency of the injury, the amount awarded is not excessive.

Appellants' next contention for a reversal of the judgment was the giving of instructions numbers 7, 8 and

9, with reference to violations of the State traffic law, and the refusal to give instruction No. 14 requested by appellants. Instruction No. 7 is as follows:

"You are instructed that, in determining whether or not the driver of the truck was negligent, the law is that the driver of a motor vehicle shall not overtake and pass any street car proceeding in the same direction when the said street car is temporarily at rest, when a traversable portion of the highway exists to the right of said street car."

Instructions numbers 8 and 9 are like No. 7, except that they refer to other violations of the regulatory traffic statutes.

Instruction No. 14, which the court refused to give at appellants' request, is as follows:

"You are instructed that the mere fact that a motor truck or automobile is driven at a greater rate of speed than prescribed by the statute, or that the driver fails to come to a stop behind a standing street car, or that the driver passes to the left instead of to the right of a street car, do not establish negligence as a matter of law, but the violation of such statutory provisions may be considered by the jury only as evidence of negligence."

It is argued that by giving instructions numbers 7, 8 and 9 and refusing to give instruction No. 14, the court, in effect, told the jury that a violation of the State traffic law by a driver of motor vehicles constituted negligence *per se,* whereas the rule is that such violations are merely evidentiary of negligence on the part of such driver. It is true that violations of the State traffic statutes are merely evidentiary of negligence, and not conclusive of the issue. *Mayes* v. *Ritchie Gro. Co., ante* p. 35. We do not, however, interpret the instructions to mean that violations of the traffic law constitute negligence *per se.* Neither one of the instructions told the jury to find for appellee in case appellants' driver violated the law. They merely declare what acts constitute violation of the State traffic law, and told the jury it might consider any violations thereof in determining the issue of negligence.

Appellants offered instruction No. 14 to cure the alleged defect in instructions numbers 7, 8 and 9, given by the court, and, if such defect existed, it would have constituted prejudicial error to refuse to give it, if such error was not cured by some other instruction given by the court. Instruction number 6, given by the court at the request of appellants, was substantially the same as their requested instruction No. 14 refused by the court. Instruction number 6, given by the court, is as follows:

"The jury are instructed that neither the traffic statutes of this State nor the ordinances of the city of Fort Smith which have been introduced in evidence create any civil liability against the defendants, and are only to be considered by the jury in passing upon the question as to whether there was negligence upon the part of either plaintiff or defendants."

Appellants' next contention for a reversal of the judgment is that the court erred in admitting the proof of a general custom violative of the city traffic law, in response to the charge of contributory negligence. If violation of the traffic law constitutes negligence *per se,* it would have been error to admit a general custom in explanation of such violation, but it will be remembered that such violations are only evidentiary and not conclusive of negligence. The custom which the court admitted in evidence was to the effect that pedestrians alighting from street cars at the intersection of North E and Seventeenth Streets, who lived on the north side of E Street, had for many years passed north around the front of east-bound street cars, when they stopped and before they started again. The motorman on the street car from which appellee debarked at the time she was injured testified that such custom had existed for eighteen years.

The custom is also assailed upon the ground that it was unreasonable. Unreasonable as countenancing an act which an ordinarily prudent person would not have done. We cannot say, as a matter of law, that walking in front of a street car which had stopped for the purpose of

allowing its passengers to get on and off was an unreasonable thing to do. There is no special hazard or danger in doing so, especially when the motorman waited for alighting passengers to do that very thing.

The custom is also assailed because it was not shown that the negro driver had knowledge of its existence. The driver had been delivering goods for appellant in the truck for more than five months when the injury occurred. From this fact alone the jury may have reasonably drawn the inference that he was familiar with the custom.

Appellants' last contention for a reversal of the judgment is that, according to the undisputed evidence, appellee failed to exercise ordinary care and caution for her own safety and in failing to do so contributed to her own injury. They call our attention to the following excerpt from the testimony of appellee:

"As I got out, started to get off the street car, I looked to the left to see if there were any cars coming and there was not, and as I stepped down I glanced back to the right and did not see any car, and immediately stepped in front of the street car, going to the other side. * * * That is the last I remember; I walked in front of the street car; I suppose the minute I stepped in front of the street car the truck hit me; I did not see the truck, and don't even remember being hit; that is the last I remember. I came to in the hospital, in the room."

The effect of her statement is that, as she started to step off the car, she looked west, and as she stepped off she looked east to see whether any automobiles were approaching from either direction, and immediately stepped in front and around the car, en route home. We have already stated that the mere act of walking in front of and around a street-car from which one has alighted is not *per se* negligence, even though in violation of the city traffic laws, meaning, of course, to such an one who otherwise exercised ordinary care and caution for his safety. We cannot say as a matter of law that appellee failed to keep the proper lookout. She looked both ways as she started to and was getting off the car, before she

proceeded on her way in accordance with the custom. Under these facts and circumstances it became a question for the jury to say whether she was guilty of contributory negligence.

No error appearing, the judgment is affirmed.

Mr. Justice KIRBY dissents.

Mr. Justice SMITH concurs in the judgment.

MARONEY *v.* STATE.

BULAH *v.* STATE (No. 3453).

STUART *v.* STATE (No. 3463).

Opinion delivered May 21, 1928.

Clary & Ball, for appellant.

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

KIRBY, J. Henry Maroney prosecutes this appeal from a judgment of conviction for the crime of selling intoxicating liquors, fixing his punishment at one year in the State Penitentiary.

Two errors are assigned for the reversal of the judgment, the first that the court erred in the examination of the jurors on their *voir dire,* and the admission of the testimony of Lee as a witness.

The record discloses that the court said to the jury:

"Gentlemen of the jury, it may develop, on the trial of this case, that the State will depend in part, to what extent I just now am not advised, on the testimony of a special agent or detective. Now I am going to ask you if you, any of you, are so prejudiced against a man who engages in that course of transactions to the extent that you would fail or refuse to bring into court a conviction upon that testimony, although you might believe that testimony was true?

"If, gentlemen, it should appear that the State could rely upon the testimony of a detective to secure a conviction in this case, if you should believe, from the testimony of the detective and together with all the other facts and circumstances, that the defendant was guilty, and be convinced of that fact beyond a reasonable doubt, would you find him guilty, notwithstanding that you might resent in some way the manner in which the testimony was secured?

"I judge, gentlemen, by your silence, that you would not let yourselves be prejudiced against the testimony because it was given by a detective, to the extent that you would disregard it, if you believe it to be reasonable and true. I am taking it for granted, gentlemen, that, although you might resent in some degree the manner in which the testimony was secured, yet if, from it and all of the other testimony in the case, you should believe beyond a reasonable doubt that the defendant was guilty, you would find him guilty. Now, if there is any man that could not do that, let me know it."

Objections were made, overruled, and exceptions saved to each of these questions and statements.

Appellant insists that this question was improper, invaded the province of the jury, and precluded them from the exercise of their own judgment in weighing the testimony of the witnesses, and cites the case of *Turner* v. *State,* 171 Ark. 1118, 287 S. W. 400, in support of his position.

It is apparent from the questions of the court that it was only the intention in asking them to ascertain whether any of the jurors were so prejudiced against testimony procured or given by a detective that they would disregard it, even though they believed it to be reasonable and true, and sufficient, with all the other testimony in the case, to convince them beyond a reasonable doubt of the guilt of the defendant. The jury would have no right, of course, to disregard the testimony of any witness if they believed it to be reasonable and true, and the court assumed, from the silence of the jurors questioned, that they would not arbitrarily disregard such testimony, and held them to be qualified jurors.

This was not an invasion by the court of the peculiar province of the jury to determine the weight and effect to be given the evidence of any witness, nor a usurpation of that function. A large measure of jurisdictional discretion must be allowed the trial court in passing upon the qualification of jurors and ascertaining the state of mind of the jurors under examination affecting their competency. *Jackson* v. *State,* 103 Ark. 21, 145 S. W. 559; *Maclin* v. *State,* 44 Ark. 115. None of the jurors, in fact, answered the question propounded by the court, nor were any of them excused by the court as incompetent, and this assignment of error cannot be sustained.

The error complained of in the admission of the testimony, over appellant's objection, of the sheriff, John C. Lee, relative to the whereabouts of witness Harper, cannot be considered, not having been assigned in the motion for a new trial. *Poe* v. *State,* 168 Ark. 167, 269

S. W. 355; *Owens* v. *State,* 169 Ark. 1118, 278 S. W. 3; *Nordin* v. *State,* 143 Ark. 364, 220 S. W. 473.

The judgment is accordingly affirmed.

In 3463, an appeal by O. G. Stuart from a conviction for the sale of intoxicating liquors, the errors assigned are the same as in the Maroney case, which is decisive herein. The error as to the admission of the testimony of Sheriff Lee relative to having received a telegram from Jonesville, La., from witness Harper, stating that he had had a fall and would not be able to attend the trial, in which he had been recognized to appear, was properly assigned in the motion for a new trial herein.

There was no attempt on the part of the sheriff to relate any statement of the absent witness relative to his knowledge or testimony about the transaction, and certainly no prejudice could have resulted from the sheriff's statement that he had received a telegram from him, showing he was out of the jurisdiction and unable to attend the trial, and the judgment is affirmed.

In 3453, an appeal by Ed Bulah from a judgment of conviction for the sale of intoxicating liquors, only two assignments of error are insisted upon for reversal, the one relative to the questioning of the jurors on *voir dire* as to whether they would arbitrarily disregard the testimony of a detective in the case, having been passed upon adversely to the appellant's contention in the Maroney case, *supra,* is controlling herein.

The other assignment being that the court erred in allowing the introduction of incompetent testimony in permitting Glover, a justice of the peace, to testify from memory and without his docket that Ed Bulah had been convicted in his court on the 17th day of May, 1926, upon a plea of guilty for transporting alcoholic liquors, and Ted Gates, a deputy sheriff, to testify that he had arrested the defendant transporting a quantity of liquor at that time.

The record discloses that, in overruling the objection to the testimony of witness Glover, the court admonished the jury that it should receive with caution his testimony,

and not receive it as tending to show whether or not the defendant is guilty of the specific charge of selling liquor for which he was being tried; that the only reason and purpose for which the evidence could be admitted was to show the course of conduct of defendant. No error was committed in the admission of this testimony, under the admonition of the court to the jury limiting its consideration to the particular purpose, and specially cautioning the jury that it could not be considered as tending to show the guilt of the defendant upon the charge upon which he was being tried. See *Taylor* v. *State,* 169 Ark. 589, 276 S. W. 577; *Mobley* v. *State,* 135 Ark. 475, 205 S. W. 827; *Noyes* v. *State,* 161 Ark. 340, 256 S. W. 63; *Tong* v. *State,* 169 Ark. 706, 276 S. W. 1004.

The same direction was given to the jury about the consideration of the testimony of the deputy sheriff relative to the apprehension of the defendant for transporting liquor, for which he pleaded guilty in the justice court, as was given for the consideration of the testimony of witness Glover, who testified about said conviction, and no error was committed in the introduction of said testimony, since the court expressly limited the jury to its consideration for the particular purpose, and admonished it that it could not consider it for any other purpose

There being no prejudicial error in the record, the judgment is affirmed.

ARKANSAS GENERAL UTILITIES COMPANY *v.* CULBREATH.

Opinion delivered May 21, 1928.

Wooldridge & Woolridge and *Danaher & Danaher,* for appellant.

D. A. Bradham, Frank Pace and *Tom W. Campbell,* for appellee.

KIRBY, J., (after stating the facts). It is first urgently insisted that the court erred in giving appellee's requested instruction No. 1, which, it is claimed, entirely ignores the alleged defense of contributory negligence, and concludes by telling the jury the verdict should be for the plaintiff. The appellant objected to the giving of the instruction, and requested the court to modify it,

which it refused to do, by adding, "unless you further find from the evidence that the plaintiff himself was guilty of contributory negligence which caused or contributed to the injury of which he complains."

It is true this court has held an instruction should be complete in itself when it undertakes to tell the jury when the verdict should be rendered for the plaintiff, and that the trial court should not instruct the jury that it must find for the plaintiff or defendant, as the case may be, upon a partial or incomplete statement of the law applicable to the material facts of the case, and that an instruction is inherently erroneous and therefore prejudicial which leaves out of consideration the plaintiff's contributory negligence or assumption of risk, or leaves to the jury the determination of the defendant's conduct as the sole issue for the jury's verdict, concluding with the phrase, "You will find for the plaintiff, or your verdict should be for the plaintiff," because, under the evidence, the conduct of the plaintiff as well as that of the defendant is essential to a proper verdict. *Temple Cotton Oil Co.* v. *Skinner,* 176 Ark. 17, 2 S. W. (2d) 676.

There is no question but that appellant did object to the giving of this instruction and ask the modification thereof, already set out, and that, if the objection was well taken, it would have constituted reversible error, but we do not find the instruction open to the objection urged, since it expressly told the jury it must find "and that plaintiff at the time was in the exercise of ordinary care for his own safety," etc., before they could render a verdict for him. If the appellee was in the exercise of ordinary care for his own safety at the time the injury occurred, he could not, of course, have been guilty of contributory negligence, which only means the failure to exercise such care in the circumstances of the case.

Neither do we find that the court erred in modifying the second instruction requested by appellant by striking out the word "sole" in the connection, "and that such negligence of the defendant was the sole cause of plain-

tiff's injuries." The instruction as given told the jury that the basis or ground of plaintiff's suit was negligence, which could not be presumed from the fact that plaintiff fell into the hole dug by the defendant on Railroad Avenue, and was thereby injured, "but such alleged negligence on the part of the defendant must be shown by a preponderance of the evidence, and that such negligence of the defendant was the cause of plaintiff's injuries." The law does not require that the negligence complained of shall be the sole cause of the injury to entitle a recovery therefor by the injured party.

In *Bennett* v. *Bell,* 176 Ark. 690, 3 S. W. (2d) 996, the court said: "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 produces the injury, but it need not be the sole cause, nor the last or nearest one." See also *Helena Gas Co.* v. *Rogers,* 104 Ark. 59, 147 S. W. 473; *Cahill* v. *Bradford,* 172 Ark. 69, 287 S. W. 595; *Coleman* v. *Gulf Refining Co.,* 172 Ark. 428, 289 S. W. 2.

No error was committed in the refusal to give appellant's requested instruction No. 9, telling the jury that, after it had dug the hole, it was only bound to the exercise of ordinary care to keep it covered and guarded for the protection and safety of those who might be traveling along the said walk or highway, and that if the jury found, in the maintenance of said hole, it exercised such care, it could not be held liable for the plaintiff's injury, since this utterly disregarded any negligence of said company in the digging of the hole in the path or walkway across the traveled street. Then, too, the court told the jury, in appellant's requested instruction No. 1, and appellee's instructions 3, 10 and 11, that the appellant was only bound to the exercise of ordinary care in the construction and maintenance of its line and the making

of holes for the placing of new poles, and the protection of the public against danger of injury therefrom.

The objection to the modification of instruction No. 10 by striking out the word "guarded" in the connection, "maintained a reasonable inspection of said hole to see that it was properly covered or guarded," and inserting the words "or otherwise properly safeguarded," could not have been prejudicial in any event, since it appears to have been more favorable to the position of the defendant as given than in the form in which it was presented, the jury being allowed to find that its duty was discharged if the hole was covered, guarded, well lighted, or inclosed. It is not susceptible to the construction urged by appellant, that the jury would have understood from the words of the amendment that appellant was bound to make the place safe for the users of the highway.

The court having properly instructed the jury relative to the measure of damages in its instruction No. 3, no error was committed in refusing to give appellant's requested instruction No. 12, which limited the recovery of appellee to "such an amount as you believe from the testimony will compensate him for the actual injury, if any, sustained by him, as a result of falling into the hole," etc. The instruction given, after properly telling the jury what elements should be considered in awarding damages, expressly told them that if they should find, after careful consideration of the evidence, appellee was entitled to damages, "you should award him such an amount of damages as will fully compensate him for the injury sustained by him, if any," etc.

Neither do we think the amount of damages excessive. Appellee was an able-bodied man, 51 years of age, in good health, and earning about $1,500 a year at the time of the injury, which the jury might have found totally incapacitated him from doing manual labor, and

he had suffered much pain from the injury, which physicians thought would continue to be painful indefinitely.

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

NATIONAL STOCK YARDS NATIONAL BANK *v.* WILLIAMSON.

Opinion delivered May 21, 1928.

J. T. Coston, for appellant.
H. C. Williamson, for appellee.

MEHAFFY, J. The appellee, H. C. Williamson, owned some land in Mississippi County, which he had rented to a negro by the name of Jones. In order to enable Jones to farm the land, Williamson waived his landlord's lien in favor of the Bank of Commerce of Earle, Arkansas, to the extent of $660, and Jones gave his note to the bank for this amount, secured by a mortgage on his crop and also certain personal property, consisting of mules, wagons, implements, etc. The note was dated April 5, 1924, and was due and payable to the Bank of Commerce, Earle, Arkansas, November 1, 1924. The Bank of Commerce transferred this note to the appellant as collateral security for money borrowed from appellant, and appellant held this note at the time the Bank of Commerce failed, which was a few days after it received the check for Jones' cotton.

The cotton upon which the bank had a mortgage was sold in Memphis by the Hanley Cotton Company. A check was made payable to the Bank of Commerce, and was handed to Williamson to take to the Bank of Commerce. Williamson had suggested to the negro, Jones, to let Hanley Cotton Company sell his cotton. The negro told him that he had spoken to the bank about it, and the bank told him it was up to him. Williamson said that was true, but he thought that the Hanley Cotton Company would get about as much for his cotton as anybody else, and would sell it a little quicker. Hanley was unable to finance himself in the cotton business, in which he was engaged, and he applied to Williamson to assist him, and Williamson indorsed for him at the bank and agreed to assist him in securing money to operate his business for 25 per cent. of the profits.

The chancellor entered a decree against Jones for the amount of Jones' indebtedness to the bank, with interest, and found in favor of Williamson.

It is earnestly insisted that Williamson and Hanley were partners. It is true that Williamson was to receive 25 per cent. of the profits, and receiving a per cent. of the

profits is always evidence proper to be submitted on the question of whether a partnership exists.

This court has many times decided that a share of the profits alone does not constitute one a partner. And the undisputed proof in this case shows that, while Williamson was to receive 25 per cent. of the profits, he was not to share in the expenses or losses, and had nothing whatever to do with the conducting of the business. If Hanley had lost money, and if his expenses had exceeded his income from the business, Williamson would not have been liable for any portion of the losses. He might have had to pay the bank the notes that he indorsed there, but he would not have had to pay any of the expenses or losses of the partnership. *Rector* v. *Robins,* 74 Ark. 437, 86 S. W. 667; *Buford* v. *Lewis,* 87 Ark. 412, 112 S. W. 963; *LaCotts* v. *Pike,* 91 Ark. 26, 120 S. W. 144, 134 A. S. R. 48; *Drilly* v. *Armstrong,* 94 Ark. 505, 127 S. W. 725.

There are numerous other authorities, but it is unnecessary to call attention to them. This court has repeatedly held that a share of the profits alone does not constitute a partnership.

It is true that Williamson was interested in getting his rent out of the cotton, but the Bank of Commerce had to be paid before he was entitled to his rent, because he had waived his lien in favor of the Bank of Commerce for the express purpose of enabling Jones, the tenant, to get money from the bank, but he was not interested with Hanley as a partner and was not interested in the cotton any further than any landlord would be interested in collecting his rent.

As we view the case, it is wholly immaterial whether Jones and Williamson had a right to pay the note to the Bank of Commerce or not, under the circumstances. Hanley sold the cotton. Williamson was in no way interested in making the sale or handling the cotton, either as an agent or as a partner. In fact, the bank had told the negro that he, the negro, had the right to sell the cotton, and he did ship it to Memphis through the Bank of Com-

merce for the purpose of selling it, and Williamson asked him to get Hanley to sell it, which he did. When the sale had been made the check was made, not to Williamson, but to the Bank of Commerce, who had shipped the cotton for the negro. And Williamson merely carried the check and sales accounts in an envelope to the Bank of Commerce. Williamson did not know, at least there is no evidence that he knew, that the plaintiff held the note and mortgage, and, whether he had known it or not, the check was payable to the Bank of Commerce, not to Williamson, and he merely acted as any other agent would in carrying the check from Hanley to the Bank of Commerce. Any person might have done this, and this would create no liability. As a matter of fact, he had delivered the check to the Bank of Commerce and then told the cashier of the Bank of Commerce that, when they had applied a sufficient amount of the check to Jones' debt to pay it, to give him, Williamson, credit on his rent for the balance, whatever that was.

Appellant argues that it was the duty of Jones and Williamson, before delivering the cotton or its proceeds to the Bank of Commerce, to demand the surrender of the note, and that they had no right to deliver the cotton or its proceeds to the Bank of Commerce without the surrender of the note. In the first place, Williamson had nothing to do with delivering the cotton to the Bank of Commerce. Jones did this, and Williamson could not have prevented it if he had wished to do so. He had waived all the right he had in favor of the Bank of Commerce. He had absolutely no interest in the cotton until Jones' debt was paid, because he had waived any interest in favor of the bank.

The learned counsel for appellant has called attention to many authorities, and the propositions of law are therein correctly stated, but we have reached the conclusion that they have no application to the facts in this case.

It is contended that the burden of proof was on Williamson to prove that the Bank of Commerce had actual

authority to collect the Jones note, or had possession of the note. Williamson did not pay or undertake to pay the note of the Bank of Commerce. What he did was to deliver a check given to him in Memphis, in which he had no interest and no right to collect and no right to appropriate to his use or to withhold same from the payee of said check. He delivered it as it was his duty to do, and then requested the bank to credit to his rent account whatever was left after the payment of the note. He was then informed that the note was not in possession of the bank, but that the bank would write and get it. We know of no way that Williamson could have repossessed himself of the check if he had desired to do so, and, if he had retained possession, he would have done so without right, and could have been compelled to deliver it up to the Bank of Commerce.

It is insisted that Williamson destroyed plaintiff's lien. He simply took the warehouse receipts to Memphis after the cotton had already been shipped there by the bank, and told Hanley about the cotton. Hanley sold it then, Williamson having nothing whatever to do with it, and after Hanley sold it he gave the check to Williamson to take back to the Bank of Commerce.

It is insisted that Williamson is liable because he gave advice resulting in the destruction of the lien. We think counsel for appellant are mistaken in this claim. Jones was told by the bank, the holder of the note and mortgage, that he, Jones, had a right to sell it. He shipped it to Memphis without any advice from Williamson. He shipped it there for the purpose of selling it, and intended to sell it, and would have sold it if he had never seen Williamson. The only thing Williamson did in connection with the sale was that he suggested that Jones have Hanley sell it for him, which the negro did. Whatever advice he gave in this connection had nothing to do with destroying the lien of the appellant. Certainly, when he came back to the bank with the check and delivered it to the bank, he was not advising or assisting

in destroying the lien. He did not, according to the proof in this case, aid either the negro or the Bank of Commerce to destroy plaintiff's lien. The negro did not know that the appellant held his note, and Williamson did not know it. The appellant had never notified either. Moreover, there is evidence that the Bank of Commerce was in the habit of collecting notes of this kind for the appellant with its knowledge and consent; that it did collect and then remit the proceeds to appellant, and that no objection was ever made to this. This custom, however, was not known to Williamson or to the negro. Neither of them knew that the appellant had the note. The undisputed testimony shows that Williamson, after he gave the check to the Bank of Commerce, thought that the Bank of Commerce had the note. It would have been his duty to deliver the check to it whether he did or not, but he certainly did nothing to assist in destroying the lien.

The finding of facts by the chancellor is sustained by a preponderance of the evidence, and the decree is correct, and is therefore affirmed.

BUTT *v.* WALKER.

Opinion delivered May 21, 1928.

A. F. Auer, for appellant.

MEHAFFY, J. Appellant obtained a judgment in the justice court of Howard County and filed same in the office of the circuit clerk of said county, and subsequently filed a transcript with the circuit clerk of Hempstead

County and had execution issued and directed to the sheriff of Hempstead County, and the sheriff levied on the lands occupied by the appellee.

Appellee gave notice, and filed his claim of exemption with the circuit clerk of Hempstead County, claiming the land levied on as his homestead and exempt from execution. The clerk sustained the claim, and issued supersedeas, and appeal was taken to the circuit court, and on the trial in the circuit court appellee's claim of exemption was sustained, and from that judgment an appeal was taken to this court.

The appellee had lived on the land about 23 years. His wife had died, and he continued to live on the land, and finally married a second wife, from whom he obtained a divorce on the 12th day of November, 1926. On the 8th day of November, 1926, the transcript of the judgment was filed with the circuit clerk of Hempstead County. After appellee obtained his divorce in November, 1926, he married again, and is still living on the land in question.

It is the contention of the appellant that, upon the filing of the transcript with the circuit clerk in Hempstead County on the 8th day of November, 1926, said judgment became a lien on the land immediately upon the granting of the divorce on the 12th day of November. That the lien attached as soon as appellee was divorced, and it is contended that the homestead exemption is not for the benefit of the husband alone, but to enable him to care for his family or those dependent on him for support, and that, when he is no longer under obligation to support any one, he has no homestead exemption.

Appellant calls attention to a number of cases, but most of the authorities referred to by appellant are unlike the instant case.

The undisputed proof is that the appellee has lived on the place that he claims as his homestead for 23 years; that his wife died, and he afterwards remarried, was divorced from the second wife, and then married again,

but during all this time he lived on the place claimed as exempt, and occupied it as a homestead. No one can acquire a homestead unless he is at the time a married man or the head of a family. But if, while a married man or head of a family, he acquires a homestead, he does not lose his right to claim it as exempt because his wife dies or because he is divorced, even though he may have no family living with him.

"While the husband may retain his homestead under the statute of this State, after having acquired it as the head of a family, though his wife may have obtained a divorce against him and he literally have no family left him, he has been allowed to retain his homestead; but he could not now declare upon an original homestead, as he is not the head of a family." Waples on Homestead and Exemption, 74.

The authorities are not in harmony on the question involved. There are authorities to sustain the position taken by appellant, but this court has announced the rule which prevails in this State, and, the question having been decided by this court, it is unnecessary to cite or discuss decisions of other States.

This court has said:

"On the next point, as to whether the land seized and sold under the execution was the homestead of the defendant, the chancellor found that Thomas was, for a period of about ten years, the head of a family, and resided upon the land in question, of which he was the owner, and that he has continued to reside upon this land, and still resides upon it and claims it as a homestead. The chancellor thereupon held that the land was his homestead, and exempt from execution. On this question we feel that there is more room for doubt, but, after consideration of the evidence, we think it is sufficient to uphold the finding that Thomas, after the death of his father, owned and lived upon this 110 acres of land, that his mother and a single sister lived with him, that he supported them, and was the head of the family. This

being so, it follows that he was entitled, as the head of a family, to claim this land as a homestead. Afterwards, in the course of time, his mother and sister died, and he has now no family. But, though a man cannot acquire a homestead right without a family, yet, when the homestead estate is once acquired, he is not, under the law as construed by the decisions in this State, deprived of it by the loss of his family. When the association of persons which constitutes the family is broken up, whether by separation or the death of some of the members, the right of homestead continues in the former head of the family, provided he still resides at his old home." *Baldwin* v. *Thomas,* 71 Ark. 206, 72 S. W. 53.

In the instant case the appellee acquired this land while he was the head of a family, occupied it as a homestead, and he was not deprived of it by the loss of his family. It is true he could not have acquired a homestead if he had not been the head of a family, but, having acquired it and occupied it while he was the head of a family, the fact that his wife died or that a divorce was granted would not deprive him of the right to claim his homestead as exempt if he still resided on it, as the appellee does in this case.

We think the case above referred to, of *Baldwin* v. *Thomas,* is decisive of this case. The judgment is therefore affirmed.

ADAMS *v.* ADAMS.

Opinion delivered May 21, 1928.

Ward & Ward, for appellant.

Holifield & Upton, for appellee.

MEHAFFY, J. Appellant and appellee were married in Greene County, Arkansas, in July, 1920. This suit for divorce was brought by appellee in the Clay Chancery Court in October, 1926. The parties at the time lived in Clay County.

Appellee alleged, as cause for divorce, indignities and adultery. The evidence is quite lengthy, and it is unnecessary to set it out in full. It is sufficient to say that there was evidence introduced tending to establish the charges in the complaint, and also evidence on the part of the appellant tending to show misconduct on the part of the appellee. Attention will be called to such parts of the evidence as necessary in the opinion.

There was a decree for appellee, and appellant prosecutes this appeal to reverse said decree.

Appellant insists, first, that the court erred in failing to sustain a demurrer to the amended complaint. The

abstract does not show that the demurrer was ever presented to the court or that there was any ruling by the court on the demurrer. Appellant's objection apparently is that there are two causes of action, and they were not properly stated in separate paragraphs. The complaint, however, was sufficient on demurrer anyway. It stated a cause of action, and, that being true, the demurrer should have been overruled. It appears that the court did sustain a demurrer to the original complaint, and required the plaintiff to amend so as to show that the parties were separated.

Appellant next insists that the court should have required appellee to elect on which ground of action he relied, that of indignities or adultery. The appellee had a right to state as many causes of divorce as he had in one complaint, and he was not required to elect, but could take proof on all, and if he proved either ground he would be entitled to a decree, unless the appellant showed that he was disentitled because of his own conduct. At any rate, there was no necessity for him to elect which cause he relied on.

Appellant's third contention is that the court erred in not striking the depositions offered by plaintiff, because he states they were taken before the suit was begun. Under our statute the suit was begun when a complaint was filed and a summons issued, and the only defect in the complaint which caused the court to sustain a demurrer was that the original complaint did not state that the parties were separated. Although the complaint did not state that, the depositions were taken by agreement, and on this issue were taken without objection, and the complaint would have been considered as amended to conform to the proof anyway.

The sustaining of the demurrer, of course, entitled the appellee to amend his complaint, which he did, but he did not amend it by stating another cause of action or a new cause of action. The only defect that the court required corrected was that the complaint did not state that the parties were separated. The causes stated in

the original complaint, so far as the record shows, were the same as those stated in the amended complaint. There was no difference in the statement of the cause of action for divorce. The evidence therefore, taken by agreement of parties, was proper to be considered by the court, and there was no error in the court's refusal to strike the depositions.

It is next insisted that the court erred in its failure to grant the exception of the defendant to certain testimony offered by the plaintiff. The abstract does not show that this exception on the part of the appellant was passed upon by the court.

"But chancery cases are tried upon appeal *de novo*. It is presumed that the chancellor heard the case only upon evidence that was competent and relevant to the issues made. Upon appeal in chancery cases, errors which relate to rulings upon the introduction of evidence will not be passed upon; but, in the trial of such chancery cases upon appeal, any evidence that was improperly excluded below will be considered, and evidence that was improperly received will be disregarded, and the case will be decided here solely upon competent evidence." *Greer* v. *Davis, ante,* p. 55; *Cox* v. *Smith,* 99 Ark. 218, 138 S. W. 978; *Niagara Fire Ins. Co.* v. *Boon,* 76 Ark. 153, 88 S. W. 915; *Latham* v. *First National Bank of Ft. Smith,* 92 Ark. 315, 122 S. W. 992.

Since the case is tried here *de novo,* all evidence that is competent will be considered, and this court will disregard any evidence that was improperly received. Therefore a ruling as to whether the testimony is competent or incompetent is unnecessary.

Appellant also contends that the decree should be reversed because the evidence was legally insufficient to sustain the finding of the court in granting a divorce.

We think there is ample evidence to justify the chancellor in granting a decree of divorce on the grounds stated in the statute as follows: "offer such indignities to the person of the other as shall render his or her condition intolerable." And, if that is true, it would be

wholly immaterial whether there was sufficient evidence to sustain the other charge or not. There is abundant evidence that appellant's conduct with Guy Bucy was such as to cause gossip in the community; to cause the church to which she belonged to appoint a committee to investigate her conduct; and to amount to such indignities to the person of the appellee as to render his condition intolerable. There is testimony to the effect that appellant admitted that her conduct was improper, and it is shown that, after she had been remonstrated with, she continued to meet and talk with Bucy just as she had before, notwithstanding she knew of the gossip; had been remonstrated with by her husband; the wife of Bucy had talked to her and asked her to leave her husband alone; the elders of the church to which she belonged investigated the matter, and, while they did not find any evidence of the truth of the charge of adultery, they did testify that they did not think she took the charges as seriously as she should, and moreover, they were not investigating the question of indignities offered to the husband especially, but the other charges.

The facts were found in favor of the appellee by the chancellor, and a finding of fact by the chancellor will not be disturbed by this court unless such finding is against the preponderance of the evidence. We have reached the conclusion in this case that the finding of the chancellor was supported by the evidence, and the decree is therefore affirmed.

MARTIN *v.* STATE.

Opinion delivered May 21, 1928.

Clary & Ball, for appellant.

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

McHANEY, J. Appellant was indicted, tried and convicted for manufacturing alcoholic liquor, and sentenced to one year in the penitentiary. He specifies one error of the court on which he relies for a reversal of this case, relating to the admission of certain testimony of Sheriff John C. Lee, wherein the witness Lee was permitted to testify, over appellant's objection, to a certain conversation he had at the still with one Tom Copeland, to the effect that 20 of the 26 barrels of the mash found at the still was appellant's mash, and that he had run two barrels of appellant's mash that morning. This testimony was objected to on the ground that the witness did not say positively that appellant heard the conversation. But the witness did testify positively that appellant was present, and that he could have heard the conversation.

The court refused to permit the sheriff to testify to another conversation with Tom Copeland, which was had to one side, and which appellant did not hear, but he permitted the witness to testify to that part of the conversation where appellant was present, and either did hear or could have heard it.

Tom Copeland and appellant were accomplices in the commission of crime, and it is a general rule that the

statements of one accomplice made in the presence and hearing of another, which are not contradicted by him, are admissible in evidence against him as an admission on his part for his failure to contradict them. *Polk* v. *State*, 45 Ark. 165; *Ford* v. *State*, 34 Ark. 654.

In *Polk* v. *State, supra,* this court said:

"On the trial of both defendants, certain statements, in the nature of confessions, made by Henry Polk, were admitted against objections. Any voluntary statement made by Henry, and tending to show he knew something of the matter, was proper evidence against him. And if made in the presence of Sylvester, and uncontradicted by him, they are also receivable against him, as a tacit admission inferred from his acquiescence in the verbal statement of another. But such implied admissions are to be received with great caution, affording, at best, but a weak presumption of guilt. *Ford* v. *State,* 34 Ark. 654; *Williams* v. *State,* 42 Ark. 382."

In *Thomas* v. *State,* 161 Ark. 644, 257 S. W. 376, a dying declaration by the deceased, to the effect that the shooting by defendant was not accidental, was held to be admissible, where it was shown to have been made in defendant's presence and defendant made no response thereto.

In *Stroud* v. *State,* 167 Ark. 502, 268 S. W. 850, this court held that the acts and declarations of a conspirator, done or made after the accomplishment of the enterprise, are not admissible against co-conspirators, unless done or made in their presence.

Here the sheriff testified to that part of the conversation he had with the witness Copeland, which was made in the presence and hearing of appellant, and it was therefore admissible. Appellant did not deny that such conversation was had between the sheriff and his co-conspirator or accomplice, Tom Copeland, and did not deny that he heard same. Moreover, the witness, Tom Copeland, testified as follows:

"Q. Did you point out anything there? A. Yes sir; I showed Mr. Lee which were my barrels and which were Mr. Martin's. Q. How many were yours? A. Six. Q. How many were Mr. Martin's? A. Twenty were Mr. Martin's. By the court: Where was Martin when you pointed to Mr. Lee the six that were yours, and the twenty that were Mr. Martin's? A. He was standing there."

Therefore, even though it might be said that the testimony was inadmissible, still it would not be prejudicial, as the witness Copeland testified to substantially the same thing, without objection from appellant.

Judgment affirmed.

FOX *v.* PINSON.

Opinion delivered May 21, 1928.

Coulter & Coulter, for appellant.

Marsh, McKay & Marlin, for appellee.

McHANEY, J. This is the second appeal of this case. The opinion on the former appeal may be found in *Fox* v.

Pinson, 172 Ark. 449, 289 S. W. 329. On that appeal the case was reversed on the ground, first, that a decree of foreclosure ordering a sale of eighty feet, on which the hotel stood, to satisfy a mortgage which covered only seventy-five feet thereof, was erroneous; second, that one who conveys land by warranty deed against incumbrances cannot foreclose his mortgage for the purchase money before paying off and clearing the record of incumbrances; and third, that, in the absence of an accelerating clause in the mortgage or the purchase money notes which it secures, the mortgagor cannot enforce his lien for the whole indebtedness, but for only such part as may be in default at the time.

During the pendency of the former appeal W. J. Pinson, who was the appellee in that case, died, and George W. Jones, who was the purchaser at the void foreclosure sale, one of the appellees on this appeal, took possession of the property under such sale. The other appellees are the widow and surviving heirs at law of W. J. Pinson. Upon a remand of the former cause, the court appointed John H. Pinson administrator for the purposes of this suit.

Thereafter, appellant filed her cross-complaint in this action, calling on the administrator and survivors of W. J. Pinson to defend her title under the warranty deed of W. J. Pinson against those who were claiming title to the property prior and paramount to hers. She further alleged that the appellees had unlawfully deprived her of the possession of the property involved in this suit from the 6th day of January, 1925, to the 17th day of January, 1927; that the fair rental value of said property for such time was $600 per month, and that, by reason of being unlawfully deprived of the possession thereof, she had been damaged in the sum of $14,640; that, in addition to the rental value, they unlawfully and wrongfully converted to their own use furniture, furnishings and fixtures located in the building on said premises, of the value of $20,000; that during said period of time, and

while appellees were unlawfully in possession of said property, they destroyed the building located thereon, of the value of $40,000. She claimed the total damage of $74,640, which she admitted should be reduced by the sum of $11,500, being twenty-three promissory notes in the sum of $500 each, which were due at that time, and prayed judgment for the balance. To this cross-complaint appellees filed separate demurrers, which the court sustained, and, on appellant's declining to plead further, her cross-complaint was dismissed for want of equity.

While it is true that, since the remand of this case, appellees have not sought or obtained a decree of foreclosure in accordance with the opinion of this court rendered on the former appeal, still we are of the opinion that the cross-complaint stated a cause of action, and that the court erred in sustaining the demurrer. We are furthermore of the opinion that the decree of the court sustaining the demurrers and dismissing the cross-complaint of appellant for want of equity was such a final order as is appealable. The order dismissing the cross-complaint was a final disposition of her right of action against appellees, and one from which an appeal may be prosecuted. In *Temple Cotton Oil Co.* v. *Davis,* 167 Ark. 448, 268 S. W. 38, this court said: "As has been said, the court sustained demurrers to the original amended complaint. This action did not constitute a final order from which an appeal could have been prosecuted, as plaintiff did not stand on the sufficiency of the complaint. Had it done so, the court would no doubt have dismissed the complaint, from which action an appeal could have been prosecuted."

In the recent case of *Flanagan* v. *Drainage District No. 17,* 176 Ark. 31, 2 S. W. (2d.) 70, this court discussed very thoroughly the question as to what constitutes a final decree, and there collected many authorities relating to the subject. The gist of all of them is that a judgment or decree is final which dismisses the party from the court, discharges him from the action, or concludes his

rights to the subject-matter in the controversy. This is exactly what the decree in this case did, so far as appellant's cross-complaint is concerned. She does not deny the alleged indebtedness existing by reason of the mortgage and purchase money notes, and we see no reason why her right to recover damages for the unlawful possession, use and destruction, or conversion, of her property could not be litigated in this action. We do not decide whether any damage has been sustained by appellant, nor who is liable therefor, if any one. We merely hold that the cross-complaint states a cause of action, and that a decree sustaining the demurrer and dismissing the complaint for want of equity is a final decree from which an appeal may be prosecuted.

The decree will therefore be reversed, and the cause remanded, with directions to overrule the demurrers to the cross-complaint and for further proceedings according to the principles of equity and not inconsistent with this opinion.

[redacted]

CLARK *v.* DEUPREE.

Opinion delivered May 28, 1928.

[redacted]

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[redacted]

G. G. Pope and *Will Steel,* for appellant.

Frank S. Quinn, for appellee.

HART, C. J., (after stating the facts). It will be observed from our statement of facts that the testimony relative to the first contract between the parties is in direct and irreconcilable conflict. On the part of the plaintiffs it is shown that Mrs. Deupree had agreed to sell them the land for the price of $3,250, and that they had paid down in cash $200 of the purchase price, and were ready to pay the balance when Mrs. Deupree should pay some back taxes, amounting to $831, as she had agreed to do under her contract. On the other hand, according to the evidence for the defendants, Mrs. Deupree had sold her interest in the land for the net price of $2,500, and Mrs. Deupree had executed a deed to the plaintiffs for her interest in the land, with that sum as a consideration, which plaintiffs refused to accept. It was understood at the time that Quinn, as her attorney, had also an interest in the land, which was not considered in the purchase of Mrs. Deupree's interest, and for which he was to receive $1,000.

The conclusion we have reached renders it unnecessary to pass upon these disputed questions of fact.

According to the testimony of Frank S. Quinn, which is uncontradicted, he was not the agent of Mrs. Deupree for the sale of the land. He had merely been her attorney in former litigation regarding the land, and only assured the plaintiffs that she would ratify any contract he would make with them relative to the sale of the land. Hence, assuming that he did enter into the contract as claimed, or as testified to by the plaintiffs, Mrs. Deupree refused to execute such a contract, when informed of its terms. The mere fact that Quinn had been attorney for Mrs. Deupree in former litigation relative to the land did not make him her agent to sell the land; and, as we have already seen, according to his testimony, which is not contradicted on this point, he did not attempt to sell the land as

agent for Mrs. Deupree. Therefore conceding, without deciding, that the first contract was as testified to by the plaintiffs, such contract was not binding upon Mrs. Deupree, and was never ratified by her.

The plaintiffs testified that, as a matter of compromise, they had agreed to give $3,500 for the land. After the court had made its finding against them, they made a tender of $3,300 to the defendants, which, with the $200 already paid, would amount to $3,500. The court held that this tender came too late, and we think it was right in so holding. The plaintiffs had refused all the way through to pay $3,500 for the land, and in the meantime the defendants had entered into a binding contract with other parties to sell the land to them.

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

BLANKENSHIP *v.* MODGLIN.

Opinion delivered May 28, 1928.

O. H. Hurst and *Caraway, Baker & Gautney,* for appellant.

Dudley & Dudley, for appellee.

HART, C. J., (after stating the facts). Counsel for Modglin seek to uphold the judgment on the ground that the mortgage was too indefinite in the description of the corn. It will be observed from our statement of facts that the corn is described as all the crop of corn to be grown by Harris on the farm belonging to Earl Keich. We do not think this description is void for uncertainty. This court has laid down the rule that a mortgage of personal property is sufficient as to description if it be such that a disinterested person, aided only by such inquiry as the instrument itself suggests, is able to identify the property. *Johnson* v. *Grissard,* 51 Ark. 410, 11 S. W. 585, 3 L. R. A. 795. Now, any disinterested person would find out from the mortgage itself that it was given by Harris to Blankenship to secure a promissory note and for merchandise supplies to be furnished by Blankenship to Harris to make a crop during the year 1926 on a farm belonging to Earl Keich. It is claimed that this description is indefinite because Earl Keich had several farms in Craighead County, where the mortgage was executed and filed. Any disinterested person, however, could have found out, by reading over the mortgage, aided by inquiry, that Harris lived on one of the farms of Earl Keich, and was going to make a crop of corn and cotton on it. Under these circumstances, we think that the description was sufficiently definite and that Blankenship had a valid mortgage on the corn in controversy.

This brings us to the remaining contention between the parties. According to the testimony of Blankenship, Harris still owed him, under the mortgage, the sum of $189.80, and the corn was not worth more than that sum. On the other hand, there was evidence adduced in favor of Modglin to the effect that Harris had paid off his mortgage indebtedness to Blankenship. The evidence

for Modglin also shows that he purchased the corn in good faith from Harris, and, as payment therefor, paid off a note and mortgage which Harris owed Earl Keich. This disputed question of fact was submitted to the jury under proper instructions. Blankenship relied upon his own testimony in the case to show that the mortgage indebtedness was not paid. This court is committed to the rule that the positive testimony of an interested party will not be treated as undisputed. *Skillern* v. *Baker*, 82 Ark. 86, 100 S. W. 764, 118 A. S. R. 52, 12 Ann. Cas. 243; and *Nelson* v. *Missouri Pacific Rd. Co.*, 172 Ark. 1053, 292 S. W. 120.

Moreover, there are facts in the record from which the jury might have inferred that the testimony of Blankenship was not reasonable and consistent in itself. His merchandise books were in his store, about eight miles from where the trial in the circuit court was held, and he failed to produce them to show the state of the account of Harris. Blankenship failed to introduce as a witness his bookkeeper, who kept the account of Harris. The note secured by the mortgage was marked paid, and had been delivered to Harris. It is true that Blankenship produced what he calls a renewal note for the balance now claimed to be due, but this note was dated January 23, 1927, which was more than four months after the note described in the mortgage was marked paid. Under all these circumstances it cannot be said that the undisputed evidence called for a directed verdict in favor of Blankenship.

It follows that the judgment must be affirmed.

AKINS *v.* HEIDEN.

Opinion delivered May 28, 1928.

[redacted]

W. A. Singfield, for appellant.

Carmichael & Hendricks and *McMillen & Scott*, for appellee.

HART, C. J., (after stating the facts). It is first earnestly insisted that appellants were not entitled to maintain their cross-complaint because there is not sufficient proof that they were heirs at law of Sam Summers, who originally owned the property involved in this controversy. We do not agree with counsel in this contention. While there are contradictory statements in the testimony of the witnesses introduced by appellants to prove their relationship to Sam Summers, we think that, when the surrounding circumstances are considered, it is fairly deducible from the evidence that Sam Summers, Peter Sullivan and the fathers and mothers of the appellants were all children of Rebecca or Fairy Bee Sullivan. It appears that all of the children of Fairy Bee Sullivan, except Peter Sullivan, were born in the State of Alabama, and were illegiti-

mate. Fairy Bee Sullivan came to Arkansas with her children and lived there with them and with her husband prior to and after 1867. Peter Sullivan was born after she came to Arkansas. All the children were recognized by Fairy Bee Sullivan and her husband, after they came to Arkansas, as their own children, although all of them, except Peter Sullivan, were children by other men. Under our statute negroes cohabiting as husband and wife and recognizing each other as such were deemed lawfully married from the passage of an act approved February 6, 1867. See Crawford & Moses' Digest, § 7040. We have construed this act to mean negroes who cohabit as husband and wife and recognize each other as such in the State of Arkansas at the date the act was passed. *Gregley* v. *Jackson,* 38 Ark. 487; *Wilson* v. *Storthz,* 117 Ark. 418, 175 S. W. 45; *Black* v. *Youmans,* 120 Ark. 209, 179 S. W. 335; and *Meekins* v. *Meekins,* 169 Ark. 265, 275 S. W. 337. As we have already seen, while there is some inconsistency in the testimony of the witnesses on this point, we are of the opinion that it fairly establishes the fact to be that Fairy Bee Sullivan and her husband recognized all their illegitimate children as their offspring in the State of Arkansas, where they were living on and prior to the 6th day of February, 1867. All the witnesses on this point were ignorant negroes, and it was to be expected that their testimony would be somewhat vague as to the dates of the births of these various children.

It is next insisted that appellants are not entitled to maintain this action because the matter of the title to the property involved in this controversy was settled by the probate of the will of Sam Summers, and that the whole matter is now *res judicata.* We cannot agree with counsel in this contention. The property involved in this lawsuit was not included in the will of Sam Summers. It is true, as contended by counsel for appellees, that there is a presumption against partial intestacy; but the will does not in any sense refer to

the property in controversy, and it is very plain from its terms that it was not intended to be included in the will. The principle of *res judicata* extends only to questions of fact and of law which were decided in a former suit or which might have been decided in that suit. *Jenkins* v. *Jenkins,* 144 Ark. 417, 222 S. W. 714, and *Howard-Sevier Rd. Imp. Dist. No. 1* v. *Hunt,* 166 Ark. 62, 265 S. W. 517.

Peter Sullivan and Lindsey Hicks contested the probate of the will of Sam Summers, but later dismissed their appeal from the order of the probate court probating the will, and this left the will admitted to probate, and, the time of appeal having expired, under the authority of *Jenkins* v. *Jenkins,* 144 Ark. 417, 222 S. W. 714, the probate of the will was conclusive as to all parties as to the property disposed of in the will. The will did not purport to dispose of the property in controversy, and no reference is made to it as being a part of the testator's estate. Hence the order admitting the will to probate did not in any manner affect the property in controversy, and any order made by the probate court with reference to it could in no sense affect the rights of the persons who claimed title to said property otherwise than as heirs or legatees of Sam Summers. In other words, the rights of third parties could not be in issue by an order admitting the will to probate.

It is next contended that the testimony of Peter Sullivan, which was introduced in part for the purpose of establishing the relationship of appellants to Sam Summers, was not competent, because at the time a guardian had been appointed for him as an insane person. The record shows that the probate court on March 2, 1925, appointed a guardian for Peter Sullivan as an insane person. In June, 1926, an order was made restoring Peter Sullivan to the management of his own affairs. His deposition was taken on June 22, 1925, in this case. It is claimed that his testimony was incompetent because at the time there was an adjudication of insanity

against him by the appointment of a guardian on March 2, 1925. We cannot agree with counsel in this contention. The deposition of Peter Sullivan was read to the chancery court, and, notwithstanding there existed an order of the probate court declaring him insane, the chancellor might give such weight to his testimony as he deemed proper under the surrounding circumstances, and upon appeal this court will give such weight to his testimony as the surrounding circumstances as to his mental condition would indicate. In this connection it may be stated that Peter Sullivan was dead at the time the case was heard in the chancery court. When his testimony is read and considered in the light of the surrounding circumstances and in view of the matters about which he was testifying, we do not think that it can be said that his testimony is not entitled to any weight. On the other hand, it shows that he knew perfectly well what he was testifying about. Of course he was an ignorant, illiterate negro, but he seemed to understand what he was doing and what he was testifying about.

We now come to a consideration of the claim of appellees to the property in question upon the evidence introduced. This court is committed to the rule that an oral gift of land is not enforceable unless there is actual possession delivered, followed by the making of valuable improvements by the donee. *Young* v. *Crawford,* 82 Ark. 33, 100 S. W. 87; *Brown* v. *Norvell,* 96 Ark. 609, 132 S. W. 922; *Murphy* v. *Graves,* 170 Ark. 180, 279 S. W. 359; and *Hunt* v. *Boyce,* 176 Ark. 303, 3 S. W. (2d.) 342.

The undisputed facts show that a house costing between $12,000 and $15,000, which rents for $160 per month, was built upon the property involved in this controversy by the Heidens, who were the grantees by mesne conveyances of Lindsey Hicks and Peter Sullivan; but the most serious question in the case is whether or not there is sufficient testimony to warrant a find-

ing that there was a parol gift of the land by Sam Summers to Peter Sullivan and Lindsey Hicks. There was a general finding by the chancellor in favor of appellees, who were plaintiffs; and the cross-complaint of appellants was dismissed for want of equity. In this view of the matter we do not know upon what theory the decision of the chancellor was based, but we presume that it was based upon the theory that there was an oral gift of said lot 2, which is in controversy in this case, by Sam Summers to Peter Sullivan and Lindsey Hicks, whom he recognized as his brothers. Sam Summers had no children of his own, and it is apparent from the testimony of Peter Sullivan and from the other evidence in the case that he recognized Peter Sullivan and Lindsey Hicks as his half-brothers. It does not appear that he had anything to do with his other half-brothers and sisters, and the fact that none of them are given anything under his will tends to show that he did not intend them to have any of his property. Of course, if he died owning lot 2, which is in controversy, they would be entitled to their share of it.

A careful consideration of the testimony of Peter Sullivan, in the light of the attendant circumstances, leads us to believe that Sam Summers gave to Peter Sullivan and Lindsey Hicks the property in controversy in his lifetime, and that Peter Sullivan accepted the gift. It will be remembered that the will of Sam Summers was executed on the 10th day of January, 1919, and that he died on the first day of the following month. Lot 2 in controversy was entirely omitted from the will. No reference whatever was made to it. The will was written by Scipio Jones. Jones testified that Sam Summers told him that Peter Sullivan and Lindsey Hicks were his only heirs. He left each of them a lot in the city of Little Rock. Sullivan and Hicks claimed to own the lot, and sold it after Summers died, upon the advice of Scipio Jones, a colored lawyer. Sullivan testified that he was not crazy. We copy from his cross-examination the following:

"Q. You say you were not crazy? A. No sir. Q. You deeded a half lot that you did not own? A. Lawyer Jones told me it was mine. Q. Do you believe everything a colored lawyer tells you? A. No sir—no lawyer. Q. You sold that fellow that lot and gave him a deed to something you did not own, but you are not willing to give him a deed to half the lot you do own? A. No sir. You see I didn't know anything about it except my brother told him it was his—brother Samuel Summers told me it was the first lot he bought in this town, and we was sitting in his house one day, the Christmas before he died, and he showed me where the lines of that property ran—how far it ran in his house. He told me this property would fall to his estate. Brother Summers told me that, and after he died lawyer Jones told me it fell to me, and by him telling me that it fell to me and my brother telling me, I believed it was mine. My brother told me—I said, 'Now, brother, I don't understand about no estate. What do you mean by estate?' 'You and Bud—he called brother Lindsey Bud— Q. Samuel Summers told you the Christmas before he died that he owned these two lots? A. That lot belonged to him—that he wasn't going to will it to anybody. Q. That it was going to his estate? A. Yes sir, he said estate; and I asked him who was the estate, and he said 'You and Bud'—he meant Bud Lindsey—and Jones told me, after his death, that it belonged to me and my brother, and that is the reason I thought it was mine. Q. How much did they pay you for that lot? A. They paid us $3,700, I believe it was. Q. You got half of it? A. Yes sir."

We think it is fairly deducible from this testimony that Sam Summers intended to give this property to his two brothers, and that he did give it to them when he pointed out the lines of the property on Christmas about a month before he died. It is true that no improvements were made on the property until after the death of Summers, but we think it is fairly inferable that

Summers intended to give the property to his brothers when he pointed out the lines of it on Christmas before he died, and that Peter Sullivan accepted the gift.

This view of the matter is strengthened when we consider that, some ten days later, Summers made a will and left other lots to his two brothers, and never attempted to dispose of the lot in controversy. He disposed of all his other property by his will. He recognized Peter Sullivan and Lindsey Hicks alone of all his brothers and sisters and their children as objects of his bounty, and it would seem that he did not attempt to dispose of the lot in controversy in his will because he recognized that he had already given it to his brothers when he had pointed out the lines of the property to Peter Sullivan, and that Peter Sullivan had, under the circumstances, accepted the gift in behalf of himself and brother.

In this view of the matter there was a parol gift of the lot, followed by the making of valuable improvements on it. This, under our decisions cited above, is enforceable.

The present suit was instituted on July 18, 1924. Sam Summers had died in Little Rock, Arkansas, on February 1, 1919. His will had been admitted to probate, and the property devised under it had been taken charge of by the various legatees. Upon the advice of their lawyer, Peter Sullivan and Lindsey Hicks claimed title to the lot in controversy, and sold it to third parties, who made valuable improvements upon it. During all this time appellants made no claim whatever to the property, although it is inferable that they knew that Sam Summers had died, and must have known what property he owned. Thus it will be seen that all the parties recognized that Sam Summers had given the lot in controversy to his half-brothers, Peter Sullivan and Lindsey Hicks. It is fairly inferable from all the evidence introduced that he delivered the possession of this lot to Peter Sullivan when he pointed out the lines of it

on Christmas before he died, and that Peter Sullivan accepted the lot as a gift from Sam Summers to himself and his brother, Lindsey Hicks, when the lines were pointed out to him. The property at that time was unimproved and was incapable of any other delivery and possession than pointing out the lines in the manner above indicated.

To sum up, it may be said that, though expressed in varying phraseology, the general rule is that evidence necessary to establish a parol gift of land must be clear and unequivocal. *Young* v. *Crawford,* 82 Ark. 33. The statement of the donor was something more than a loose declaration of his intention or a casual conversation of his intention. As above stated, about ten days later he made a will, and devised all of his property except the lots in controversy, and told the attorney to leave it out of the will. This tended to show that the testator believed that he had already given the lot to his brothers. The conduct of the donees was equally positive and definite. Peter Sullivan took the advice of an attorney, and then, in conjunction with his brother, Lindsey Hicks, conveyed the lot to one who erected a valuable business house on it. The testimony shows that this was the desire of the testator. He had conveyed in his lifetime the north half of the lot to a person for the purpose of having a valuable business house erected on it. The deed contained an imperfect or indefinite description of the property. The grantee never carried out the intention of his grantor, but reconveyed the lot to Peter Sullivan and Lindsey Hicks, who deeded it to persons who subsequently carried out the intention of Sam Summers and did erect a valuable business house on the lot.

In conclusion, we again say that we adhere to the rule laid down in the early case of *Guynn* v. *McCauley,* 32 Ark. 97, that chancery will not decree performance of a mere voluntary agreement. But, when a donee enters into possession and makes valuable improve-

ments on the land, the money thus expended on the faith of the gift is a consideration on which to ground a claim for specific performance. This holding is in accord with that of the Supreme Court of the United States in *Neale* v. *Neale,* 9 Wall. 1, where this language is used: "And equity protects a parol gift of land equally with a parol agreement to sell it, if accompanied by possession, and the donee, induced by the promise to give it, has made valuable improvements on the property."

Peter Sullivan was a witness for appellants, and they mainly relied on his testimony to show their relationship to Sam Summers; and he, Peter Sullivan, recognized them as children of the deceased, illegitimate brothers and sisters of Sam Summers, and as entitled to a share of his estate. His testimony, as quoted above, was brought out on cross-examination, and shows clearly, when the situation and condition of the parties are considered in the light of what followed in a few days, that there was a parol gift of the lot by Sam Summers to Peter Sullivan and Lindsey Hicks, and that, induced by the belief that the lot belonged to them, they sold it to persons who erected a valuable business house upon it, in accordance with the expressed desire of Sam Summers.

The result of our views is that the decision of the chancery court was correct, and it will be affirmed.

FRICK *v.* STATE.

Opinion delivered May 28, 1928.

[redacted]

Gordon Frierson, R. V. Wheeler, John Cooper and *Wils Davis,* for appellant.

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

WOOD, J. C. Frick was indicted by the grand jury of Crittenden County, Arkansas, for the crime of murder in the first degree in the killing of one Prentiss Hoop, by shooting him, in Crittenden County, Arkansas, on the 7th of June, 1927. The indictment was valid. The defendant was tried and convicted of the crime of voluntary manslaughter, and by judgment of the Crittenden Circuit Court sentenced to imprisonment in the State Penitentiary for two years, from which judgment he duly prosecutes this appeal.

1. The appellant contends, first, that there was no testimony to sustain the verdict. The testimony of Mack Hoop was to the effect that he and his brother, Prentiss Hoop, on the night of June 7, 1927, in Crittenden County, Arkansas, were bumming their way to the Kansas wheat fields. They caught a freight train on the Harahan bridge, and were riding between two boxcars. They rode about one hundred yards west, when two special agents of the railway company called, "Get off, you sons of b....., or we'll shoot you off." The Hoops jumped off the train, and started running down the embankment. One of the men who called to them fired two shots, one of which hit Prentiss Hoop in the back. Prentiss Hoop at that time was fifteen years old. Witness saw Mr. Carter down at the bottom of the dump, on the right-hand side. Carter was called by Guthrie, who stated that there was a boy dead up there. Witness and Carter went to the place, and found witness' brother dead. The train, at the time witness and his brother jumped off, was going west, and they jumped off on the north side. The men that did the shooting were on the walkway on the south side when they told them to get off the train. Witness recognized the defendant by his voice. Witness was interested in a suit that had been brought against the railroad company in Federal court in Memphis for the killing of his brother. There were two railway tracks on the bridge, and the train was on the south track and was going west. Witness saw the special agents when they said they would shoot them off. The train was moving slowly—about three or four miles an hour. Witness was running faster than the train was moving. Witness' brother was behind witness.

Pictures were introduced in evidence with the positions marked showing the location of the train on the bridge, the place where witness and his brother jumped off the train, and the positions of witness when the shots were fired. The shooting occurred on June 7, 1927, in Crittenden County, Arkansas.

Witness Guthrie testified, in substance, that he was the undertaker who took charge of the body of Prentiss Hoop on the night he was killed. His testimony shows that Hoop was shot in the back, three or four inches below the shoulder. The bullet, ranging downward, went through the body at an angle of about forty-five degrees. Witness found the body on the main trestle back towards the Mississippi River, about two hundred feet from the dirt dump on the Arkansas side. It was not a bright moonlight night, nor was it a real dark night. After being notified of the shooting, witness got to the place, and found the body thirty or forty minutes thereafter.

Charlie Martin, a negro, testified, on behalf of the State, that he had been working for the Frisco Railroad as a bridge tester for twenty-three years, and was on the Frisco trestle at the time Hoop was killed, about 150 yards south of the Harahan bridge and about 100 yards from where the shooting took place. Witness saw the shots fired. They were fired from the south side of the bridge next to the Frisco. Witness pointed out the defendant as the one who did the shooting. The Frisco bridge is lighted by electric lights all the way across. Witness was working on the Frisco bridge at the time. There were no electric lights where the shooting occurred. What light witness had came from right at the end of the bridge. The shooting occurred about two barrel lengths from the end of the bridge back toward Memphis—east. Witness heard somebody cursing before the shooting, and immediately after the cursing the shots were fired. The little man was the one who did the shooting. The witness, on cross-examination, finally stated that he would not say positively that the defendant was the man who did the shooting.

J. T. Carter testified that, on the night of June 7, 1927, he was out on the driveway of Harahan Park. He was sitting on the fence on the roadway, and heard some cursing and some one saying, "Get off there, you sons of b....., or I'll shoot you off." He heard that

a couple of times, and two shots were fired. Witness noticed two men dressed in dark suits and two fellows running—the two shots were fired, and one of the fellows continued running down the hill. Witness flashed a light on him and asked him what the trouble was, and he said that the special agent shot at them. The train rolled on by. Witness saw a man on top of the train, and saw him with his flashlight down in the car after the shooting. Witness had seen two men before the shooting, and saw two flashes of the pistol. When the boy came down the hill, he said his brother was with him. Witness and boy walked up the hill together, and found the dead body of a young boy about fifteen or sixteen years of age. The train was running slowly when the shooting occurred. Witness' attention was drawn by the cursing and shooting. The train was then rolling. The body was found on the right-hand side of the track coming west.

Howard Curlin testified that he was a deputy sheriff of Crittenden County. On the morning of the next day after the shooting occurred and the defendants were brought over and put in jail, witness was talking to them at the jail. Both were present at the time the talking was going on. They were discussing the shooting, and the defendant Frick said that he did all the shooting—that Brownlow didn't fire a shot. He didn't have anything to do with it, except that he was present. The defendant Frick didn't say that he shot and killed the boy—he said he did all the shooting. The defendants voluntarily surrendered themselves to the sheriff of Crittenden County.

William Shoate, a witness for the State, testified that he was at his restaurant, which was about sixty feet from the Harahan bridge, on the night of the shooting. He was in his living room, at a table, playing solitaire, when he heard two shots, and jumped up and opened the door, and looked down toward the viaduct to see if there was any trouble down there. He heard loud talking on the bridge, and finally went up there. He saw

the body of Prentiss Hoop. Witness illustrated to the jury the location of the wound. The body was about six or seven steps from the dirt end of the bridge. It was a light night, and while the shooting was going on there was a motor-car, which operated on the Missouri Pacific and which had a very bright light, coming up the hill. It was going east.

W. D. Jones testified that he was collector on the viaduct, and was there the night the Hoop boy was shot. It was a bright night; the shooting occurred between ten and ten fifteen o'clock. Witness heard two shots, and saw one of them. He was looking right toward the railroad when the shots were fired—one right behind the other. Witness was right at the end of the viaduct, sitting with his back to the wall looking toward the bridge—he was right under the Frisco Railway trestle. He heard a shot, and looked up and say the flash of a pistol—the second shot. It was impossible to recognize any one at that distance. The man who did the shooting was on the south side, shooting north. The blaze went north. There was no train between witness and the flash which witness saw. Witness was sitting right under the Frisco bridge, looking north.

The testimony on behalf of the defendants tended to show that Frick and Brownlow were "train-riders" employed by the Missouri Pacific Railroad Company for the purpose of protecting the company's property, and it was their duty to ride merchandise train No. 265, leaving Memphis shortly after night each night to Wynne. From February 23, 1927, until June 7, 1927, there had been 23 box-car robberies between Memphis and Parkin, Arkansas, on trains out of Memphis. Frick and Brownlow had been riding this train—No. 265—each night from May 1 or 2.

Frick and Brownlow testified, in substance, that they were riding train No. 265 west on the night of June 7, 1927, and that, when the train stopped near the west end of the Harahan bridge, they got off the train about

thirty-five cars east of the engine, and started walking west toward the engine on the south side of the train, which was composed entirely of box-cars, except for two stock-cars next to the engine. They always walked toward the engine, as by so doing they could see objects between them and the engine in the light cast by the head-light and the fire-box. Frick saw two or three men standing on the south side of the train, apparently attempting to open the door to a car, and Frick called to Brownlow, who also saw the same thing. Each drew his pistol and ran toward the men, hollering. Frick shot two shots westward over the heads of the men, for the purpose of frightening them, and the men then ran westward toward the engine and disappeared. They discovered a car door which had been partially opened when they arrived at the place where the men were. Frick denied shooting north or at any man.

The defendant introduced a photographer, who identified pictures which he took purporting to illustrate the position of Carter and the cars, the defendants, and the Hoops, on the night Prentiss Hoop was shot. These pictures were in evidence.

Dr. McVey testified as an expert that, in his opinion, a man wounded as Prentiss Hoop was could only have taken one or two steps after being shot.

V. E. Murray testified, for the defendants, that he was acquainted with the general reputation of witness Carter for truth and morality, and that it was bad.

Learned counsel for the appellant contend that, under the above evidence, the court erred in not instructing the jury, at appellant's request, to return a verdict finding him not guilty. But the testimony speaks for itself, and is amply sufficient to justify the jury in finding that the appellant fired the shot that killed Prentiss Hoop.

2. The appellant requested the court to instruct the jury as follows: "You are instructed that, in cases of circumstantial evidence, each and every circumstance must be proved beyond all reasonable doubt, and it must

show defendant's guilt beyond all reasonable doubt, and to the exclusion of every other reasonable hypothesis. In the cases of circumstantial evidence the circumstances must be shown to be consistent with the guilt of the defendant and wholly inconsistent with his innocence." Prayer No. 1 by the appellant was substantially to the same effect. The court refused these prayers for instruction. The appellant objected, and duly excepted to the ruling of the court in not granting same.

Counsel for the appellant assume that the State in this case relies for conviction wholly upon circumstantial evidence. But we are convinced that counsel are mistaken in this view of the evidence. It is not a case depending wholly upon circumstantial evidence. The jury might have found from the testimony of eye-witnesses that the appellant shot and killed Prentiss Hoop. Manifestly, the jury believed the testimony of the witnesses Carter and Martin, who saw the shots fired and saw the Hoops running, and also the testimony of Jones. Even the testimony of the appellant himself was to the effect that he fired shots, but that he fired above the heads of the fleeing men. It is not disclosed by the testimony that there were any other shots fired that night, so we have the direct testimony of eye-witnesses to the effect that they saw and heard the shots fired, that they were fired in the direction of the fleeing men, and that the man was found dead immediately after these shots were fired. Testimony of this nature could hardly be classified as wholly circumstantial, but it seems to us it was in the nature of direct testimony. Certainly, the most that could be claimed from a consideration of all the testimony in the record is that it consisted partly of direct and partly of circumstantial evidence. It occurs to us that it is a case where the ultimate fact to be proved depends more upon the credibility of the eye-witnesses than upon inferences to be drawn from collateral facts established by the direct testimony. It is not a case calling for the discussion of and the making of a nice discrimination

between direct and circumstantial evidence as these two kinds of evidence are defined by standard law-writers on evidence. For, as is said by Mr. Burrill in his work on Circumstantial Evidence, page 231, speaking of the relative value of direct and circumstantial evidence:

"They are in practice constantly found to occur in the closest connection; indeed, they are seldom wholly dissevered, especially so as to exclude the indirect species. It is very rare, as has been often remarked, that any body of evidence presented to the mind as the basis of a judgment is, on examination, found to consist wholly of direct, without any admixture of circumstantial, evidence. Finally, as thus associated, they are constantly found to be mutually consistent, and to cooperate toward the attainment of their common object, with the greatest harmony. That, indeed, may be pronounced the most perfect body of evidence in which strong direct testimony is sustained throughout by numerous and according circumstances." See also 1 Greenleaf on Evidence, § 13; Wills on Circumstantial Evidence, p. 16.

But, even if counsel were correct in assuming that this case depended wholly upon circumstantial evidence, there was no prejudicial error in the ruling of the court refusing the above prayers for instructions, since this court has ruled in numerous cases, some of them quite recent, that it is not error to refuse such an instruction, even in cases depending wholly on circumstantial evidence, where the court, in other instructions, has correctly defined reasonable doubt and declared the law applicable to that subject. The court in this case gave correct instructions on the subjects of presumption of innocence, burden of proof, and reasonable doubt. See *Adams* v. *State,* 176 Ark. 916, 5 S. W. (2d.) 946; *Barton* v. *State,* 175 Ark. 120, 298 S. W. 867, and cases there cited.

Furthermore, the instruction was inherently erroneous because it told the jury that it was necessary for the State to prove "each and every circumstance beyond all reasonable doubt." Such is not the law. It is sufficient

if the State proves the guilt of the defendant in the whole case beyond a reasonable doubt. *Lackey* v. *State,* 67 Ark. 426, 55 S. W. 213; *Cummins* v. *State,* 163 Ark. 24, 258 S. W. 622; *Sullivan* v. *State,* 163 Ark. 11, 258 S. W. 643; *Martin* v. *State,* 163 Ark. 103, 259 S. W. 6, 33 A. L. R. 133.

It appears from the bill of exceptions that the court correctly defined the degrees of homicide contained in the indictment, and in one of its instructions, after defining voluntary manslaughter, told the jury, if they found the defendant guilty of voluntary manslaughter, they should express that finding in their verdict and fix his punishment at imprisonment in the State Penitentiary at a period from two to seven years. The court directed the reporter to write out, to be given to the jury, the forms of the verdict for the different degrees of homicide included in the indictment, and the reporter, in writing out the forms, erroneously transcribed the form of the verdict for voluntary manslaughter by inserting the prefix "in" before the word "manslaughter." When the verdict was returned into court it expressed that the jury found the defendant guilty of involuntary manslaughter. The court thereupon asked the jury if it was their intention to return a verdict finding defendant guilty of involuntary manslaughter or voluntary manslaughter, and requested the jury, if it was their intention to return a verdict finding defendant guilty of voluntary manslaughter instead of involuntary manslaughter, to hold up their hands. All of the jurors, in response to the question of the court, held up their hands, thus affirming that it was their intention to return a verdict finding the defendant guilty of voluntary manslaughter. Thereupon the court, in presence of the defendant, his counsel, and all the jury, corrected the typographical error made by the court reporter, by striking from the form of the verdict the prefix "in" before the word "manslaughter" leaving the words "voluntary manslaughter," and asked each member of the jury, after the verdict was corrected and read as cor-

rected, if such were his verdict, and each replied in the affirmative. There was no error in this procedure. It was manifest that the word "involuntary" as originally written in the form of the verdict, was a clerical misprision of the court reporter, and that it was the intention of the jury to find the defendant guilty of voluntary manslaughter and to so return their verdict.

The record presents no error. Let the judgment be affirmed.

PAYNE *v.* STATE.

Opinion delivered May 28, 1928.

Smith & Blackford, for appellant.

H. W. Applegate, Attorney General, *John L. Carter,* Assistant, and *Penix & Barrett,* special counsel, for appellee.

SMITH, J. This appeal is from a judgment sentencing appellant to the penitentiary for the term of his natural life for the alleged killing of Fred Brandon. Only two assignments of error are argued for the reversal of the judgment, the first being that a child was erroneously permitted to testify on behalf of the State, and the second, that the court erred in refusing to give instruction number 2, requested by appellant.

No witness testified that he saw the killing, and the State relied entirely upon circumstantial evidence to secure the conviction. Two small boys, one Levi Phillips, who was seven years old, and another, Roy Pearson, whose age was eleven, gave testimony which supplied an essential link in the chain of circumstances.

The defendant denied the killing, and undertook to prove an alibi, and offered testimony to the effect that he was far removed from the scene of the killing at the time it was shown to have occurred. According to the testimony of the boys above named, appellant was in deceased's field, with a gun and dogs, hunting, a few minutes before the shots, three in number, were fired by an automatic shotgun, which killed the deceased.

No preliminary questions touching the competency of Roy Pearson were asked that witness, but, when Levi Phillips was called, he was first interrogated by the prosecuting attorney as follows:

"Q. Tell these men your name? A. Levi Phillips. Q. How old are you? A. Seven years old. Q. When was your birthday? A. On Thursday, I think. I can't tell you just when it was, but it was on Thursday. Q. Is it

wrong to tell a story? A. Yes sir. Q. What becomes of boys that tell stories? A. They lock them up. Q. If you are good and die, where do you go? A. Go to heaven. Q. Do you know Sam Payne here? Objection by the defendant."

Counsel for appellant then asked the witness the following questions:

"Q. Do you know what the punishment is, son, for telling a lie in court—you don't know that, do you? A. (No answer). Q. Then you don't know what the penalty for perjury is, do you? A. (No answer)."

Counsel for appellant, after propounding these questions, to which no answer was given, objected to the witness testifying, and saved an exception when his objection was overruled.

After the court had ruled that the witness was competent to testify, the witness told about seeing appellant in the deceased's field with dogs and gun, and was then subjected to a lengthy cross-examination by counsel for appellant. The answers of the witness indicated that the boy possessed at least average intelligence for a youth of his age. His answers were responsive to the questions asked him, and showed that he understood all these questions.

It is earnestly insisted that, under the rule announced in the case of *Crosby* v. *State,* 93 Ark. 156, 124 S. W. 781, the witness was not qualified to testify. In the Crosby case, a colored boy named Will Howard, ten years old, was permitted to testify, over the objection of the defendant. In that case, as in this, the witness stated that he knew it would be wrong not to tell the truth, but the colored boy answered that he did not know what would be done with him if he did not do so, while the witness Levi Phillips answered that he would be locked up if he told a story. The witness Will Howard was held to be incompetent, and the admission of his testimony was error calling for the reversal of the judgment. In each case the witness knew it was wrong to tell a story, but the witness Will Howard did not know that any punish-

ment would attend if he did so, while the witness in the instant case not only knew it was wrong to tell a story, but that persons were punished who did so.

It is true, as counsel for appellant argue, that the witness made no answer to either of the questions asked him on his cross-examination. But we think the ability to correctly answer these questions was not the true test of competency. Many persons of sufficient intelligence to fully comprehend the obligation of an oath might be unable to answer what the punishment was for telling a lie in court, and who would not know what the penalty for perjury is.

In determining the competency of a witness testifying in a criminal case, we follow the common law on that subject, as announced in the case of *Flanagin* v. *State*, 25 Ark. 92, where it was said:

"As to children, there is no precise age within which they are absolutely excluded, on the presumption that they have not sufficient understanding. At the age of fourteen all persons are presumed to have common discretion and understanding, until the contrary appears, but under that age it is not presumed; hence inquiry should be made as to the degree of understanding which the child offered as a witness possesses; and if he appears to have sufficient natural intelligence, and to have been so instructed as to comprehend the nature and effect of an oath, he should be admitted to testify, no matter what his age may be."

The common law on the subject of the competency of witnesses in civil cases was changed by the Civil Code, § 663 of which (§ 4146, C. & M. Digest) provides that "infants under the age of ten years, and over that age if incapable of understanding the obligation of an oath," shall be incompetent to testify in civil cases, but the common law on the subject of the competency of witnesses in criminal cases was not changed by this statute, and remains as it was announced to be in the Flanagin case, *supra*.

In the case of *Wheeler* v. *United States,* 159 U. S. 523, Mr. Justice Brewer, speaking for the Supreme Court of the United States, said:

"That the boy was not, by reason of his youth, as a matter of law, absolutely disqualified as a witness, is clear. While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review, unless from that which is preserved it is clear that it was erroneous. These rules have been settled by many decisions, and there seems to be no dissent among the recent authorities."

It is, of course, the duty of the trial court to follow closely the examination of a witness about whose competency there is a serious question on account of his youth, and if, during the course of the examination, it appears that the witness does not appreciate the questions asked him and the relevancy of the answers given, because of his youth, it would be the duty of the trial court to exclude the entire testimony of the witness, although his preliminary examination apparently indicated that the witness understood the obligations of an oath; but, as was said by Mr. Justice Brewer in the case above cited, the decision of this question rests primarily with the trial judge.

Under the test stated we think no abuse of discretion was shown in the admission of the testimony of the witness Levi Phillips, as his entire examination showed an

intelligent appreciation of the facts in regard to which the witness was interrogated, as well as the obligation to tell the truth in regard thereto.

The court refused to give instruction number 2, requested by appellant, which reads as follows: "Before the jury would be authorized to find the defendant guilty upon circumstantial evidence alone, the circumstances in proof must be so connected and linked together as to make an unbroken chain, and sufficient to exclude every other reasonable hypothesis for the commission of the offense except by the defendant."

We think this instruction was objectionable because it is argumentative in form. The trial court might very well, in a case where the guilt of the accused depends entirely upon circumstantial evidence, tell the jury that the circumstances proved should be such that, if true, they excluded every reasonable hypothesis except that of guilt. But it has been several times held that the failure to do so is not error where the court has, in other instructions, fully charged the jury on the presumption of innocence which attends one charged with the commission of a crime and the necessity of showing the guilt of the accused beyond a reasonable doubt.

This exact question was recently very thoroughly considered by us in the case of *Adams* v. *State,* 176 Ark. 916, 5 S. W. (2d.) 946, where it was said:

"Even if it could be said that this were 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, 264 S. W. 726; *Cummins* v. *State,* 163 Ark. 24, 258 S. W. 628; *Barker* v. *State,* 135 Ark. 404, 205 S. W. 835; *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."

In this case the court fully charged the jury on the subject of the credibility of witnesses and the manner of weighing their testimony, and the presumption of innocence attending the defendant, and the necessity on the part of the State of proving the guilt of the accused beyond a reasonable doubt before convicting him, and we conclude therefore that there was no error in refusing defendant's instruction number 2.

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

EVANS *v.* ROBERTSON.

Opinion delivered May 28, 1928.

Duty & Duty, for appellant.

Rice & Dickson, for appellee.

SMITH, J. On April 4, 1925, J. A. Robertson owned certain lots in the city of Rogers, on which his residence stood and in which he resided with his wife, Zeva Robertson, and their infant son. They were in debt on the place to the extent of about seven hundred dollars, and applied to Ira D. Swearingen for a loan of that amount to discharge the indebtedness. Swearingen declined to make the loan, for the reason that he was unwilling to incur the expense of a possible foreclosure, but he agreed to take a warranty deed to the property and to execute an agreement to reconvey it at any time within one year after the date of the deed for a consideration of $770. This arrangement was consummated, and Robertson and his wife executed and delivered to Swearingen a warranty deed conveying the property to him, and he, at the time of the delivery of the deed, executed the following contract:

"This agreement certifies that Ira D. Swearingen agrees and binds himself to convey to J. A. Robertson, Jr., or his assigns, the following described lands in Benton County, Arkansas, to-wit (describing lots), at any time within one year from this date, providing the said J. A. Robertson, or his assigns, shall pay to the said Ira D. Swearingen during said time the sum of $770.

"Time is made the essence of this agreement.

"This 4th day of April, 1925.

"J. A. Robertson, Jr.

"Zeva Robertson.

"Accepted: Ira D. Swearingen."

Robertson was addicted to the excessive use of intoxicating liquors, and before the expiration of the year became almost *non compos mentis*, and suffered from delirium tremens, and so deported himself that his wife was compelled to leave their home and return to that of her father. She did this because she and her father

thought it unsafe for her to live with her husband. Robertson's condition was such that it became certain that he could not and would not redeem the property, and Mrs. Robertson's father, acting for her and in her behalf, applied to Swearingen to redeem the property, and offered to pay the $770 for a deed. This offer was made before the expiration of the year.

Robertson appeared to be much under the influence of appellant Evans, who, from time to time, loaned him small sums of money and sold him merchandise out of his store on credit. Evans knew that Mrs. Robertson was negotiating for the redemption of the lots, and she knew that he also contemplated purchasing them, and she offered to permit him to buy the property, which was worth from seventeen hundred to two thousand dollars, provided he would pay her $500, and she testified that she would not agree for Evans to buy the property unless he would pay her that amount of money, but this he declined to do.

One year to a day after the date of the deed and the contract to reconvey, Swearingen executed a deed to Evans for the property. Swearingen testified that Mrs. Robertson's father came to see him about redeeming the property, and that he would have permitted her to do so but, about the time the contract matured, Robertson told him to make the deed to Evans, who was Robertson's "assigns." Witness examined his contract, and saw that it read that he should reconvey the property to Robertson or his assigns, and he therefore conveyed the property to Evans, who paid him $770 in cash for a deed. The contract to reconvey had not been assigned to Evans by Robertson. Witness at first declined to execute a deed to Evans, but, when his attention was called to the language of the contract, he made a deed as directed by Robertson, because he thought his contract required him to do so.

After executing the deed, Swearingen, on April 8, wrote appellee's father the following letter:

"Dear friend: Robertson paid me, and as our contract read 'Robertson, Jr., or his assigns,' he made me make the deed to a man named Evans as his assign. I did not know that was in the contract until today.

"P. S. Am awfully sorry that it was in the contract that way."

It was shown that Evans borrowed the money with which he purchased the lots, and as security therefor executed a mortgage on the lots.

Robertson died in June, 1926, and on July 1, 1926, Mrs. Robertson and her infant son brought this suit, and alleged that the money procured from Swearingen was a loan, and that the deed executed to him was in fact a mortgage, and that Robertson had procured the execution of the deed to Evans for the purpose of defeating the dower rights of his wife and the homestead rights of herself and their infant child.

Evans filed an answer, alleging that the conveyance to Swearingen was in fact a deed, as it purported to be, and that the contract executed at the time of the delivery of the deed was a mere agreement to reconvey within one year, and that time was made of the essence of the contract to reconvey, and the right to repurchase was not exercised within the time limited.

The court expressly found the fact to be that Evans was not an innocent purchaser, and the testimony appears to abundantly support that finding. The court further found that the deed was in fact a mortgage, and that it was executed to secure a loan of $700, and it was decreed that the right of redemption existed and might be exercised by plaintiffs paying $770 of the money which Evans had borrowed from a third party to pay Swearingen, and to whom he had given a mortgage, with interest at eight per cent. to date, and this appeal is from that decree.

Appellant earnestly insists, upon the authority of the case of *Hays* v. *Emerson,* 75 Ark. 551, 87 S. W. 1027, that the deed from Robertson and wife to Swearingen was an absolute conveyance in consideration of $700 paid them, and not a mere security for a loan for that

amount, and that the agreement to reconvey within a year did not create a mortgage, but was a conditional sale, which became absolute upon the expiration of the year.

We think the decree was not an erroneous one, even though appellants were correct in the contention stated (a point we do not decide), for the reason that Mrs. Robertson had a very substantial interest in the property if it were redeemed, to-wit, that of dower and homestead, and she regarded that right as of sufficient value to warrant her in redeeming the lots by paying the sum required for that purpose. Within the time limited for that purpose her father, as her agent in her behalf, offered to redeem the property, and would have done so had Swearingen not misconceived it to be his duty, under his contract, to convey the property to Robertson's "assigns." All parties knew, when Swearingen executed his deed to Evans, that Robertson could not and would not effect a redemption of the lots. Robertson and his wife were not divorced, and she had left his home only because her husband's misconduct had made it unsafe for her and her child to live there. Her rights of homestead and dower subsisted, and to protect these rights she was entitled to redeem the property, and especially so when it became apparent that her husband would not exercise the right of redemption.

At § 299 of the chapter on Mortgages, in 19 R. C. L., page 503, it is said that the equitable right to redeem a mortgage, after breach of condition, extends beyond the mortgagor to all who claim through or under him, and that a right of homestead gives the privilege of redemption. The cases collected in the annotator's note to the case of *Mackenna* v. *Fidelity Trust Co.*, 6 A. & E. Ann. Cases 471, cited in the note to the above text, fully sustain the text.

Now, although the agreement between Robertson and wife and Swearingen may have constituted a conditional sale, and not a mortgage, there was a contractual right to redeem within a year, and the holder of a homestead right was entitled to exercise that right. The

interposition of Evans, who, as the court found, was not an innocent purchaser, defeated the attempt to exercise this right, and the court below was correct therefore in holding that the right of redemption had not been destroyed.

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

BODNER *v.* STATE.

Opinion delivered May 28, 1928.

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

HUMPHREYS, J. Appellant was indicted, tried and convicted in the circuit court of Sebastian County, Greenwood District, for receiving stolen property, and was adjudged to serve a term of one year in the State Penitentiary as a punishment therefor.

Appellant first assigns as reversible error the insufficiency of the evidence to support the verdict and judgment.

The evidence introduced by the State showed that the store of L. T. Byers at Alma, Arkansas, was burglarized the night before Thanksgiving, in 1926, and that clothing to the amount of $600 was taken; that three woolen dresses, a red sweater, a lumberjack and some other clothing, which was stolen out of the store at the time referred to, was at the home and in the possession of appellant, a part of which was being worn by him; that the articles found, as well as other property, were brought to the home of appellant nearly a year before his arrest, in cotton sacks, and first placed in a cotton-house, and at a later date brought into the house, where the tags were taken off the clothing and burned, and that for a time the clothing was hidden under the floor; that subsequently a part of the property was removed by Frank Thomas and Joe Cook, who had brought same to the house. Although appellant stoutly denied being present when the tags were removed and burned and the clothing hidden under the floor, yet the jury believed the other witnesses, and their testimony is sufficient to support the verdict and judgment.

Appellant next assigns as reversible error the giving of instructions numbered 1, 2 and A. Instruction number 1 is as follows:

"If you find from the evidence in this case, beyond a reasonable doubt, that the defendant, Bart Bodner, in the Greenwood District of Sebastian County, and within three years next before the filing of this indictment, three woolen dresses, one leather coat and one sweater, of more than the value of $10, the property of L. T. Byers, lately before then unlawfully and feloniously stolen, taken and carried away, did then and there unlawfully and feloniously have and receive, with the intent to deprive the true owner thereof, he, the said Bart Bodner, then and there, well knowing that the said property had been so unlawfully and feloniously stolen;

taken and carried away, you should convict the defendant; otherwise you should acquit the defendant."

It will be observed that the instruction required the jury to find, beyond a reasonable doubt, every essential fact necessary to a conviction upon a charge of receiving stolen property before returning a verdict of guilty, and to acquit appellant unless the charge had been established by proof beyond a reasonable doubt. The law applicable to the facts was correctly declared by the instruction.

It is unnecessary to set out instruction number 2 and determine whether it is a correct declaration of the law applicable to the facts, as no objection was made thereto or exceptions saved at the time it was given. It was too late to object and save an exception thereto after conviction.

It is also unnecessary to set out instruction number A and determine whether same is a correct declaration of the law applicable to the facts, as it was given at the request of appellant.

Appellant next assigns as reversible error the refusal of the court to give his requested instruction number 2. An examination of the instructions given reveals the fact that the requested instruction, in so far as same correctly declared the law, was fully covered by instructions numbered 1 and 3 given by the court at the request of appellant.

Appellant's fifth, sixth and seventh assignments of reversible error are as follows:

(5) That the court erred in modifying instruction No. 4, requested by defendant. (6) That the court erred in stating to the jury that, at the request of defendant, he had given instruction number 4, as modified, relating to the corroboration of an accomplice, and that he was withdrawing said instruction from their consideration. (7) That the court erred in substituting instruction No. A for instruction No. 4, as modified, previously given."

Appellant is mistaken as to what the record discloses regarding his requested instruction No. 4, relating to the

necessity of corroboration of the evidence of an accomplice before there can be a conviction. There is nothing in the record to show that the court modified the instruction and gave it as modified, or that it was given and afterwards withdrawn, or that the court substituted appellant's requested instruction No. A for his requested instruction No. 4 after modifying same. What the record actually reflects is that the court refused to give appellant's requested instruction No. 4 because he gave his requested instruction No. A, which was a complete, full and correct instruction regarding the necessity for corroboration of the evidence of an accomplice before there can be a conviction upon his testimony. The court is not required to multiply instructions upon the same subject.

Appellant's last assignment of reversible error is that the court erred in refusing to instruct as to the effect of finding of the value of the property received by appellant, if any, being under the sum of $10. Appellant did not request an instruction upon that point, and is in no position to complain because one was not given. It was appellant's duty to have asked a correct instruction upon the question. *Hays* v. *State,* 129 Ark. 324, 196 S. W. 123.

No error appearing, the judgment is affirmed.

RICE *v.* MILLIGAN.

Opinion delivered May 28, 1928.

Coleman & Reeder, for appellant.

J. H. Townsend and *L. B. Poindexter,* for appellee.

HUMPHREYS, J. This is a suit brought by appellant against appellee in the circuit court of Lawrence County, Western District, for alleged balances totaling $735.76 upon five promissory notes, one of which was executed for corn and the others for rent of a bottom farm for the years 1922, 1923, 1925 and 1926. A note was also executed for rent for said farm for 1924, but it had been paid in full, and was not included in the suit. The several rent notes sued upon were originally for $300 each. One was executed each year for the rent for the farm for that specific year and made payable the following fall. The rent notes were similar in form and substance, so the purport of each may be understood by setting out only one of them. The first one executed is as follows:

"$300.00 Jan. 21, 1922.

"On or before Nov. 1, 1922, I promise to pay to W. M. Rice the sum of three hundred dollars, with interest at the rate of 10 per cent. per annum from January 1, 1923, until paid; for.....value received.

"The consideration for which the above note is given is for rent on the Caynie Brook farm for the year 1922; east side of Caynie Creek.

"Signed K. F. Milligan.

Indorsed: "March 29, 1923: Credit by one check given by Mrs. M. G. Shaver $300. Balance due May 25, 1925 .....$ 9.12

1.51 Int. 1 yr. 8 mo.

Total $10.63

December 10, 1926. Credit by 10 bu. corn $10. $10.63 paid in full."

Credits in different amounts appear on the respective notes.

Appellee interposed the defense to the alleged cause of action that there was an oral contemporaneous agreement to the effect that, should the crop be damaged or destroyed by the floods during any year of the five-year rental period, he should have a credit on the rental note

for that particular year in the same proportion that the damage bore to the whole crop so damaged, and that under said agreement he was entitled to a credit of $225 by reason of damage to his crops on said farm by overflow for the year 1923, and the sum of $270 by reason of damages to his crop by overflow on said farm for the year 1925, and that he had made other payments which did not appear as credits upon any of the notes sued upon.

A demurrer was filed to the answer and overruled, to which action of the court appellant objected and excepted.

In the course of the trial appellee was allowed to prove the alleged oral contemporaneous agreement, over the objection and exception of appellant. After he was permitted to introduce proof tending to show such an oral agreement, appellant testified that he did not agree to allow a *pro rata* credit on the rent notes on account of damages resulting to crops from floods.

The cause was sent to the jury, over appellant's objection and exception, to determine this issue of fact, as well as what other credits appellee was entitled to on the rent notes, the court instructing the jury as follows relative to the issue of damages done by floods:

"Now, if you believe from the preponderance of the testimony in this case that the defendant, Milligan, entered into a contract with the plaintiff, Rice, for the lands that have been testified about in the case, and that it was agreed in said contract that, in case of an overflow and loss or damage to the crops, the defendant, Milligan, was to have credit in the event of such overflow for the loss of any of the crops, and further believe that there were such overflows during the term of years that he had this land rented from the plaintiff, Rice, that caused damage to the crop for any such year, then you would be authorized to give the defendant, Milligan, credit for such loss or damage as you believe from the preponderance of the testimony he has sustained from such overflows, if any."

The jury returned a verdict in favor of appellee, on which judgment was rendered dismissing appellant's complaint at his cost, from which is this appeal.

The trial court erred in sending the case to the jury upon the issue of whether the notes should have been credited on account of damage done to the crops for the years 1923 and 1925 by reason of the floods.

The rent notes were contractual by their terms, specifying a certain and definite amount to be paid by appellee for the rent of the farm in question for each year. No condition that appellant would allow a credit on the rent notes for damage done to the crops on account of floods was incorporated in the notes. The notes purport to be an absolute promise to pay so much rent each of the years for the rent of the farm, and to permit or allow oral proof to the effect that they should be credited *pro rata* for damages done to the crops by floods would contravene the rule of law which precludes the admission of parol evidence to contradict or substantially vary the legal import of the note. *Harmon* v. *Harmon,* 131 Ark. 501, 199 S. W. 553; *Abbott* v. *Kennedy,* 133 Ark. 105, 201 S. W. 830. It was said by this court in the recent case of *First National Bank of Jonesboro* v. *Snyder Mfg. Co.,* 175 Ark. 1174, 1 S. W. (2d.) 817, that "parol testimony is not admissible to vary the terms of a written contract, or to show a contrary intention than that disclosed by the instrument itself, unless there is an ambiguity, and this rule is applicable to promissory notes."

As stated before, the note on its face is contractual, and, as written, was a complete contract within itself, not subject to contradiction by parol testimony of an oral contemporaneous agreement.

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

FRANCIS *v.* STATE.

Opinion delivered May 28, 1928.

R. W. Huie, Jr., for appellant.

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

KIRBY, J. These appeals are from judgments of conviction of appellant for possessing a still and manufacturing whiskey. These cases are consolidated here.

It is insisted for reversal that the testimony is insufficient to support the judgment, and that the court erred in compelling appellant to go to trial in the absence of his witnesses.

The testimony shows that the sheriff and his posse had come out to where this still was situated, and found it in operation on the day in question, the appellant being present in and about the still, and pouring water from the branch on the stillworm in the trough. He had on overalls, and was smutty and greasy, as though he had been working about it. Two empty kegs were found in his car.

He testified that he was a farmer, lived 20 miles away, and had come down to the still to get some whiskey. Accounted for his appearance by saying that he had had trouble with his car before arriving, and had put on his overalls and fixed it, getting grease and dirt on his clothing.

It is argued that a list of his witnesses had been given to the sheriff, but they had not been subpoenaed and were not present at the trial, and that he would have been able to show by them that he did not own the still or have it in possession.

The record does not show that he objected to going to trial, nor did he make a motion for continuance because of the absence of his witnesses, and, such being the case, he is not in position to complain about the matter here *Brown* v. *State,* 169 Ark. 324, 274 S. W. 1.

The testimony is meager as to his ownership or possession of the still, but he was present while the still was in operation, was pouring water on the worm and assisting in the manufacture of liquor that was being run at the time, and there was a quantity of mash on hand and enough operatives assisting to complete the manufacture of the mash into whiskey.

The testimony is sufficient to support the verdict, and the judgment in each case is affirmed.

HULTSMAN *v.* CARROLL.

Opinion delivered May 28, 1928.

Owens & Ehrman and *St. Clair Hultsman,* for appellant.

Tom F. Digby, for appellee.

MEHAFFY, J. The appellant, in July, 1927, purchased a gasoline filling station from the appellee, paying therefor $6,000. Appellant brought this suit, and alleged that, at the time he purchased the property, he informed the appellee that he intended to sell gasoline at a price less than the prevailing prices at other filling stations in the city. That, in all probability, the other companies would try to freeze him out of business by selling gasoline at a nearby station for less than the price set by the appellant. He told appellee that he would not purchase the property unless appellee would agree not to enter into any such combination or sell gasoline at a price equal to or less than the price charged by appellant. The appellee stated that he did not care anything about the gasoline business, and if appellant would give him $6,000 he would let him have the property which was located across the street from appellee's garage, and appellee would not sell gasoline at a price equal to or less than the price

charged by appellant. Appellant alleged that, relying on this statement, he paid appellee the money, and began selling gasoline four cents cheaper than the generally prevailing prices. About two months later appellee started selling gasoline one cent cheaper per gallon than the price charged by the plaintiff.

This suit was then filed in the chancery court, asking that appellee be enjoined from a further breach of his contract, and for damages. A demurrer was filed to the complaint, which was by the chancellor sustained, and to reverse the order sustaining the demurrer and dismissing the complaint, this appeal is prosecuted.

The demurrer was as follows: (1) That the complaint did not state a cause of action in equity. (2) That the alleged contract upon which the action was based was on its face void and unenforceable. (3) That plaintiff had an adequate remedy at law.

The appellee first contends that the contract or agreement is void because it is in restraint of trade, and therefore contrary to public policy. A contract, of course, is against public policy if it is in any way injurious to the interest of the public or contravenes some established interest of society, or if it contravenes a public statute, or is against good morals, or tends to interfere with the public welfare.

"Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labor, skill, or talent, by any contract that he enters into. On the other hand, public policy requires that when a man has, by skill or by any other means, obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and in order to enable him to sell it advantageously in the market, it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case the same public policy that enables him to do this does not restrain him from alienating that which he wants to alienate, and therefore enables him to enter into any

stipulation which, in the judgment of the court, is not unreasonable, having regard to the subject-matter of the contract. There are several reasons for upholding a covenant on the part of the vendor in all such cases to desist from the business in competition with the purchaser, which do not obtain in other cases. In the first place, the restraint is partial, in the sense that it covers only the time and locality during and in which the vendee carries on the business purchased, and beyond these limitations the seller is at liberty to carry on the same business. Then, too, the vendor receives an equivalent for his partial abstention from that business in the increased price paid him for it on account of his covenant; and his entering into and observance of the covenant not only do not tend to his pauperization to the detriment of the public, but, on the contrary, by securing to him the full value of his business and its good will, a value which he has an absolute right to secure in this way, the covenant operates to his affirmative pecuniary benefit and against his impoverishment, in that, while being paid for desisting from the particular business in the locality covered by it, he may still enter upon other pursuits of gain in the same locality, or upon this one in other localities. Finally, while such covenants preclude the competition of the covenantor, it is ordinarily neither their purpose nor effect to stifle competition generally in the locality, nor to prevent it at all in a way or to an extent injurious to the public, for the business in the hands of the purchaser is carried on just as it was in the hands of the vendor; the former merely takes the place of the latter; the commodities of the trade are as open to the public as they were before, the same competition exists as existed before, there is the same employment furnished to others after as before, the profits of the business go as they did before to swell the sum of public wealth, the public has the same opportunities of purchasing, if it is a mercantile business, and production is not lessened if it is a manufacturing plant." 6 R. C. L. 793.

The demurrer, of course, admits that appellant paid $6,000 for the land because the appellee promised that he would not engage in competition with him in his place of business across the street. According to the allegations of the complaint, appellee made this agreement, and would not have been able to sell his place for the $6,000 to appellant if he had not made it. It does not undertake to prohibit him from selling gasoline anywhere else except at the place across the street, at any price he may wish to sell it. It does not seek to prohibit or interfere with the sale of any other person at any locality, but it alleges that appellant desired to purchase it for the purpose of selling gasoline to the public at four cents below the prevailing prices, and expected competition from others, and expected that they would try to destroy his business by selling cheaper than he could afford to sell. He therefore contracted with the appellee that appellee would not engage in this competition at his place of business just across the street from the property purchased. The contract, if enforced, would in no way injure the public, and is not against public policy.

This court very recently said:

"There is no hard and fast rule in this State as to what contracts are void as being in restraint of trade, and each case must be judged according to its own facts and circumstances. It is also well settled that a person may legally purchase the business of another for the purpose of removing competition, with an agreement on the part of the seller not to carry on the same business in the same place for a limited period of time. Covenants of this kind operate to prevent the seller from engaging in a business which he sells, so as to protect the buyer in the enjoyment of what he has purchased and to enable the seller to get the full value of his property, including the good will of his business. In general this does not injure the public, because his business is open to all other persons, and there is little danger that it will suffer harm, if the business is profitable. The agreement could in no sense prevent other persons from entering the business,

if they should see it was a profitable one." *Robbins* v. *Plant,* 174 Ark. 639, 297 S. W. 1027; *Shapard* v. *Lesser,* 127 Ark. 590, 193 S. W. 262, 3 A. L. R. 247, and cases cited; *Wakenight* v. *Spear & Rogers,* 147 Ark. 342, 227 S. W. 419; *McSpadden* v. *Leonard,* 159 Ark. 193, 251 S. W. 694; *Bloom* v. *Home Ins. Agency,* 91 Ark. 367, 121 S. W. 293.

It is not contended that the contract involved is either in violation of law or immoral, but the contention is that it is contrary to public policy.

The appellee calls attention to and relies on the case of *Anderson* v. *Shawnee Compress Co.,* 17 Okla. 231, 87 P. 315, 15 L. R. A. (N. S.) 846. In that case the court said that the public welfare is the first consideration to which the courts will look, and then the question of whether the restraint upon the one party is or is not greater than the protection of the other requires. And the court further said:

"The real, the veritable, purpose actuating the officers of the Gulf Compress Company, as disclosed by its plan of organization and mode of operation, and as manifested by the circumstances surrounding the conduct of its business and the results of its management by them, is, beyond reasonable question, to place within their power the control of the compress industry, by purchasing or leasing those plants which are advantageously located in each of the hauling districts or territories established by the carriers in their cotton tariffs. * * * It may be true, as declared upon the witness stand by its president, that such is not the purpose of this organization; then the intention of its officers, as evinced in the declarations which fall from their lips, is at wide variance from the purposes evidenced by the results they have brought about."

The facts in that case are so different that the quotation from it by appellee has no application here. But we think a reading of the Oklahoma case will convince one, not only of the difference between the two cases, but that, according to the principles announced by the

Supreme Court of Oklahoma, the contract in the instant case is not contrary to public policy.

Appellee calls attention also to the case of *National Phonograph Co.* v. *Schlegel,* 117 Fed. 624. In that case the defendants filed a stipulation agreeing to an injunction. They agreed to be enjoined. But the court said: "Why do defendants agree to be enjoined? Is it simply to save costs? Is not the contract one that stifles trade? And if it is such a contract, should this court enforce it by the great writ of injunction? Are the parties to the contract alone concerned in its enforcement?"

Then the court further said:

"Injunctions are not granted as of course, and should not be granted when it is believed, as I do believe, that such a writ would be improperly used. As an injunction is not required to coerce the defendants in this case, they, in effect, having agreed to comply with complainant's demands, for what can the writ be used? Undoubtedly to intimidate or terrorize others engaged in the like business. It will be used to hold up to others that this court has recognized the validity of the contract. The decree of this court will be used for advertising literature; and, before a decree should be so used, it should be quite certain that such a decree is required as between the parties to the record. Believing that such a decree is not required as between the parties to the record herein on such grounds, the writ, although agreed to by the parties, should be denied."

In that case the court found, not only that the parties agreed to an injunction, but they were already complying with the contract, and that, so far as the parties themselves were concerned, there was no occasion whatever for an injunction, but it was sought for the purpose of terrorizing others and compelling others to comply with the wishes of the complainant. But there is no intimation or suggestion in the above case that an injunction would not be granted to prevent the violation of a contract which was entered into by the parties and was not in restraint of trade.

Appellee next calls attention to 22 Cyc. 866. It is true that it is there stated that, before a court will enjoin a breach, there must be no doubt about the validity of the contract and its terms must be clearly proved and the fact of breach established beyond doubt. But we have the facts here stated in the complaint and admitted to be true so far as the demurrer is concerned.

"Where one has made a valid contract restricting the use to which he may put his land, a violation of such restriction by him will be restrained by injunction; such covenants are usually made at the time of a conveyance, the grantee agreeing not to use the land conveyed in certain ways, or the grantor limiting his use of other land retained by him." 22 Cyc. 859.

If the contract is not contrary to public policy and the violations of the contract are continued from day to day, like the selling of gasoline, and the contract is not unreasonable, a court of equity will restrain the violation of the contract.

"The complainants are therefore entitled to a decree restraining the defendant from carting over any of the avenues in the park any stone taken from his lot for any purpose, except such loose stones as it is necessary to remove for the purpose of fitting his lot for building and occupation." *Haskell* v. *Wright,* 23 N. J. Eq. 389.

The Supreme Court of Michigan, where the contract involved was alleged to be in restraint of trade, where it is sought to restrain one from carrying on the ice business, said: "The rule is that contracts of this nature will be enforced in equity where the restraint is only partial, being limited as to time and place, and where reasonable grounds exist for the restraint, and where it is founded on a good consideration." *Up River Ice Co.* v. *Denler,* 114 Mich. 296, 72 N. W. 157, 68 A. S. R. 480.

The court in the above case also held that the fact that there was no time limit for which the seller must refrain from carrying on the business would not render the agreement invalid.

While, according to the allegations of the complaint, there is no time limit in the contract involved in the instant case, yet the restrictions were especially limited by the contract to the lot across the street from the one purchased by appellant. The contract does not undertake to prevent any other persons from engaging in competition with appellant, nor to prohibit appellee from selling gasoline wherever he may wish, and at any price for which he may wish to sell, except at his place of business across the street from the lot purchased by appellant.

We think the complaint states a cause of action, and the decree is therefore reversed, and remanded with directions to overrule the demurrer, and for further proceedings not inconsistent with this opinion.

ARKANSAS-LOUISIANA HIGHWAY IMPROVEMENT DISTRICT *v.* TAYLOR.

Opinion delivered May 28, 1928.

Rose, Hemingway, Cantrell & Loughborough, Ed Trice and *William L. Baugh, Jr.*, for appellant.

John Baxter, for appellee.

MEHAFFY, J. This suit was brought by the appellee, Walter E. Taylor, Bank Commissioner, to recover certain notes, assets of the Desha Bank & Trust Company, and pledged by the Desha Bank and Trust Company to the Arkansas-Louisiana Highway Improvement District Commission to secure the public funds which the commission had on deposit in said bank, and alleged that the hypothecation of such assets by the bank to secure the deposit of such funds was illegal and void as against the other creditors and depositors of said bank, and asked that the notes be returned to the appellee, so that collection might be made and the proceeds distributed *pro rata* to the depositors.

The appellant, Arkansas-Louisiana Highway Improvement District, is a road improvement district created by special act of the General Assembly, and the Desha Bank & Trust Company is a corporation organized under the laws of the State of Arkansas for the purpose of doing a banking business and receiving deposits.

On July 21, 1927, the assets of the Desha Bank & Trust Company were insufficient to discharge its obligations and liabilities, and the Bank Commissioner took charge for the purpose of liquidation. Prior to the closing of said bank, the improvement district had on deposit in said bank approximately $5,000, said funds being placed in said bank as a general deposit and checking account. A short time prior to the time the Bank Commissioner took charge of the Desha Bank & Trust Company, it delivered to the treasurer of the improvement district certain notes, one for $3,147.40, one for $1,215.25, and one for $3,500. Said notes were listed as the assets of the Desha Bank & Trust Company at the time they were delivered to the improvement district, and they were delivered to the district for the purpose of securing a general deposit in the bank. Demand was made by the Bank Commissioner, and the improvement district refused to return said notes.

Appellee also alleged that the bank was insolvent at the time these notes were given to the improvement district to secure the deposit that was already in the bank, and that the insolvency was known to said district.

The answer of the improvement district denied all of the material allegations of the complaint, and the case was tried upon the following agreed statement of facts:

"It is agreed by John Baxter, representing the plaintiff, and Ed Trice, representing the Arkansas-Louisiana Highway Improvement District, that the only issue to be determined in this case is the right of a bank to secure deposits by pledging its own assets as security for said deposits.

"It is agreed that, on or about the first day of July, 1927, the Arkansas-Louisiana Highway Commission had on deposit in the Desha Bank & Trust Company approximately $6,000. That, prior to June first, the Arkansas-Louisiana Highway Commission had funds on deposit in numerous banks in Southeast Arkansas, and all banks were notified by the commission that they would be expected to file with the commission surety bonds covering said deposits in each respective bank prior to June 10, 1927, when act 182 of the Legislature of 1927 took effect. That for some reason the Desha Bank & Trust Company failed to file the surety bond, as requested, and had not filed the surety bond up to July 1, 1927, and on July 1, in lieu of said surety bond, the bank offered and the Arkansas-Louisiana Highway Commission took the notes described in the plaintiff's complaint for the deposit the commission had in said bank, said notes being assets of said bank at the time they were hypothecated.

"It is further admitted that, if said notes had not been pledged or given to the commission, a draft would have been drawn on said bank for the payment of said funds.

"It is further admitted that the Desha Bank & Trust Company closed its doors by order of the Bank Department on July 21, 1927, and that since that time the assets

of said bank have been in charge of Walter E. Taylor, as Bank Commissioner for the State of Arkansas.

"It is further agreed that the Desha Bank & Trust Company accepted deposits and paid checks until it was closed by the Bank Commissioner.

"It is admitted that H. Thane was president of the Desha Bank & Trust Company, and that a resolution was in effect in said bank authorizing the president, vice president or cashier to hypothecate and pledge notes, mortgages, and other assets as collateral security for loans.

"It is further admitted that the funds deposited in said bank were the property of the Arkansas-Louisiana Highway Improvement District, the same being public funds of said district."

Appellant's first contention is that banks in Arkansas have always had a right to pledge that portion of their assets proper to secure depositors; and that, second, whether they did have the right prior to the passage of act 182 of the 1927 Legislature, after the passage of that act the bank had the power. And appellant also states that it and the appellee are agreed in the statement of the very narrow issue involved in this appeal. Both appellant and appellee state that the only issue in the case is: Did the Desha Bank & Trust Company, on July 1, 1927, have the power to pledge that portion of its assets proper to secure the public funds which the Arkansas-Louisiana Highway Improvement District had on deposit at said bank?

Act 182 of the 1927 Legislature provides that commissioners, treasurers and other officers of all road, drainage, levee, bridge, street, sewer, paving and all other improvement districts of this State, having in their charge the moneys and funds of such districts, shall, before depositing same in any bank, trust company, savings association or with any other person or company, require of such depository a good and sufficient bond, signed by some surety company authorized to do business in the State of Arkansas, conditioned for the apt and full

and complete payment of all funds so deposited, together with the interest thereon. It is further provided, however, that the said depository may, in lieu of said bond above mentioned, deposit United States bonds, or notes of the State of Arkansas, the bonds of any legally organized school, levee, drainage, or other improvement district of the State of Arkansas, which bonds and all proceedings concerning the issuing of same have been approved by some reputable attorney, who is recognized by the bond buyers of the United States as such, as collateral security, and such bonds shall be deposited in escrow with some other bank than the depository of the funds of such district, to be delivered to such district only on failure of the depository of such funds to repay the said funds to the district or to pay same on the order of the district.

Said act 182, as will be seen, expressly provides that the depository may, in lieu of giving the surety bonds provided for in the act, deposit United States bonds and other bonds therein mentioned. The securities authorized by said act are specifically mentioned, and the securities involved in this case are not included in the kind of bonds mentioned in the statute.

It is earnestly urged that the power to contract for guaranteeing or securing depositors arises from the nature of the relation existing between the banks and their depositors. The relation created between the bank and the depositor by the receipt of deposits is that of debtor and creditor. And act 182 expressly authorizes improvement districts, when they deposit money with banks, to require either a surety bond or the kind of bonds mentioned in the act in lieu of the surety bond. The Legislature could have authorized banks to pledge their assets to secure deposits, but it has not done so.

The Kentucky court said:

"When deposits are received, the bank becomes a debtor to the depositor for the amount of the deposits, and, if it agrees to pay interest, for that also. These are the only terms and conditions regulating deposits

and the payment of interest, and if, in addition to this, the bank may pledge its assets to the depositor, then it may exercise another most extraordinary power, which is not conferred by article 2 and not necessary for the conduct of its business of receiving deposits and paying interest thereon. It would be a dangerous implication to deduce from the words of the statute, which should rather be construed strictly for the benefit of the stockholders and protection for the depositors. The exercise of such a power is therefore clearly beyond the terms of the law or any reasonable or necessary implication which the court would be authorized to deduce from the language of the statute, and would tend to lessen the usefulness of the banks as great public institutions by destroying public confidence in them. Such a practice, if indulged and authorized, might work great injustice and inflict financial loss, not only on the depositors, but on the stockholders as well. Large depositors, if secured, might absorb the greater part of the assets of the bank and inflict loss upon unsecured depositors and financial ruin upon innocent stockholders under the double liability law." *Commercial Bank & Trust Co.* v. *Citizens' Trust & Guaranty Co. of West Virginia,* 153 Ky. 566, 156 S. W. 160, 45 L. R. A. (N. S.) 950, Ann. Cas. 1915C, 166.

If a bank could pledge any portion of its assets to secure deposits, it could pledge all of its assets, because, if the authority to pledge its assets exists at all, it is without limit. And a few large depositors might be able to secure the entire assets of the bank as a pledge for their deposits, to the injury of every depositor and the stockholders. The act relied on should be strictly construed for the benefit of the stockholders and protection of the depositors, and the power to deposit assets by a bank should not be held to extend beyond the express authority given in the statute.

Learned counsel have referred to and discussed many authorities, but the authorities are not in harmony, and it would serve no useful purpose to review or discuss the authorities relied on. We adopted the view expressed

by the Kentucky court in the case above referred to, and it would therefore be useless to discuss the authorities taking the opposite view.

While it is true that, when deposits are received by a bank the bank becomes the debtor to the depositor for the amount of the deposit, we think there is a difference between this debt and a debt created by the bank in borrowing money, although in both instances, that is, where one deposits money in the bank and where one makes a loan to the bank, the relation of debtor and creditor exists, and while the bank may pledge its bills receivable to secure loans, it does not follow that it may do so to secure deposits.

"The doctrine that there is no difference between a loan and a deposit we cannot accept in all its implications. It is true that in law the two transactions have many characteristics in common; but so have other business deals which, nevertheless, are not identical in all their legal incidents. The striking fact remains, a fact which this court cannot ignore, that a real difference between a deposit and a loan has always been assumed, as a matter of custom, in the banking business itself, and in all legislation dealing with the subject since statehood.

"We are warranted in taking judicial notice of the fact that, in the banking business, it has been and still is customary to treat loans and deposits as distinct and essentially dissimilar transactions. Without going into details, this fact is evidenced by methods of bookkeeping and of making reports of the financial condition of the bank, both to private individuals, through the press or otherwise, and to the public examiner. Originally, one of the main functions of a bank was to receive money deposits or valuables for safekeeping, and this early concept of a bank's primary office has, in a large measure, been recognized by custom in the business, and has influenced the course of legislation upon the subject. * * * If the power exist to pledge bills receivable in order to secure a general deposit, it means, in all ordinary circumstances, that its repayment would be insured by the

other and unsecured depositors of the bank, for, manifestly, a sale of the pledge, in the event of insolvency, would reduce the assets available to pay general depositors by the amount or value of the securities. The principle of subrogation would in but few, if any, cases be efficacious to avert this result. It is difficult to discover any principle on which the receiver of the bank could recover from the surety for the benefit of the depositors, after the obligation to pay the public deposit has been discharged by a sale of the pledge; and in case the public depositor proceeds first against the surety on the bond, the surety would have 'the benefit of every security' held by the principal, and it would be subrogated to the rights of the public corporation in the securities. * * * If the power exist, it is without limit or qualification in the statutes; and there is no requirement, legal or administrative, which removes the mantle of absolute secrecy from the transaction. The bank could—as every business man knows has been done on occasion—make the pledge agreement, keep the assets in its possession, and execute its receipt therefor to the favored depositor, all without a trace on the records of the corporation showing the transaction which actually took place." *Divide County* v. *Baird,* 55 N. D. 45, 212 N. W. 236, 51 A. L. R. 296.

Of course the bank could pledge the assets mentioned in act 182, the Legislature having authorized improvement districts to receive pledges of this kind from the bank, but the power to pledge the assets of the bank should not be extended beyond that expressly authorized by the Legislature.

Having reached the conclusion that the correct view of the law is stated in the decisions to which we have called attention, it would unnecessarily prolong this opinion and serve no useful purpose to review other authorities. We think the law as announced in the two decisions to which we have called attention is the better rule, and, adopting that rule, it becomes unnecessary to

discuss the other questions discussed by counsel in their brief.

The decree of the chancery court is therefore affirmed.

DEAREN *v.* STATE.

Opinion delivered May 28, 1928.

George W. Johnson, for appellant.

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

MEHAFFY, J. The appellant, who was the county clerk of Sebastian County, was indicted, charged with the

crime of embezzlement of public funds of Sebastian County. He was granted a change of venue to Scott County, where he was tried and convicted, and his punishment fixed at imprisonment in the penitentiary for a period of five years. Motion for new trial was filed and overruled, exceptions saved, and appellant prosecutes this appeal to reverse the judgment.

Appellant's first contention is that the court erred in admitting certain testimony. Mrs. Pettigrew, a witness, was asked this question:

"Q. I hand you an affidavit to an account for $435 purported to be signed by Wm. J. Dearen on the 12th day of October, 1925, and I will ask you if you recognize that account?" She answered: "I do not know whether I recognize the account, but I recognize the signature. Q. Whose signature is that? A. Mr. Dearen's."

The prosecuting attorney here asked to introduce the affidavit in evidence, and the attorney for appellant objected on the ground that it purported to be an original claim, and that it does not show that it has ever been filed in the county clerk's office, and that it is inadmissible in evidence in any other court except the county court of Sebastian County, Fort Smith District, and further objects because it does not tend to show the defendant guilty of the offense charged. The paper introduced was as follows:

"Affidavit of county account, county of Sebastian, Fort Smith District:

To Wm. J. Dearen	Dr.
To 498 claims v. county	423.50
Insanity matters, 5 at $1.65	8.25
	431.75

"State of Arkansas, county of Sebastian, Fort Smith District.

"I, ..., do solemnly swear that the foregoing claim is just and correct, and that no part thereof has been paid previously, that the service charged for or

material furnished, as the case may be, were actually rendered or furnished, and that the charge made therefor does not exceed the amount allowed by law, or customary charges, for similar services or material furnished, when estimated and paid in lawful money of the United States, and that such accounts, claims, demands of fee bill are not enlarged, enhanced or otherwise made greater in consequence of or by reason of any estimated, supposed or real depreciation in the value of county warrants. Wm. J. Dearen.

"Sworn to and subscribed before me this 12th day of August, 1925. Wm. J. Dearen, Clerk. By Leota C. Pettigrew, D. C.

"No. 499. $431.75. Claim for allowance: Co. Ct. Wm. J. Dearen v. Sebastian County, Fort Smith District. Filed on the.....day of.....192..... .....Clerk. By.....D. C. Examined and allowed Aug. 10, 1925. T. A. Norris, Judge."

Several other accounts and affidavits similar to the above were introduced, and objection was made to all of them. The aggregate amount was several hundred dollars, and the accountant, Gilbertson, also testified to a shortage of something in excess of $4,000.

It is earnestly insisted that these affidavits of the appellant were erroneously admitted in evidence. These affidavits were signed and sworn to by appellant, and they were therefore competent evidence if they tended to show his connection with the crime with which he was charged. It is always permissible to prove declarations and admissions against a person charged with an offense, if his declarations or admissions tend in any way to show his connection with the crime charged or tend to prove his guilt.

"It is insisted that error was committed in permitting witnesses to detail conversations had with the defendant prior to the arrest of one and at the time of the arrest of the other, and subsequent to the robbery, because they were indicted as accessories before the fact.

But any admission of a defendant, whenever made, which tends to show his connection with the crime charged in the indictment, is admissible against him." *Jenkins* v. *State,* 131 Ark. 312, 198 S. W. 877; *Crawford* v. *State,* 130 Ark. 101, 197 S. W. 19; *Stroud* v. *State,* 167 Ark. 502, 268 S. W. 850; *Dennis* v. *State,* 169 Ark. 505, 275 S. W. 739.

Appellant contends, however, that this was an original claim, and inadmissible in evidence in any other court except the county court of Sebastian County. It is admissible because it is a declaration of the appellant himself, and would be competent evidence in any court, whether it had ever been filed anywhere or whether it was intended to be filed. But it is said that it does not tend to show the defendant is guilty of the offense charged. This affidavit alone, of course, did not show him guilty of the offense charged, but all the evidence cannot be introduced at once. It is never possible to show by one statement or declaration all the elements of the crime. This evidence was admissible as tending to show the connection of the defendant with the crime charged, and it would make no difference, so far as the admissibility of this statement is concerned, where the claim or statement or affidavit came from.

It is also contended that the records were improperly introduced. Appellant urges that the county court records were not properly identified as coming from the defendant's office. It is true that, at the time of the introduction of the records, the prosecuting attorney simply stated that they were the county court records of Sebastian County. The defendant objected, but did not state any specific objection, and witness Gilbertson, an accountant who had examined the county court records of the Fort Smith District of Sebastian County, identified the records sufficiently to authorize their introduction, as there was no specific objection made to them. It was stated, when the records were introduced, that they were the records that were in the defendant's office, and made

by him. This is not disputed. The appellant simply objected to their introduction. If there was any question or doubt about their admissibility because they were not the records kept by the appellant, he should have made this objection.

It was stated, when the records were offered, that they were the records in the defendant's office, and made there by him. And this statement was not disputed, and no objection was made by appellant because they were not the proper records, but just a general objection to their introduction. If the appellant had made the objection that the records were not those kept by him, or not the records of the Fort Smith District of Sebastian County, or if there had been any dispute about them being the records kept by him, it would have been necessary to show these facts or to identify the records by other evidence. The purpose, however, of introducing the clerk who keeps the records to identify them is necessary only to show that they are the county court records kept by the proper officers, and we think the proof was sufficient in this case when the witness Gilbertson testified that he examined the records in the county clerk's office. The statement was made in appellant's presence that they were the records kept in his office by him, and no suggestion that they were not in fact the records of the county court of Sebastian County. It is true that, in order to introduce any document or any record, it must appear that it is what it purports to be. Its authenticity and genuineness must be established, whether by evidence of witnesses or evidence appearing on its face, or by showing the custody from which it came. Appellant does not dispute the custody from which this record came, and does not dispute its correctness. Whenever a record is produced in court and identified by the custodian thereof, no further proof of its authenticity is required, as a general rule. Appellant himself, however, was the custodian in this case, and the identity of the record may be shown by any competent witness who knows the fact. The state-

ment of the prosecuting attorney to the court was that these were the records kept by the defendant in his office. They are the same records testified about by the witness Gilbertson.

Moreover, witness Earl Dawson testified that he was county clerk of Sebastian County, and had charge and custody of the records of the Fort Smith District pertaining to the office of county clerk, and had in his care records K and L, and also the records of the scrip register of Sebastian County, and, referring to the records, witness was asked: "Those are the records that were in the office at that time?" The witness answered that they were, and that they were the records used by him since that time as the records of the county. He also testified to having in his possession certain pistol registration applications, and testified that he also had the fee-book E of the Fort Smith District of Sebastian County, and the county court docket and scrip stubs.

We therefore think that the records were sufficiently identified to authorize their introduction in evidence.

The appellant also contends that it was not proper to take the accounts filed against the county and the records to Scott County and introduce them in evidence, and that it was not shown that the accounts were filed in any court or in any office.

We have already stated that the affidavits and accounts signed by the appellant were properly introduced in evidence as statements made by him, and we think there was no error in admitting the other documentary evidence.

It is next contended by the appellant that the case should be reversed because the funds which it is charged that appellant embezzled were the funds of the Fort Smith District of Sebastian County, and not of Sebastian County. The defendant is charged with embezzling public funds of Sebastian County, and we think the proof is not at variance with the charge in the indictment. They were county funds, notwithstanding they might be for

use in the Fort Smith District only. Chandler, who was for six years treasurer of Sebastian County, testified that, under the salary law based upon a fee system, the surplus fees earned by them over the salary were divided between the two districts in proportion to the fees earned in the respective districts. They were county funds, but divided in proportion to the fees earned in the respective districts.

Appellant calls attention to the case of *Jewett* v. *Norris,* 170 Ark. 71, 278 S. W. 652, and the court in that case said:

"It may be conceded that these districts are not counties within the ordinary meaning of the word; but we think, in view of the unique provision of the Constitution in regard to Sebastian County, that the two districts thereof are to be treated as if they were in fact separate counties, so far as their fiscal affairs are concerned."

They are treated as if they were separate counties so far as their fiscal affairs were concerned, but this does not make them separate counties, and it in no way prevents the taxes collected in the county from being county taxes, although each district is apportioned its share of said county taxes. They are still county funds, just as the officers are county officers.

The indictment complies with the requirements of the law, because it is direct and certain as to the party charged, the offense charged, the county in which the offense was committed, and the particular circumstances of the offense charged. And the funds, as we have already said, which appellant is charged with embezzling, were the funds of Sebastian County, and the fact that Sebastian County is divided into two districts is immaterial.

Appellant also insists that the court erred in the instructions given and refused, but we think the instructions as a whole correctly stated the law, and it would serve no useful purpose to set them out here.

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

HOME FIRE INSURANCE COMPANY *v.* WRAY.

Opinion delivered May 28, 1928.

Barber & Henry, Troy W. Lewis and *Clayton Freeman,* for appellant.

J. F. Holtzendorff, for appellee.

McHANEY, J. This action of replevin was originally brought by Jennings Motor Company against the appellees for the recovery of a model 70 Chrysler coach automobile, which it claimed by virtue of a contract or note of appellee, J. R. Newton, for the balance of the purchase price thereof, in which it retained title to said car. The Home Fire Insurance Company paid the Jennings Motor Company the amount due it under a policy of conversion insurance, took an assignment of Jennings' interest in the cause of action, and was substituted as plaintiff. The suit was subsequently prosecuted in its name. The facts, briefly stated, are as follows:

Two representatives of Jennings Motor Company, Chrysler dealers, on September 24, 1926, sold to J. R. Newton, in Dumas, Arkansas, the car in controversy, for the price of $1,248, payable $200 cash, for which Newton delivered his check at the time, which was worthless, and one Ford car of the agreed value of $225. This left a balance of $823, for which, according to the two Chrysler salesmen, a title-retaining note was taken, payable four

days later, which was to be refinanced through title notes to some credit or finance company, which the Jennings Company would make out and send to Newton from Little Rock, and such a note was produced at the trial.

According to Ragsdale, a witness for appellee, nothing was said about title-retaining notes, and that Newton did not sign such a note at the time of the sale, but notes were to be sent from Little Rock for him to execute and return. A few days later, Newton sold the Chrysler coach to appellee in Hazen, Arkansas, and gave him a bill of sale therefor. He never did execute and deliver the credit company notes, but, shortly after making the sale to appellee, he left for parts unknown.

The court, over appellant's objections, instructed the jury, at appellee's request, as follows:

"No. 1. The defendant contends that, at the time the sale of this car was made, the representative of the Jennings Motor Company stated to Newton that he would take his check in the sum of $200 and his Ford car as part payment on the Chrysler car, and that, at a later date, title-retaining notes would be sent to Newton for him to sign and return to them, and, before said title-retaining note was executed by Newton and returned to the Jennings Motor Company, Newton sold said car to the defendant Wray. If you find this to be a fact by a preponderance of the testimony, then you will find for the defendant Wray.

"No. 2. You are instructed that, if you find that a representative of Jennings Motor Company made a trade with Newton in which they sold him a Chrysler car and received a check for $200 and a Ford touring car as part payment on the Chrysler, and at a later date were to send Newton their notes, which they claim are title-retaining notes, and that Newton was to sign these notes, and that Newton signed these notes and returned them to Jennings Motor Company, and then came to Hazen and sold the car to Mr. Wray, then under the law the plaintiff cannot recover possession of the car. If you find that to be a fact, then you will find for the defendant."

The court refused to instruct the jury, at appellant's request, to return a verdict for the possession of the car and whatever damages had been sustained for the wrongful detention thereof as shown by the evidence, or, in the alternative, the value of the car at the time demand was made for it, as shown by the evidence.

The jury returned a verdict for appellee.

This case was defended by appellee on the theory that, although a conditional sale of the Chrysler coach was made to Newton by which title was to be retained by notes thereafter to be executed, such a reservation of title could not be made by parol, but must be in writing; and the sale to appellee, having been made at a time before the execution of any such notes by Newton, passed the title to appellee. The trial court adopted appellee's theory of the law of the case, and gave instructions 1 and 2 heretofore set out. This was error. *Jones* v. *Bank of Commerce,* 131 Ark. 362, 199 S. W. 103; *Estes* v. *Lamb & Co.,* 149 Ark. 369, 233 S. W. 99; *Sternberg* v. *City National Bank,* 149 Ark. 432, 233 S. W. 691. The holding in all these cases is to the effect that the vendor of a chattel may deliver possession to the vendee on condition that the title shall remain in the vendor until the whole purchase price shall have been paid, and that even a subsequent purchaser thereof, without notice of such reservation, acquires no title as against the original vendor; and that such a contract need not be in writing, but may rest wholly in parol.

Conceding, as the jury has apparently found, that the representatives of Jennings Motor Company did not take a title note to the car at the time of its sale and delivery to Newton, as they testify positively they did, still appellee concedes in his instruction No. 1, given at his request, "that at a later date title-retaining notes would be sent to Newton for him to sign and return to them." This shows conclusively that the title to the car was not to pass, but would be retained in the seller until the purchase price was paid in full, and, though verbal, was valid and binding on appellee, an innocent purchaser.

It necessarily follows from what we have said that the only question that should have been submitted to the jury was the question of damages for the wrongful detention of the car, or, in the alternative, the fair market value of the car at the time demanded.

Reversed, and remanded for a new trial.

[redacted]

CASHION *v.* PARR.

Opinion delivered May 28, 1928.

[redacted]

W. W. Grubbs, for appellant.

William West and *Streett & Burnside,* for appellee.

McHaney, J. Appellant, E. T. Cashion, is the administrator of the estate of J. M. Basket, deceased, who died testate in Chicot County, Arkansas, on November 30, 1926, and the other appellants, Susie Martin and Clementine Webb, are the sole legatees under Basket's will. Appellees are husband and wife.

In the year 1905, Dr. Parr, then a young physician, located in Eudora for the practice of his profession, and roomed and boarded with said Basket and his wife until the death of Mrs. Basket, in 1906. They continued to live together in Basket's home, sharing the expenses equally, until Dr. Parr's marriage. After Dr. and Mrs. Parr were married, they bought Basket's home, and paid for it by boarding and rooming Basket at $200 per year for six and one-half years. He thereafter continued to board with the Parrs, paying a flat monthly sum for room and board, until 1919, when he left, and went to live with appellant, Mrs. Susie Martin, in Lake Providence, Louisiana, selling out his blacksmith shop in Eudora, at which he had been engaged for many years. His purpose in going to Lake Providence to live with Mrs. Martin was to make that place his home, but in April, 1924, Mrs. Martin removed from Lake Providence, La., to West Virginia, and Mr. Basket came back to Eudora, and again made his home with the Parrs from then until his death. For a short time after his return to Eudora he paid the appellees $25 per month for his room and board, and, on complaint being made, he thereafter, until his death, paid them at the rate of $30 per month, which was accepted without objection, and no demand was ever made for any additional sum until after Basket's death. In December, 1925, Mrs. Parr bought some real estate in Eudora on monthly payments of $80 per month, and, at her suggestion, Mr. Basket acquired these purchase money notes and carried them as a loan for the appellees. These notes were paid off each month by the appellees to Basket until his death. Appellee, Dr. Parr, had been Basket's physician during all these years, except during the period of his absence in Lake Providence, La.,

and had received pay for services rendered up to the year 1914. He had never presented any bill to Mr. Basket, or received any pay subsequent to 1914. After Basket's death, Dr. Parr filed a claim against the estate for medical services for the period of time running from January 1, 1914, until his death, except the years he was living in Louisiana, amounting to $710. Included in the claim was $406.25 for room rent for two years 8½ months at $12.50 per month, being the period of time he had lived in the Parr home subsequent to his return from Louisiana. Other items were included in the bill for nurse hire, about which there was no dispute. The administrator disallowed the claims, but the probate court allowed them in the sum of $949.41. The appellee, Mrs. Parr, filed a claim against the estate for nursing and special care from April 1, 1924, to the date of his death, in the sum of $250, which was disallowed by the administrator, and allowed in full by the probate court. The legatees under the will and the administrator appealed to the circuit court, where they filed answers, in both cases admitting that they owed Dr. Parr the $12 item for board, the item for nurse hire and for laundry, etc., and also a reasonable fee for his services during the deceased's last illness, but contested the claim for $225 for medical services from November 22 to November 30, 1926, covering Basket's last illness. On a trial before the court sitting as a jury, the court found, over appellant's objections and exceptions, that the claim for medical services rendered from April 1, 1924, to the testator's death, including the item of $225 for eight days' services during his last illness, should be allowed in the sum of $550. The court further found, as a matter of fact, that there was no given sum fixed for board for the years 1924, 1925 and 1926, and that the customary charge for board in Eudora was $40 per month, and allowed the additional sum of $10 per month, or a total of $325. The court also allowed the items about which there was no dispute, and also allowed the claim of appellee, Irene Parr, on special finding of fact, that she had rendered services during

the years mentioned in her claim of a special nature, and not contemplated by the parties in their contract for board. Appellants excepted to these allowances, and have brought the case here for review.

We think the court was in error in allowing all these claims, except for the services rendered by Dr. Parr during the last illness of the deceased, and this allowance of $225, we think, is excessive, and except part of the claim of Mrs. Parr. As to the allowance of the additional amount for room rent, the proof shows conclusively that he paid $30 per month each and every month up until the 18th of November, 1926, and that at his death he owed for twelve days' board, which the court properly allowed at the rate of $1 per day. There was no contract to pay any additional sum. He had, for many years prior to his going to Louisiana in 1919, boarded with the Parrs and paid a flat sum monthly for room and board. He had never paid a specified amount for room rent and another specified amount for board. Both were included in a flat monthly sum, and paid by him monthly. When therefore they continued to accept a specified sum monthly after his return from Louisiana, without a special contract agreeing to pay more, they would have no just claim against his estate after his death for an additional sum, the presumption of law being that the stipulated payments monthly were in full satisfaction of all claims on this account, unless the claimant is able to show that the decedent agreed to pay an additional sum.

In 24 C. J., p. 280, it is said: "Where services have been fully paid for in the lifetime of decedent, there cannot, of course, be any further recovery on that account against the estate, and, where the claimant has received a stated sum periodically for wages or salary, in payment of board or otherwise, the presumption is against a larger allowance, unless decedent is shown to have agreed accordingly."

The cases cited under the above text are all from other States, but they support the rule announced. There is no evidence in the record to indicate that, up to the

time of Mr. Basket's death, either of the appellees ever suggested to him that the $30 per month paid was insufficient, or that they were expecting more, and the record is totally lacking in any evidence to show that Mr. Basket agreed or expected to pay more. The same thing is true with reference to the items in Dr. Parr's account for medical services. As heretofore stated, he filed a claim covering all the years from 1914, except the period of time he was in Louisiana. During all this time he rendered no bill to Mr. Basket, made no claim for medical services, and at the time Mr. Basket went to Louisiana to live, when it was thought by all parties concerned that he would, in all probability, never return to Eudora, nothing was said about any indebtedness from him to appellees. And we think the court was in error in allowing all the items for medical services except during his last illness, and that the item of $225 allowed in this connection is excessive. The proof wholly fails to show what medical services were rendered; that the charge was reasonable for the services rendered. The proof shows that the only time he was in bed from any illness, after his return from Louisiana, was in August, prior to his death in November, 1926, and that, while he was not physically strong, he was up and out on the streets every day. He went to the blacksmith shop, and did some collecting for the then owner, until he was stricken fatally in November. During all this time no bills were rendered, no amount claimed from Mr. Basket by Dr. Parr, but, on the contrary, the doctor was paying to Mr. Basket the monthly installment notes of $80 each, without claim of deduction for medical services, or otherwise. He says the reason he did not render a bill was that he wanted the old man to enjoy his money while he had it.

Neither do we think the item of $250 allowed Mrs. Parr can be sustained. She made this claim, and same was allowed to her, on the theory that she had rendered special services in connection with his diet, by preparing special food, such as soft-boiled eggs and light diet. She says that the special diet consisted of "soft-boiled

eggs that he could eat, and cereals and stuff like that, and then I had to prepare them three or four times a day, sometimes five times a day that he was fed." She doesn't say over what period of time she prepared these special diets, but presumably it was for the short time he was sick in August, and the eight days during his last illness. It is said that she assisted in nursing him during his last illness, and caused an injury to her kidney by helping him on the bed. The proof shows, however, that the doctor employed for Mr. Basket, during his last illness, one trained nurse and two colored nurses, incurring a total expense for nurse hire of $75.66. We do not think therefore that there is any evidence in the record to support a finding of the court in allowing this claim of $250 for special services rendered, with the exception of the eight days during his last illness, and this amount would be clearly excessive for this service. He had paid his board regularly, and no demand for additional compensation had been made upon him for special services prior to his last illness, and there had been no promise or agreement on his part to pay an additional amount for special services. However, there is some evidence in the record to support her claim for special services rendered during his last illness, but not sufficient to support the amount thereof.

For the errors indicated the judgment will be reversed, and the cause remanded, with directions to determine the value of Dr. Parr's services for medical attention during his last illness, and the value of Mrs. Parr's special services rendered during his last illness, and to allow their claims for such amounts as may be just and proper as shown by the evidence introduced thereon.

INTERCITY TERMINAL RAILROAD COMPANY *v.* WORDEN.

Opinion delivered May 28, 1928.

T. F. Digby and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

Harb & Barnard, for appellee.

McHANEY, J. Appellant operates street cars across the Main Street bridge, spanning the Arkansas River, connecting the cities of Little Rock and North Little Rock. For this purpose it maintains double tracks across said bridge, running north and south. The east track is used for northbound cars and the west track for southbound cars. The east, or northbound, track, after cross-

ing the bridge and its approach, turns east on Washington Avenue, in North Little Rock, and makes a loop in said city, to return to the Little Rock side of the river on the southbound track. On and for some days prior to April 23, 1927, on account of the excessive high water and flood conditions generally, the northbound track was under water from Second and Main to Washington Avenue, in North Little Rock, which made it impossible to use the northbound track during the flood conditions, in the ordinary way. Therefore during the flood conditions appellant was operating all of its cars across the Main Street bridge on the southbound track, thereby running its cars, both north and south, on the southbound track.

On said date appellee's son was driving her car south on the Main Street bridge, and had a collision with a northbound car, operating as aforesaid, on the southbound track, in which he and his companion were severely injured, and the automobile was considerably damaged. Appellee brought this action to recover damages to her car, in which she alleged that appellant was negligent, in that the street car was driven at a high rate of speed, without giving any signals or warnings of approach in operating said street car north on the southbound track, and in failing to give proper warning while operating the street car in a north direction on a track which was generally used for southbound cars; also in failing to keep a lookout, and in failing to stop said car.

Appellant denied all allegations of negligence.

The trial resulted in a verdict and judgment against appellant for $150.

Two errors are assigned for a reversal. The first is that the court erred in permitting the witness, John Hunter, to testify to statements made by the motorman right after the collision. Appellee's son, Ralph Sigler, and his companion, the witness, John Hunter, were riding in the car together, and the witness Hunter was permitted to testify, over appellant's objection, that, imme-

diately after the collision, the motorman stopped his car, got out, and said: "Boy, are you hurt very bad? I didn't see you; I was up so close I couldn't stop the car so quick; the car had nothing on it but a handbrake."

The evidence shows that this statement was made immediately after the accident, at a time when the car was badly wrecked, and the witness himself was badly cut and was bleeding profusely. It is said that this testimony was incompetent and inadmissible as a part of the *res gestae,* under the rule announced in *Itzkowitz* v. *Ruebel & Co.,* 158 Ark. 454, 250 S. W. 535. In that case the court quoted with approval from *Carr* v. *State,* 43 Ark. 99, as follows:

"*Res gestae* are the surrounding facts of a transaction, explanatory of an act, or showing a motive for acting. They are proper to be submitted to a jury, provided they can be established by competent means sanctioned by the law, and afford any fair presumption or inference as to the question in dispute. * * * Now, circumstances and declarations which were contemporaneous with the main fact under consideration, or so nearly related to it as to illustrate its character and the state of mind, sentiments or dispositions of the actors, are parts of the *res gestae.* They are regarded as verbal facts, indicating a present purpose and intention, and are therefore admitted in proof like any other material facts. * * * Nor need any such declarations be strictly coincident as to time, if they are generated by an excited feeling which extends without break or let-down from the moment of the event they illustrate. But they must stand in immediate causal relation to the act, and become part either of the action immediately preceding it or of action which it immediately precedes."

We think this testimony was competent, and that the court did not err in admitting it for such consideration as the jury might deem proper to give it in determining the question as to whether the motorman of the street car was negligent. There is no question in this case of the

negligence of the driver of the automobile, and the only question for determination was whether appellant was guilty of negligence in failing to exercise ordinary care in the operation of its street cars to avoid injury to persons and property traveling on said bridge. In the Itzkowitz case, the collision between the two automobiles occurred at the intersection of Capitol Avenue, on the south side thereof, with the alley which runs north and south between Main and Scott Streets, and officer Witt testified that he heard the noise of the collision, and ran up to the place where it occurred; that he was stationed at Main Street and Capitol Avenue, and was permitted to testify, over objection, that he interrogated the driver of one of the cars regarding the accident and why he did not stop, and the driver replied that his brakes would not work. This court held in that case that the declarations or statements made by the driver were incompetent as part of the *res gestae,* not being a part of the transaction itself, but a mere history or narrative thereof given afterwards. The court said: "The investigation and inquiry of the officer necessarily broke the continuity between the main fact sought to be elicited and the narrative given of it, and we think that, under these circumstances, the evidence cannot be received as a part of the *res gestae.*" But here the facts are different. Immediately after the accident, and as soon as his street car was stopped, the motorman went to the wrecked automobile and made the statement heretofore quoted.

As said by this court in *Beal-Doyle Dry Goods Co.* v. *Carr,* 85 Ark. 479-484, 108 S. W. 1053, 14 Ann. Cas. 43:

"It is not easy always to determine when a declaration is a part of the *res gestae.* It is dependent upon the particular circumstances under which the declaration is made."

And, as was said by this court in *Clinton* v. *Estes,* 20 Ark. 225:

"It may be difficult to determine at all times when declarations shall be received as a part of the *res gestae.*

But, when they explain and illustrate it, they are clearly admissible. Mere narratives of past events, having no necessary connection with the act done, would not tend to explain it. But the declaration may properly refer to a past event as the true reason of the present conduct."

In *Flynn* v. *State,* 43 Ark. 292, it is said:

"In cases like this, words uttered during the continuance of the main action, or so soon thereafter as to preclude the hypothesis of concoction or premeditation, whether by the active or passive party, become a part of the transaction itself, and, if they are relevant, may be proved as any other fact, without calling the party who uttered them."

In the Beal-Doyle case, above cited, many of the decisions of this court and the text-writers relating to the subject are cited and discussed. It would serve no useful purpose to again review them here. But, under these authorities, the statements of the motorman, having been made immediately after the accident, at a time when undoubtedly the exciting influence thereof had not lost its sway or had not been dissipated, must be held to be a part of the transaction itself, and therefore admissible, and not merely a narrative of a past event.

The second ground of complaint made by appellant is the instruction of the court, given on its own motion, as follows:

"If you find in this case, from a preponderance of the evidence, that the street car was being operated on the left-hand track, and that in doing so the operator of the car was negligent, and that this negligence caused the damage, your verdict will be for the plaintiff."

The complaint made against this instruction is that it was left to the jury to say whether or not the appellant was negligent in operating its car on the left-hand track. It was undisputed that the car was being operated on the left-hand track, that is, was being run north on the southbound track. Appellant says that this question should not have been submitted to the jury, because as a matter

of law it was not, under the circumstances, negligence merely to operate its car on the left-hand track, and it made a specific objection to this effect against said instruction. It also, in its requested instruction No. 7, asked the court to instruct the jury as follows:

"You are instructed as a matter of law it was not negligence for the defendant company to operate its street car north on the west track of its double track line."

The court refused to give this requested instruction, and overruled its specific objection to the above instruction on the court's own motion. We think this was error, calling for a reversal of this case. It was undisputed that the northbound track was incapable of being operated, on account of the flood conditions, as heretofore stated, but it was appellant's duty, as well as its right, to operate its cars across said bridge for the convenience of the public. Of course, if the operator of the car was negligent in its operation on either track, appellant would be liable, but the above instruction given by the court did something more than to submit the negligence of the operator in running the car, to the jury, as it said that, if they found that "the street car was being operated on the left-hand track, and that in doing so the operator of the car was negligent," etc., which left it to the jury to find that merely operating the car on the left-hand track was negligence, no matter how careful and free from negligence he otherwise might have been in the operation of the car. We do not think the mere fact of operating the car on the left-hand track could be said to be negligence, but that there would have to be some other affirmative careless action on the part of the operator, or the failure to do something that he should have done, to be guilty of negligence. We do not find any decision of our own court in point, and counsel have not cited any. Cases from other courts, however, are cited, which we think are illustrative and authoritative for this holding. *Bush* v.

Los Angeles Ry. Co., 78 Cal. 536, 174 Pac. 665, 2 A. L. R. 1607; *William Altreuter* v. *Hudson River Ry. Co.*, 2 ed. Smith (N. Y.) 151; *North Street Ry. Co.* v. *Irwin*, 82 Ill. App. Rep. 145; *Cincinnati Traction Co.* v. *Jameson*, 32 Ohio Circuit Court Reports, 335.

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

MIDLAND SAVINGS & LOAN COMPANY *v.* BROOKS.

Opinion delivered June 4, 1928.

[redacted]

Jno. D. Rogers and *P. P. Bacon,* for appellant.

Frank S. Quinn, for appellee.

HART, C. J., (after stating the facts). As will be seen from our statement of facts, on the 5th day of May, 1926, Dan Dewberry entered into a written contract with Paul R. Brooks for the sale of the lot in controversy. After making a small cash payment, Brooks executed a note to Dewberry for the balance of the purchase money, and was placed in possession of the property. He has actually resided on the property since the date of his purchase, and was residing there at the time a mortgage was executed by B. V. Long and wife to the Midland Savings & Loan Company, on the 18th day of May, 1926. The possession of the property by Brooks and wife at the time the mortgage to the Midland Savings & Loan Company was executed was equivalent to actual notice to that company of the title, rights and equities of the occupants. *Thalheimer* v. *Lockert,* 76 Ark. 25, 88 S. W. 591; *Naill* v. *Kirby,* 162 Ark. 140, 257 S. W. 735; *First National Bank of Paris* v. *Gray,* 168 Ark. 12, 268 S. W. 616; *Reed* v. *Ziff Lodge 119 Order of Masons,* 175 Ark. 980, 1 S. W. (2d.) 1000; *Crawley* v. *Neal,* 152 Ark. 232, 238 S. W. 1054; *American Building & Loan Association* v. *Warren,* 101 Ark. 163, 141 S. W. 765. In the case last cited the law applicable to cases of this sort is clearly stated as follows:

"Ordinarily, possession by a person under a contract of purchase, although unrecorded, is notice of his equitable rights and interests in the property. Actual possession is evidence of some title in the possessor, and puts the subsequent purchaser or mortgagee on notice as to the title which the occupant holds or claims in the property. Generally, actual, visible and exclusive possession is notice to the world of the title and interest of the possession in the property, and it is incumbent upon the subsequent purchaser or mortgagee to make diligent inquiry to learn the nature of the interest and claim of such possessor, and, if he does not do so, notice thereof will be imputed to him."

In the case at bar Brooks went into possession of the lot as soon as he purchased it, and made payments of the purchase money under the terms of his contract to the amount of $420. He testified that he did this in good faith, and his testimony is not contradicted. The other evidence in the case shows that Dan Dewberry purchased the property from Mrs. Agnes McCall and had the title put in the name of B. V. Long for his benefit. Brooks did not have any notice of this, and, relying upon the assertions of Dan Dewberry, believed that the title was in Dewberry at the time he purchased the lot, and entered into possession of it. There is nothing whatever in the record to impeach the good faith of Brooks in the purchase of the property. Dewberry represented that the title was in him when he made the contract with Brooks, and Brooks signed the note for the purchase money and entered into possession of the property, believing that he was acquiring a good title thereto. B. V. Long admitted that the property was purchased by Dan Dewberry from Mrs. Agnes McCall and that the title was taken in the name of B. V. Long for the benefit of Dan Dewberry, and that he (Long) had no interest whatever in the property. Under these circumstances Brooks had an equitable interest in the property, and his possession of it was notice to the

defendant, the Midland Savings & Loan Company, of his rights.

It follows that the decree of the chancery court will be affirmed.

McGregor *v.* Cain.

Opinion delivered June 4, 1928.

J. F. Summers, for appellant.

Roy D. Campbell, for appellee.

HART, C. J., (after stating the facts). The Legislature of 1923 passed an act to establish a circuit court and a chancery court at McCrory, Arkansas, and to create the Central Judicial District. Special Acts of 1923, p. 210. Under § 19 of said act it is made the duty of the collector of taxes of Woodruff County to collect the same in the respective districts of said county as now provided by law, the same as if said districts

were separate and distinct counties. Under the provisions of § 10042 of Crawford & Moses' Digest, the collector or his deputy is required to attend at his office at the county seat until the tenth day of April each year to receive taxes from persons wishing to pay the same. This section is an amendment to a part of the original revenue act which came up for construction in this court in *Hare* v. *Carnall,* 39 Ark. 196. In that case the court had under consideration a section of the statute requiring the collector to attend at his office at the county seat until the twentieth day of April each year, to receive taxes from persons wishing to pay the same. The court said that this provision was intended for the benefit of the taxpayers, and that its observance was a condition precedent to any valid sale of land. Hence the court held that the provision was mandatory.

It is now contended that, unless the collector maintains an office in the courthouse until the tenth day of April in each year to receive taxes from persons wishing to pay the same, all tax sales will be void. We do not think so. The term "county seat" indicates the seat of government of a county, the town in which the county and other courts are held, and where the county officers discharge their duties. *Williams* v. *Reutzel,* 60 Ark. 155, 29 S. W. 374, and *Graham* v. *Nix,* 102 Ark. 277, 144 S. W. 214. Hence the county seat does not consist merely of the courthouse and jail, but also of the territory of the town designated as the county seat. While ordinarily it would be the duty of the collector of taxes to maintain an office in the courthouse to collect taxes under our revenue act, still there could be no imperative duty upon him to maintain an office there under all circumstances.

In the case at bar the allegations of the response of the collector were established by evidence. The special act of the Legislature creating three judicial districts in Woodruff County was held valid by this court in *Bonner* v. *Jackson,* 158 Ark. 526, 251 S. W. 1. The court will take judicial notice that three judicial districts were

established in Woodruff County by that act, and that McCrory was designated as the county seat of the middle district. It is a small town, and, under the facts established by the record, there was no courthouse erected; and the building provided by the county court within which to hold court and establish county offices was destroyed by fire. The county court then provided another building for courthouse purposes, and offered to fit up a room upstairs in it for the use of the collector in collecting taxes. The collector of taxes refused to do this, and established his office for the purpose of collecting taxes in the Central District in a mercantile establishment about a block away from the building designated for courthouse purposes. He gives as a reason for so doing that the building designated for courthouse purposes had no fireproof vault in which to keep the tax records, and that the mercantile building had such fireproof vault. The office of the collector in the mercantile building was kept open at all reasonable hours during the day, and the place was well known to the property owners and inhabitants of the Central District of Woodruff County as the place where taxes were received from all persons wishing to pay the same. This was done without cost to the county.

Under these circumstances the circuit court erred in issuing a writ of mandamus, at the request of the county judge, to require the county collector to maintain an office in the building designated for a courthouse for the purpose of receiving taxes from persons desiring to pay the same. Therefore the judgment of the circuit court will be reversed, and the cause is remanded with directions to the circuit court to dismiss the petition of the county judge. It is so ordered.

PHILLIPS *v.* HARDY.

Opinion delivered June 4, 1928.

[redacted]

Owens & Ehrman, for appellant.

J. S. McKnight and *Thomas W. H. Hardy,* for appellee.

WOOD, J. This action was instituted by Frank Phillips against Louis Tatum and Pearl Tatum to foreclose two mortgages on certain lands situated in Calhoun County, Arkansas. The plaintiff alleged that the mortgages were executed to secure certain notes, one for $175, executed in favor of the Camden National Bank, which note and mortgage the plaintiff had purchased from the bank, and also another note in the sum of $560.95, secured by a mortgage executed by Louis and Pearl Tatum to the plaintiff. The plaintiff alleged that both notes were due, also that the defendants were indebted to the plaintiff in the sum of $1,375.62 on account, which was secured by a second mortgage. The notes and mortgages were made exhibits to the complaint. Service was had upon the Tatums, but they failed to appear, and a decree was entered against them by default in the sum of $1,375.62, and the land described in the complaint and mortgages was ordered sold to satisfy the decree. The land was sold under the decree, and the commissioner appointed to make the sale made his report to the court in May, 1926.

Thomas W. Hardy, trustee for Gathright Livingston, who was the guardian of Girtha Lee Livingston and

Mary Lee Livingston, minors, and also as the next friend of these minors, filed a petition for intervention and a motion to postpone confirmation of the sale. In their petition it was alleged that Gathright Livingston, the guardian of the two minors, had, on November 24, 1922, been authorized by the probate court to loan Louis Tatum $2,000, which had been done; that the loan was evidenced by a note secured by a deed of trust on the lands in controversy, which had been duly recorded; that the First National Bank of Camden and Frank Phillips, the plaintiff in the foreclosure suits, had full knowledge of this prior deed of trust; that Phillips and Louis Tatum entered into a conspiracy whereby they represented that the money due Livingston as guardian had been paid, and induced him to enter satisfaction of the mortgage on the record; that Phillips knew that the indebtedness due by Louis Tatum to Livingston as guardian had not been paid, but was past due under the terms of the mortgage securing the same; that Phillips knew these facts at the time he purchased the note from the First National Bank of Camden, and also at the time he took the note and mortgage to evidence and secure the indebtedness due him by the Tatums.

Hardy, as the trustee for Livingston, the guardian, and as next friend of the minors, alleged that they were damaged in the sum of $1,000 by reason of the acts of the plaintiff and the Tatums in thus clouding their title. The prayer of the complaint was that their own mortgage be foreclosed on the land involved as prior to the mortgage of the plaintiff, Phillips. Attached to the petition of intervention were a deed of trust, letters of guardianship, a copy of the order of the probate court authorizing the loan by Livingston, the guardian, and a copy of the note to the bank. Service was had upon the plaintiff, Phillips, and upon Joe Bradshaw, the trustee named in the mortgage of the Tatums to Phillips. The defendants, Louis and Pearl Tatum, waived service, and entered their appearance to the intervention. Phillips, the plaintiff in the original action, answered the inter-

vention, denying its allegations, and alleged that Livingston, the guardian, on April 29, 1925, had satisfied of record the mortgage executed by the Tatums to Gathright Livingston, as guardian, and alleged that the debts secured by that mortgage had been paid.

An amendment to the exceptions to the report of the commissioner was made for the minors, in which they alleged that the satisfaction of the mortgage to their guardian, Gathright Livingston, had been fraudulently obtained by the plaintiff in the original action; that they had no knowledge of the prior foreclosure proceedings, and that they had made known and asserted their rights immediately after learning thereof. They asked that the satisfaction of the record of the mortgage made to their guardian, Gathright Livingston, be canceled, and that such mortgage be foreclosed.

Under an agreement by counsel representing respective parties, all documents and records referred to in the pleadings were introduced as evidence in the cause. It was shown on behalf of the minors that a note for $2,000 executed by the Tatums to Gathright Livingston, their guardian, was left in the Merchants' & Planters' Bank of Camden for safekeeping. The note had never been paid through the bank. Thomas W. Hardy testified for the minors that, in the fall of 1922, Gathright Livingston, as guardian of his two minor children, Girtha Lee and Mary Lee, had in his possession $2,000 belonging to them. Livingston was authorized by an order of the probate court to loan this money to the Tatums, to be secured by a deed of trust on the lands described in the pleadings and the deed of trust. Witness was named as trustee in the deed of trust executed to secure the loan. The note evidencing the loan for $2,000 had never been paid, so far as witness knew. Witness informed Frank Phillips, at the time the note was executed and the mortgage was taken covering the same land, that Gathright Livingston had a mortgage on the land and the indebtedness to Livingston had not been paid. Witness did not remember the exact date, but did remember

telling Phillips that the land belonged to these little negroes, and that if he took a mortgage on it he would lose it; that he could not get anything out of it until the $2,000 was paid.

Lee York testified that he sold the land in controversy to Louis Tatum. The proceeds of the loan made by Gathright Livingston, as guardian, to Tatum were paid direct to witness. Witness had a conversation with Phillips, in which Phillips stated that he had settled all the indebtedness owed by Louis Tatum. He did not say what indebtedness. Witness talked to Phillips several times about this mortgage prior to April, 1925, and Phillips understood that the Livingston children had a lien on the land in controversy. Witness told him that they had a mortgage on this land to secure the sum of $2,000. At the time witness so informed Phillips, Phillips was furnishing Tatum and the Livingstons. The conversation referred to took place in the spring of 1925.

Gathright Livingston testified that he was the father of the minors, Girtha Lee and Mary Lee Livingston. He was their guardian. Witness could read and write. He identifies what purported to be the note given by Louis and Pearl Tatum, November, 1922. The mortgage was given to secure the note. The note had never been paid. On April 29, 1925, witness entered a satisfaction of record on the records of Calhoun County, where the mortgage referred to had been recorded. Witness was asked why he entered the satisfaction on the record, and stated, in substance, that he did so because Phillips told him to do so; that Phillips said he had paid all the indebtedness that Louis Tatum owed; Phillips said they could send witness to the penitentiary; that the record should have been satisfied ten days earlier. Phillips stated that he had paid what Louis Tatum owed to the Merchants' & Planters' Bank at Camden. Witness further testified that he and Tatum, in 1923, gave Phillips a joint mortgage on their mules and crops. Witness denied that he had ever told Phillips that the mortgage of the Tatums to witness for the children had been paid. He

stated that Phillips told him that he had paid out the indebtedness of Tatum on the place, and if witness did not satisfy the record he, Phillips, was going to send witness to the penitentiary. In 1925 witness was living on the children's place, and that year Phillips furnished witness fertilizer to use on the place. The note of the Tatums to Gathright Livingston was due November 24, 1927.

Frank Phillips, the plaintiff in the original action, testified that he was engaged in the mercantile business at Camden, Arkansas; that he was in the clerk's office in Hampton when Gathright Livingston satisfied the mortgage given to him by the Tatums. Witness did not state to Gathright Livingston that witness had paid the indebtedness of the Tatums to the children; that he had paid to the Merchants' & Planters' Bank at Camden the indebtedness due by Louis Tatum and wife to the Livingston children. Witness took a mortgage in the year 1923-24 on Gathright Livingston's mules and crops. Livingston did not pay anything—claimed that his cotton was burned. Witness found out that Livingston had sold cotton in Hampton and in Camden. Witness advised Livingston that he'd have to have his money or foreclose his mortgage. Louis Tatum suggested to witness that he take a mortgage on the land to secure the Livingston indebtedness and $175 which Tatum owed the bank. Witness refused to do so until furnished with an abstract. Witness went to the bank to see about paying off the $175 which Tatum owed the bank, and was informed that there was a mortgage on the land to Livingston for $2,000. Tatum and Livingston stated to witness that they wanted to secure him, pay the bank, and secure furnishings for that year. Livingston had not, prior to that time, told witness about the $2,000 indebtedness. When witness asked Livingston about it, Livingston told him that the Tatums did not owe him anything, and that he, Livingston, would satisfy the mortgage. Witness did not threaten or intimidate Livingston in any way to satisfy the mortgage, but

Livingston satisfied the mortgage in order to get witness to advance money to pay the bank to secure the indebtedness which was past due and to get six or seven hundred dollars' worth of supplies for the ensuing year; that Tatum notified witness that the indebtedness had been paid. After witness' mortgage on the land was taken, both Tatum and Livingston told him that the indebtedness to the children had been paid and that everything was cleared. Livingston was living on the land in question in 1924, and most of the money furnished by witness on the mortgage went to Livingston. Witness did not know that there was any other lien on the land except that of the bank. Livingston furnished him an abstract which showed upon its face that the property was clear. Witness could not testify from his own knowledge that the $2,000 due the children had been paid. Witness further testified, in regard to the satisfaction of the mortgage, that he told Tatum and Livingston that, if they wanted him to furnish them, the mortgage to Gathright Livingston would have to be satisfied. The mortgage of the Tatums to the bank was acquired by the witness in November, 1924, and on the same day the Tatums executed the mortgage on the lands to witness. Witness told Tatum and Gathright Livingston that the mortgage given by the Tatums to the bank would have to be satisfied before witness would furnish them anything. Gathright Livingston did not tell witness at the time that he had a mortgage on the land. He said there was nothing against it. Witness told Livingston that he was not going to pay the bank until he had satisfied his mortgage. Livingston met witness on the Locust Bayou road, and came and satisfied the mortgage. Witness did not use any coercion or threats to have Livingston satisfy the mortgage. Witness did not furnish a nickel's worth of supplies to Livingston and Tatum until witness knew that the mortgage to the children had been satisfied.

Several witnesses testified to the effect that Gathright Livingston's reputation for truth and honesty in the

community where he lived was bad. There was testimony to show that the Livingstons and the Tatums were negroes, and were associated together in making crops on the lands in controversy. Phillips was a white man.

Upon the above record the court entered a decree refusing to confirm the sale made under the original decree in favor of Phillips, and entered a decree in favor of the interveners, Thomas W. Hardy as next friend and Gathright Livingston as guardian of the minors, Girtha Lee and Mary Lee Livingston, against Louis and Pearl Tatum, in the sum of $2,774, principal and interest, and declaring the same a first lien on the land in controversy, and superior to the lien of the plaintiff on such land. From that decree is this appeal.

The above record shows that the deed of trust from the Tatums to Thomas W. Hardy, trustee in the deed of trust to Gathright Livingston for his minor children, was filed for record December 1, 1922. This deed of trust was unsatisfied of record when the Tatums executed their deed of trust to the First National Bank of Camden. This deed of trust to Thomas W. Hardy, trustee, was unsatisfied when the Tatums executed their deed of trust to appellant, Frank Phillips, on November 24, 1924. When the appellant therefore took his first mortgage from the Tatums he had constructive notice of the mortgage in favor of the minors. For this mortgage recited that Gathright Livingston was guardian. An inquiry of Livingston would have disclosed that he was the guardian of his minor children and that the money loaned the Tatums was the money of these minors. Appellant also had actual knowledge, at the time he took his mortgage from the Tatums, that the mortgage in favor of the minors had not been satisfied, for the trustee in that mortgage, Thomas W. Hardy, so informed him, and the appellant himself states that when he went to the bank to inquire about the purchase of the mortgage from the Tatums to the bank, he was shown a letter by an officer of the bank informing him that the mortgage in favor of the minors had not been satisfied. But, not-

withstanding this notice, both actual and constructive, of the mortgage in favor of the minors, and that same had not been satisfied, appellant, on the next day after he had been so informed, purchased the mortgage in favor of the bank. He testified that he purchased this mortgage upon the representations by Livingston and Louis Tatum that the mortgage of the Tatums in favor of the minors was clear, and he did not purchase the mortgage until Livingston had satisfied the mortgage of record. Livingston denied that he told the appellant that the Tatums had paid the debt due by them to him as guardian for the minors.

It could serve no useful purpose to further discuss the facts, which are set forth in detail above. We are thoroughly convinced that the chancery court was correct in finding that the appellant had actual notice, at the time he took his mortgage from the Tatums, and also at the time he purchased the mortgage of the Tatums to the bank, that the debt due by the Tatums to Gathright Livingston, as guardian for his minor children, had not been paid. Even if he did not have actual knowledge of such fact, he had notice of facts which were sufficient to put him upon inquiry, which inquiry, if pursued, would have revealed to him that the debt to the minors had not been paid, even though Livingston and Louis Tatum informed him to the contrary. The court was certainly justified in finding that the appellant, under the circumstances, was not an innocent holder of the mortgage of the Tatums to the bank. The chancery court was also fully justified in finding that the mortgage of the Tatums in favor of Gathright Livingston, guardian for the minors, in which Thomas W. Hardy was named trustee, was prior and paramount to the mortgages under which the appellant claims, and in entering its decree to that effect.

Certainly it cannot be said that the decree is clearly against a preponderance of the evidence. Therefore let the decree be affirmed.

GRAY *v.* BREWER.

Opinion delivered June 4, 1928.

T. A. Gray, for appellant.

Cole & Poindexter and *S. M. Casey,* for appellee.

SMITH, J. Appellant brought this suit at law to recover the amount of a loss sustained by him in the purchase of 207 bales of cotton from appellee in the spring of 1919. He alleged that the sale of the cotton was evidenced by a written contract wherein appellee

guaranteed the weights of the cotton to be as represented at the time of the sale, whereas a loss of weight was sustained on nearly every bale purchased.

Appellee filed an answer, in which he denied that he had guaranteed the weights of the cotton, but alleged that appellant had bought the cotton on his own weights after weighing it himself.

Appellee moved that the cause be transferred to equity, and appellant saved an exception when that order was made. We think no error was committed in transferring the cause to equity. The sales in question represented several different transactions. The cotton was sold at various prices per pound, and the alleged loss of cotton involved a calculation as to the extent of loss as to each separate bale upon which a loss of weight is claimed. The account is therefore an involved one, if that question is reached, and it was therefore not improper to transfer the cause to equity for this reason. Moreover, no motion was made in the chancery court to transfer the cause back to the law court, nor was objection made to trying the cause in the chancery court, and the error, if any, was therefore waived. *Hemphill* v. *Lewis,* 174 Ark. 224, 294 S. W. 1010; *Ætna Casualty & Surety Co.* v. *State,* 174 Ark. 988, 298 S. W. 501.

There was a motion to quash certain depositions taken in behalf of appellee, but, as the testimony which was offered upon hearing this motion is not brought into the record, it will be conclusively presumed that the motion was properly overruled, as the depositions appear upon their face to have been properly taken.

The real question in the case is whether or not there was a guaranty of the weights of the cotton. Upon this issue the testimony on the part of appellant was to the following effect: Appellee is a merchant and cotton buyer in the city of Batesville, and sold the cotton to appellant under an express guaranty as to weights, which contract was evidenced by a writing signed by appellee. Appellant is a cotton buyer, and bought the cotton for the account of various brokers. In making

purchases it was customary to use a specially prepared invoice, having columns ruled so as to show the following items in regard to the bales purchased: Marks, number, weight, re-weight, our tag, price, amount loss, gain. Printed at the top of the invoice was the following notation: "Bought of ..... B/C, by..... Weights of cotton covered by this invoice are guaranteed by seller to be correct on date of delivery of same to consignee at Newport, Arkansas." Other blank invoices used by appellant did not have the name of the place of destination printed, but the destination was left blank, and was inserted at the time of concluding the contract of purchase.

The sales here in dispute were made in 1919 on the following dates: 4-3, 4-10, 4-22, 4-26, 4-30, 5-5, and 5-13, and nine blank invoice sheets were used. Appellant testified that, upon each purchase being agreed upon, appellee filled out a blank invoice, and in the space intended to show the name of the owner of the cotton, wrote his name, and in appropriate spaces wrote the marks, number and weight of the bales, and also signed his name on the face of the invoices.

Appellant testified, and offered testimony of other buyers to the effect that it was customary for the seller to guarantee the weights of the cotton at the compress where the cotton was to be compressed, and that, when the seller wrote his name in the space intended to show the name of the person from whom the cotton was purchased, this, according to the custom of the trade, was treated as a written contract of sale of the bales of cotton, the number and weight of which were written into the invoice, with a guaranty of weights at the designated place of destination. Appellant also offered testimony concerning the amount of the loss upon each of the bales where a loss of weight had been sustained.

Appellee testified that appellant negotiated with him for some days in regard to the purchase of the cotton before a sale was made; that appellant had a cotton yard, in which cotton belonging to various owners

was stored until it was ready for shipment, and that appellant weighed each bale as it was received in his yard, and made a charge for weighing and storage against each bale. Appellee had previously sold appellant cotton the weights of which were guaranteed, but he expressly refused to guarantee the weights of the cotton here in question, and he finally sold the cotton to appellant upon appellant's own weights and with the express understanding that there was no guaranty of weights. Upon completing the sale, appellant re-sampled and re-weighed the cotton in his own yard, and gave appellee a check for the contract price, which was duly paid.

Appellee admitted writing his name in the space showing the owner of the cotton sold, but denied writing his name on the face of the invoices, and there was testimony in regard to his handwriting which corroborated him in this respect.

The testimony shows that where Newport, Arkansas, was printed as the destination at which the cotton should be re-weighed, the name of that city was erased and Memphis, Tennessee, was inserted, and in the invoices, where no place was named as the destination, Memphis, Tennessee, was inserted as the destination. Appellant testified that appellee wrote Memphis, Tennessee, in each of the invoices as the place of destination, while appellee testified that he did not write the name of any place in any of the invoices as the point of destination. Appellee further testified that he used the blank invoices of appellant only because they were furnished him to make memoranda as to the marks, number and weight of the bales, and that there was no thought on the part of either party of making a written contract of sale, including a guaranty of weights.

At § 129 of the chapter on Contracts, 13 C. J. 306, it is said that: "It is not necessary that the signature of a party to a contract should appear at the end thereof. If his name is written by him in any part of the contract, or at the top, or at the right or left hand, with

intention to sign or for the purpose of authenticating the instrument, it is sufficient to bind him, unless subscription is required by law."

At § 75 of the same chapter, page 277, it is said that: "Where a person signs a document, he is not permitted to show that he did not know its terms, and, in the absence of fraud, he will be bound by its provisions. Therefore, when an action is brought on a written agreement which is signed by defendant, the agreement is proved by proving his signature, and, in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its contents."

Again, at § 76 of the same chapter, page 277, it is said that: "A contract may be formed by accepting a paper containing terms. If an offer is made by delivering to another a paper containing the terms of a proposed contract, and the paper is accepted, the acceptor is bound by its terms; and this is true as a rule, whether he reads the paper or not."

These are well recognized principles of law, and no useful purpose would be served in reviewing the cases cited in support of the text quoted in the notes thereto; but we do not think it appears, under the facts as herein summarized, that the court below ignored these principles in finding for the defendant and in dismissing the complaint as being without equity.

If the blank invoices had been tendered appellee as an offer to contract, and required only the insertion of the marks, number and weight of the cotton and the signature of appellee to make a complete written contract, we would hold that appellee had sufficiently signed the contract to make it valid as a written contract, the conditions of which he would not be heard to deny. But appellee testified (and was corroborated by two witnesses in that testimony) that the invoices were intended only to evidence the notations made by him thereon, to-wit, the marks, number and weight of the bales, and that there was no discussion or agreement concerning the destination where the cotton should be re-weighed, and

that the point of destination was written into the invoices by appellant after they had been delivered to him, without appellee's knowledge or consent, and without any authority, express or implied, so to do. Appellee further testified that, upon the contrary, this insertion on appellant's part, in so far as it apparently made a written contract of guaranty of weights, was done in disregard of an express understanding that there should be no contract to guarantee the weights, but that appellant should himself weigh the cotton and buy according to his own weights, and that this was done.

As we have said, the testimony is in irreconcilable conflict as to whether appellant or appellee wrote into the contract the point of destination, and as to whether appellee signed the invoices on the face thereof after the point of destination had been written in the invoices. The court made a general finding, both as to the law and the facts, in favor of appellee, and we are unable to say, after a careful consideration of the testimony, that the finding of the court upon the facts is clearly against the preponderance of the evidence; and if there was no written contract expressing all the essential terms of the agreement, no error was committed in admitting parol testimony to show what the agreement between the parties really was.

The decree of the court below must therefore be affirmed, and it is so ordered.

WILSON *v.* SAWYER.

Opinion delivered June 4, 1928.

[redacted]

Harris, Hanley & Wilson, for appellant.

Walter M. Purvis, for appellee.

SMITH, J. Appellant brought suit against Thomas M. Sawyer, a disabled World War Veteran, and, as an incident thereto, sued out a writ of garnishment against the Bank of Melbourne and J. W. Hall. The bank answered that it had on deposit the sum of $681.39 belonging to Sawyer, which had been deposited for his benefit in the name of J. W. Hall as clerk of the probate court. Hall answered that he had on deposit $681.39 with the bank, and a note for $500 and another for $100 which had been taken by plaintiff as guardian for Sawyer, pursuant to § 5059, C. & M. Digest, all of which had been turned over to him by plaintiff when plaintiff's final settlement of his guardianship of Sawyer had been approved and plaintiff discharged as guardian, and that he held the notes to and for the use of Sawyer.

A motion was filed to quash the garnishment, upon the ground that the money which had come into Wilson's hands, a portion of which he had invested in the notes, had been paid to him by the United States Government on account of the disability of his ward. In support of this motion Wilson was called as a witness, and testified that letters of guardianship were issued to him in 1924, and that he had received from the Veterans' Bureau, on account of his ward, the sum of $3,280, and that he had made full and final settlement of his guard-

ianship and had been discharged, and had paid the balance found by the probate court to be in his hands to J. W. Hall, clerk of the court, under the order of the court, for the account of his former ward.

Upon hearing this testimony the court quashed the garnishment, and in so doing declared the law as follows:

"The court will dissolve this attachment. I do not think these funds can be attached until they come into the hands of Tom Sawyer, and they have never been in his hands. They are money derived from the Federal Government, and, under the Federal laws, those funds cannot be garnished until they come into the hands of the party entitled to receive, under the law. These funds were paid by the United States Government to Mr. Wilson, as guardian. He has been discharged, and the funds have been paid over to the clerk of the probate court, and the funds are now in the hands of the register of the court, with instructions to turn them over to Tom Sawyer, and, until they come into the hands of Tom Sawyer, they cannot be attached. The petition to quash the garnishment and release the funds will be sustained."

The court was correct in the declaration of law made, except that the funds were not subject to seizure even after they had come into the hands of the ward.

In 28 C. J., page 187, § 227, of the chapter on Garnishment, it is said: "But, after a pension or bounty has been paid to, and received by, the beneficiary, it is subject to garnishment in the hands of a third person to the same extent as other property, unless exempted by statute."

The funds here involved are exempted by the statute under which they were allowed and paid to Sawyer.

The act known as the "World War Veterans' Act, 1924" (June 7, 1924, c. 320, § 1, 43 Stat. 607), makes provision for compensation and treatment for disabled veterans, this being part 2 of the act; for their insurance, this being part 3, and for vocation rehabilitation, this being part 4 of the act. By § 22 of the act it is provided: "That the compensation, insurance, and maintenance

and support allowance payable under titles 2, 3 and 4, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under titles 2, 3 or 4; and shall be exempt from all taxation; provided, that such compensation, insurance and maintenance and support allowance shall be subject to any claim which the United States may have, under titles 2, 3, 4 and 5, against the person on whose account the compensation, insurance or maintenance and support allowance is payable* * *."

In the case of *Payne* v. *Jordan,* 36 Ga. App. 787, 138 S. E. 262, it was held by the Court of Appeals of Georgia that a house purchased with proceeds only of war risk insurance payable under the War Risk Insurance Act of Congress, approved October 6, 1917, was not subject to execution. In a case of the same style, 152 Ga. 367, 110 S. E. 4, it was held by the Supreme Court of Georgia that funds actually paid by the government to the beneficiary of an insurance policy, and by her deposited in a bank, are not subject to garnishment.

In the case of *Succession of Geier,* 99 Sou. 26, the Supreme Court of Louisiana held that the heirs-at-law, who received insurance from a deceased service man, under the provisions of the War Risk Insurance Act, received the money as beneficiaries, and not as heirs, and that the money so received was not subject to the payment of an inheritance tax under the laws of that State taxing the right to inherit.

The World War Veterans' Act of 1924 contains substantially the same exemption from seizure as is found in the War Risk Insurance Act, and the cases cited which construe the latter act are applicable here.

We think the manifest purpose of the legislation making provision for World War Veterans was to devote the benefactions there provided to the sole use of the beneficiaries, and that the same should not be subject to the demands of creditors, even after the money had

come into their hands or was held by another for their benefit.

The writ of garnishment was therefore properly quashed, and the judgment of the court so ordering is affirmed.

CROCKETT MOTOR COMPANY *v.* THOMPSON.

Opinion delivered June 4, 1928.

Ward & Ward, for appellant.

Dudley & Dudley, for appellee.

HUMPHREYS, J. Appellant brought suit against appellee, in the court of a justice of the peace in Clay County, to recover the balance due for an automobile purchased from it by appellee, amounting to $180.76. The justice of the peace found the issues for appellee, and appellant appealed to the circuit court of said county, Eastern District. Appellee failed to appear himself in the circuit court when the case was called for trial, but his father appeared, and, over the objection and excep-

tion of appellant, was appointed guardian *ad litem* for his son, upon the representation that he was a minor, and was allowed to interpose his son's minority and disaffirmance of the contract as a defense to appellant's alleged cause of action.

On the trial of the cause it was disclosed by the undisputed testimony that appellee was a minor when he purchased the automobile; that he lived out in the country two or three miles, with Mr. Thompson, and that he used the machine to drive back and forth to town and to drive around with his friends. At the conclusion of the testimony the court instructed the jury to return a verdict for appellee, over appellant's objection and exception. Judgment was rendered in accordance with the instructed verdict, dismissing appellant's complaint, from which is this appeal.

Appellant's first contention for a reversal of the judgment is that the disaffirmance of the contract of sale and purchase was interposed as a defense the first time in the circuit court on appeal. It is immaterial whether the defense was interposed before the justice of the peace. On appeal from justices' courts to the circuit court, on trials *de novo,* any defense may be interposed to the action, except set-off which was not pleaded before the justice. *Texas & St. Louis Ry.* v. *Hall,* 44 Ark. 375; *Meddock* v. *Williams,* 91 Ark. 93, 120 S. W. 842. Error was not committed in allowing the plea of minority and disaffirmance of the contract in the circuit court. The defense was neither a new cause of action nor a set-off.

Appellant's next contention for a reversal of the judgment is that only a minor himself can disaffirm his contract. This may be true after a minor reaches his majority and within the statutory period of limitations, but we know of no law inhibiting a natural guardian, or guardian *ad litem,* from disaffirming his child's or ward's contract when an attempt is made to enforce it during the minority of the child or ward. Appellant cites the cases of *Bozeman* v. *Browning,* 31 Ark. 364, and *Cooper* v. *State,* 37 Ark. 421, in support of this contention.

Neither case has any application to the point involved here. The Bozeman case simply announces the doctrine that no one but a minor's legal representative, after his death, or his privies in blood, may disaffirm his contract; and the Cooper case simply announces the doctrine that a minor is not bound by any express contract for necessaries, but bound only on an implied contract to pay value for them.

Appellant's last contention for a reversal of the judgment is that the automobile was one of the necessaries of life, for the price of which appellee was liable. It is true that minors may be required to pay for necessaries of life, but, where a minor uses an automobile for pleasure and to ride a few miles to town and back, as in the instant case, it cannot be characterized as a necessity of life for which he may be required to pay.

No error appearing, the judgment is affirmed.

School District No. 26 *v.* School District No. 32.

Opinion delivered June 4, 1928.

Emmet Vaughan, for appellant.

George W. Emerson, for appellee.

Humphreys, J. On petition of School District No. 26 to the county board of education of Prairie County, under authority of § 8823 of Crawford & Moses' Digest,

the board detached three sections of land from School District 32 and added same to said District 26, from which order of the board an appeal was prosecuted to the Southern District of the circuit court of Prairie County. The cause was tried *de novo* in the circuit court upon an amended petition and response and the oral testimony of the witnesses, resulting in a denial of the prayer and a dismissal of appellant's petition, from which is this appeal.

Appellant contends for a reversal of the judgment upon two grounds: First, because contrary to the evidence, and second, because the circuit court is not authorized by statute to try appeals from the county board of education *de novo*.

(1). We are not called upon to determine whether the judgment of the court is supported by the weight of the evidence. The rule is that, if the finding of the court is supported by any substantial evidence, this court cannot disturb it on appeal. We have read the testimony, and have concluded that the finding and judgment of the court is supported by substantial evidence. We do not understand appellant to seriously contend that the finding and judgment of the court is not supported by some substantial evidence. It could serve no useful purpose to set out the testimony of the several witnesses, so we will not unnecessarily extend this opinion by doing so.

(2). It was provided by act 183 of the Acts of the General Assembly of 1925 that a party to the record in a proceeding before any county board of education, who feels aggrieved by any final order or decision of such board, may prosecute an appeal therefrom within thirty days to the circuit court of the district. The argument is made that, because said act fails to expressly provide for trial *de novo* in the circuit court, the Legislature only intended that errors of law or gross abuse of power by such boards might be corrected on appeal. Had this been the intention of the Legislature, the act would not have provided for a general appeal, but for one limited in scope. No provision is made in the law for making

and preserving the record of proceedings before the county boards of education and for transmitting same to the circuit court. Without such a record it would be impossible for the circuit court to determine whether errors were committed in the proceedings or whether such boards grossly abused the power conferred upon them. It is quite evident that the Legislature intended to allow any party to the record who felt aggrieved to appeal and try his case upon its merits in the circuit court.

No error appearing, the judgment is affirmed.

TREVATHAN *v.* TAYLOR.

Opinion delivered June 4, 1928.

Davis & Costen, for appellant.

S. H. Mann, for appellee.

MEHAFFY, J. Beginning about 1916, the appellant, a farmer, owned certain lands in Crittenden County, Arkansas, described in plaintiff's complaint, and was doing business with the bank in Crittenden County. He owed the bank considerable money, and executed a deed of trust to secure the payment of his indebtedness to the bank, and from year to year would give mortgages on personal property, including crops. He was unable to pay the indebtedness to the bank, and, some time in 1924, a suit was brought in the chancery court to foreclose the mort-

gage or deed of trust. The complaint was filed, and summons was served on the appellant. Shortly after the summons was served on appellant, he went to see the officials of the bank, talked to the cashier, who was in charge, and the cashier told him to forget about the foreclosure, and to go right ahead and they would give him a chance to pay it out. He would go right ahead farming just as he had been doing.

The appellant himself testifies that the cashier told him, when he asked him about the mortgage foreclosure, to forget it. The appellant testified: "I asked Mr. Rhodes, the cashier, what he was going to do about it. He said to forget it, and carry my business on as usual. My understanding and impression was that the foreclosure was not to be carried out." But, whether it was or was not to be carried out, both parties agree that Mr. Trevathan was to carry on his business as usual, and the preponderance of the testimony shows that the bank arranged with Mr. Trevathan that he should go right on with his business and make his chattel mortgages yearly as usual. He was not to pay any rent, and did not pay any for two years, and the bank was to give him a chance to pay the indebtedness.

The foreclosure suit and the agreement were really one transaction. Mr. Trevathan relied on the bank giving him a chance to pay it out, and, according to his testimony, he understood that there would be no further procedure in the foreclosure suit. But, whether that was true or not, both parties understood that Mr. Trevathan was to go ahead with his farming business as usual and try to pay the debt to the bank, and, if he did pay it, the land was to be his. According to this understanding, the sale was made, and, although the suit was to foreclose a debt for $16,000, the bank bid the land in for the entire indebtedness due it from Trevathan, and Trevathan kept the place, farmed it the two years, did not pay any rent, insured the place as usual, with a clause in the policy payable to the bank as its interest might appear, and in every way treated the property just as he did before the

foreclosure. He paid the taxes on it, and the bank also treated it as if there had been no foreclosure.

The testimony of the bank officials showed that it was the intention for Mr. Trevathan to pay the debt, and, if he could do that, he was to have the place. He was unable to pay the indebtedness, and in 1927 the bank brought a suit to foreclose on one of the notes that Trevathan had given, which had matured, and which was secured by a chattel mortgage, it alleging that it was the owner of the land which it had purchased.

After the bank failed and the Bank Commissioner took charge, Mr. Trevathan agreed with the bank officials to turn over all his property, including land and personal property, in payment of the debt. This was agreed to by the bank, and the representative of the bank actually took charge of and sold five mules, began arrangements to rent to Mr. Travathan one hundred acres of the land, sold some of the hay, and then Mr. Trevathan changed his mind, and claimed that, because of the foreclosure sale, which he said he did not know about when he first offered to turn his property over to the bank, the bank was indebted to him, becuase the record showed that the land was conveyed to the bank for $27,000, practically the entire indebtedness. It was, however, agreed by all parties that Mr. Trevathan could not go on with it, could not pay it, and no one claims that all the property, land and personal, was worth as much as the debt. In fact, the undisputed proof shows that Mr. Trevathan, before this time, wanted to turn over all the property in payment of the debt, and the bank declined to accept it.

But Mr. Trevathan testified himself: "After I had the conversation with Mr. Rhodes, I understood I owned the land and owed the debt. I did not know any difference until Mr. Oliver told me. I made the proposition to turn over everything to Mr. Oliver, and changed my mind when I saw no prospects of getting my papers. I had nothing to do with the price put on the mules; Mr. Outzen told me he was getting $85 apiece for them. At

the time I made the agreement to deliver this personal property I did not know that the land had been sold."

But he did know, according to his own testimony, that he was going on as he usually did, that he did not pay rent, and he knew, according to his conversation with Mr. Rhodes, that he owed the debt and was to own the land. Certainly he did not expect to retain the land without paying the debt.

There is practically no conflict in the testimony, except Mr. Trevathan insists that he did not know that the bank had proceeded with the foreclosure suit, but his agreement would have been the same if he had known it. He was to pay his indebtedness and have the land, and the fact that the consideration shown in the deed was the entire indebtedness and the fact that Mr. Trevathan remained just as he was on the farm without the payment of any rent, and continued to give his mortgages annually as he had before, are all circumstances tending to show that the agreement was made that Trevathan was to pay the debt and then own the land.

The rule is well stated in a note in 42 A. L. R. 82, as follows:

"An examination of the authorities will disclose that many of them simply lay down the general proposition that, where one buys land at a judicial sale under a parol agreement to purchase for another, and fails to convey according to the agreement, a resulting trust arises, where the promisee owned or had any interest in the land, without discussing other equities or other equitable considerations. And while the facts of this case, as we have above pointed out, make it unnecessary to so decide, it would appear to be hardly practicable in all cases to search for further equities, and that it would be enough to say with the Mississippi and California courts, above quoted, that 'the defendant, upon the faith of such an agreement, may have ceased his efforts to raise the money for the purpose of paying off the execution, and thus preventing a sale of his property.' In fact, it could only be for the purpose of saving his property

that such an agreement would be made, and it is but reasonable and natural to suppose that further efforts would be made, did not the particular promisor afford sufficient assurance that he would make the desired purchase, and therefore afford the desired protection."

And, still quoting from the note:

"In such case it is not the parol contract, but the trust, that is sought to be enforced. If the owners were lulled into security and thereby induced to desist from trying to save their property, and the person agreeing to buy it in acquires it at a grossly inadequate price, then the right of action rests not upon the parol contract, but upon the fiduciary relations and transactions, of which the agreement was a mere attendant."

Here the bank bid in the property for $27,000, when the foreclosure suit was for only $16,000, and no one contends that the land was worth anything like $27,000. There is no testimony showing what the land is worth, but the appellant, through his son, agreed to rent 100 acres of it at $3 an acre, provided he was permitted to select the 100 acres himself.

Many authorities hold that, where there is a friendly foreclosure with the understanding that the property shall be bid in and held for security for the amount advanced, the purchaser holds in trust for the owner. It is said that this trust is enforceable in some jurisdictions as an express trust, and in others it is called a trust *ex maleficio*. But it is a trust nevertheless, and the bank could have been compelled to restore the property to Trevathan at any time that he paid the debt. And, if it was binding on one party, it would, of course, be binding on the other.

In the instant case there appears to have been a friendly suit, a friendly foreclosure, with the understanding that Mr. Trevathan should own the property when he paid the debt. If the foreclosure was as contended for by appellant, he would be entitled to equitable relief.

The New York court has held:

"In the case cited the defendant had undertaken to purchase certain real estate at a foreclosure sale for the benefit of the owner of the equity of redemption, and had thus acquired the property at a price very much below its true value. Under these circumstances such purchaser was held to be a trustee of the party for whom he promised to act in buying the land, and was compelled to convey it to the party for whom he really acted, upon a tender of the purchase money and interest. I am unable to see why, under the rule thus applied, the respondent in the case at bar is not compellable, upon proof of the facts set out in this amended complaint, to account as trustee to the plaintiffs in the present action." *Wakeman* v. *Somarindyck,* 73 App. Div. 606, 76 N. Y. Sup. 818.

But this court has passed on similar questions numerous times, and, discussing the question quoted from the Missouri court, said:

"There is another class of cases growing out of the conduct of debtors and purchasers at public sales. This is where the purchaser becomes such under a state of facts as would make it a fraud to permit him to hold on to his bargain. As if a purchaser, by means of a promise to reconvey to his debtor, should induce a relaxation of the efforts on his part to prevent a sacrifice of his property, and thereby obtain it at an under price, or, if the purchaser, taking advantage of that reluctance invariably manifested by those attending public sales to interfere with any arrangement a debtor makes to save his property, should create an impression that he was buying for the debtor, thereby preventing competition, or by any other improper means obtain the property of a debtor at a sacrifice, such conduct would convert the purchaser into a trustee for the benefit of those who were defrauded by his conduct. * * * The same rule applies where the promisee relaxed his efforts to save the property from being sold at the judicial sale." *Strasner* v. *Carroll,* 125 Ark. 34, 187 S. W. 1057.

As to the weight of the evidence and the credibility of the witnesses, the finding of a chancellor is never disturbed unless such finding is against the preponderance of the evidence.

We think the chancellor's finding in this case is supported by the preponderance of the evidence, and the decree is therefore affirmed.

HARRELL *v.* STATE.

Opinion delivered June 4, 1928.

Dudley & Dudley, for appellant.

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

McHANEY, J. Appellant was indicted and convicted of the larceny of "one Remington automatic shotgun, of

the value of $50, the property of G. W. Barker," and sentenced to the penitentiary for one year.

It is first contended that the indictment is too indefinite and uncertain to charge the larceny of the particular gun, as there are many Remington automatic shotguns. The third subdivision of § 3013, C. & M. Digest, provides an indictment is sufficient if it can be understood therefrom "that the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment on conviction, according to the right of the case." Section 3028, C. & M. Digest, 2d subdivision, relating to the contents of indictments, provides that the language must contain "a statement of the acts constituting the offense, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended."

This court has many times held that the indictment is sufficient if it states facts with sufficient certainty to charge a specific offense. *State* v. *Bunch,* 119 Ark. 219, 177 S. W. 932; *State* v. *Scott,* 114 Ark. 38, 169 S. W. 314. In *State* v. *Haller,* 119 Ark. 503, 177 S. W. 1138, the indictment charged the stealing of "one cow (bull)," and this indictment was held sufficient where the proof showed that a "bull" was the subject of the larceny. In the recent case of *Bell* v. *State,* 175 Ark. 1169, 1 S. W. (2d.) 1006, this court held that an indictment which charged the defendant with the crime of grand larceny by stealing "one certain yearling, the property of Joe Allen," was sufficient. We therefore hold that the indictment was sufficiently definite. The fact that the number of the gun was not set out in the indictment, but was proved on the trial of the case, did not render the indictment void for indefiniteness or uncertainty.

Complaint is made also of instructions 5 and 6, given by the court over appellant's objection. Instruction 5 told the jury that, if they found from the evidence, beyond a reasonable doubt, that appellant did "unlawfully and feloniously take, steal and carry away one Remington automatic shotgun, of a value in excess of $10, the prop-

erty of G. W. Barker," they should find him guilty. It is said that the instruction fails to tell the jury that the felonious intent at the time the gun was taken, if taken, was of the essence of the offense, and that it does not tell the jury that the taking must be with the intent to deprive the true owner of his property. We think the words "unlawfully" and "feloniously," as used in the instruction, are sufficient to cover the matters complained of. If the taking was done unlawfully and feloniously, it necessarily follows that it was done with felonious intent at the time of the taking, and done with the intent to deprive the owner of his property. Instruction No. 6 is as follows:

"You are instructed that the possession of property recently stolen, without reasonable explanation of that possession, is evidence which goes to you for your consideration, under all the circumstances in the case, to be weighed as tending to show the guilt of the one in whose hands such property is found, but such evidence alone does not imperatively impose upon you the duty of convicting, even though it be not rebutted."

Complaint is made of this instruction for the reason that it tells the jury that the possession of stolen property may be used by them in determining the guilt or innocence of the defendant. It does do that very thing, and that is the law. An instruction in the exact language as the above was approved in *McDonald* v. *State,* 165 Ark. 411, 264 S. W. 961, and it was again cited with approval in the recent case of *Thomas* v. *State,* 175 Ark. 279, 298 S. W. 1021, where we said, after quoting the above instruction verbatim:

"The court held in that case that the above instruction was not open to objection as being a charge upon the weight of the evidence, or as making it the necessary duty of the jury to convict upon proof of unexplained possession of property recently stolen. This court has many times held that the mere possession of property stolen and unexplained by the defendant does not afford presumptive evidence of the defendant's guilt" (Citing cases).

It is next urged that the court erred in overruling appellant's motion to require the State to elect upon which count of the indictment the State would try the defendant. The indictment was in two counts, the second charging the appellant with receiving and buying said shotgun, knowing that the same had been stolen. This count in the indictment was not submitted to the jury. The court did not submit the second count to the jury, and we fail to see where appellant was prejudiced by the action of the court in overruling his motion to require the State to elect.

It is finally insisted that the court should have peremptorily instructed a verdict of not guilty, because of the insufficiency of the indictment and the evidence to support it. What we have already said with reference to the indictment disposes of that part of this contention. It was conclusively proved, and it is undisputed, that somebody stole Mr. Barker's Remington automatic shotgun, and it is not disputed that the gun found in the possession of the appellant was Barker's gun. He identified it, both by number and otherwise. It is said that the testimony of Bryan Burgess, to the effect that appellant brought the gun to his house in the night time, and hid it in a brush-pile near his house, where it remained for some weeks, is unreasonable and unworthy of belief. This was a question for the consideration of the jury. The testimony of this witness, if believed by the jury, and apparently it did believe him, was sufficient to take the case to the jury. Appellant testified as to how he came into the possession of the gun, and, if believed by the jury, this was sufficient to exonerate him; but the jury refused to believe his story.

We do not think it necessary to set out the testimony in detail. We have examined it carefully, and find it sufficient to take the case to the jury, and its verdict on a disputed question of fact, material to the issue, is binding on this court. The court correctly charged the jury with reference to the burden of proof, the weight and

sufficiency of the evidence, credibility of the witnesses, and upon the question of reasonable doubt. We find no error, and the judgment is accordingly affirmed.

NEWCOMB *v.* STATE.

Opinion delivered June 11, 1928.

McMillan & McMillan, for appellant.

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

HART, C. J. Tommie Newcomb prosecutes this appeal to reverse a judgment of conviction against him for making mash suitable for use in the distillation of alcoholic liquors, in violation of the statute.

The first assignment of error is that the evidence is not legally sufficient to warrant the verdict.

According to the testimony of the sheriff of Clark County, he saw the defendant putting mash into two ten-gallon crocks buried in the ground, near his residence in Clark County, Arkansas. The ingredients of the mixture were water, sugar and meal, and it tasted like mash. The witness then went to the house of the defendant, and found a quart of moonshine whiskey there. He also saw some backings in the backyard which smelled just like backings that they pour out of a still after making mash.

Another witness for the State, who was present, stated that the defendant was pouring meal out of a bucket into the jars which had been buried in the ground, and was stirring the mixture with a paddle. The ingredients in the jars consisted of water, sugar and meal. The defendant was pouring scalded meal out of a bucket into the ten-gallon jars which had been buried in the ground. This witness also corroborated the testimony of the sheriff to the effect that a quart fruit-jar of moonshine whiskey was found in the defendant's house. This witness also said that the mash containing water, sugar and meal possessed by the defendant was the kind of mash that moonshine whiskey is made out of.

This testimony, if believed by the jury, was sufficient to warrant a verdict of guilty. It is true that the defendant testified that he was just simply making some home brew, and did not intend to make any intoxicating liquor. Under the circumstances the jury was warranted in not believing his testimony. The fact that he had a quart of moonshine whiskey at his house warranted the jury in believing that he intended to manufacture the mash into moonshine whiskey. The witnesses for the State also testified that they found some backings in his backyard which were the kind poured out of a still after making mash. It is not essential for a conviction, under the statute in question, that the mash suitable for distillation of alcoholic liquors had not in fact reached the alcoholic stage. *Lynn* v. *State*, 169 Ark. 880, 277 S. W. 19,

The next assignment of error is that the court erred in allowing the State to prove the finding of whiskey at the defendant's house. This testimony was competent as tending to show that the defendant intended to manufacture the mash into alcoholic liquors. *Herren* v. *State,* 169 Ark. 636, 276 S. W. 365; and *Lynn* v. *State,* 169 Ark. 880, 277 S. W. 19.

The next assignment of error is that the court erred in refusing to tell the jury that it was lawful for the defendant to have intoxicating liquors in his possession, and in making this contention the defendant relies upon the case of *Dickerson* v. *State,* 161 Ark. 60, 255 S. W. 873. Since the decision in that case the Legislature has passed an act prohibiting the possession of intoxicating liquors in a private residence for the purpose of sale as a beverage. General Acts of 1925, p. 363. Hence this assignment of error is not well taken.

Finally it is insisted that the court erred in refusing instruction No. 3 at the request of the defendant, which told the jury that, before they could convict the defendant, all the facts and circumstances, when taken together, must be inconsistent with any reasonable hypothesis except that he is guilty. This court has held that it is not error to refuse to give this instruction, where the State did not rely entirely upon circumstantial evidence. *Bartlett* v. *State,* 140 Ark. 553, 216 S. W. 33; *Rogers* v. *State,* 163 Ark. 252, 260 S. W. 23; and *Adams* v. *State,* 176 Ark. 916, 5 S. W. (2d.) 946.

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

PACE *v.* STATE.

Opinion delivered June 11, 1928.

Robert L. Rogers, for appellant.

H. W. Applegate, Attorney General, and *Walter L. Pope,* Assistant, for appellee.

HART, C. J., (after stating the facts). In *Ex parte Robinson,* 19 Wall. 505, Mr. Justice Field, speaking for the Supreme Court of the United States, said:

"The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice."

This view has been adopted by this court in *Turk and Wallen* v. *State,* 123 Ark. 341, 185 S. W. 472, and *Weldon* v. *State,* 150 Ark. 407, 234 S. W. 466, 18 A. L. R. 202.

In the first case cited this court said that the power to punish for contempt is inherent in courts of justice, and the right to inflict punishment upon an offender against their dignity and authority is an incident of judicial power which cannot be removed by statutory enactment. It was said that preventing the appearance of a litigant in court for the prosecution of a civil suit, by intimidation and threats, was an obstruction of judicial procedure and tended to bring the administration of justice into disrepute. Hence it was held that the court did not exceed its authority in assessing the punishment inflicted on the defendants in that case.

In the Weldon case it was held that, by the common law, a court may punish as for contempt insults offered to the person of the judge in consequence of his judicial acts, though offered on a day when court was not in session and at a place where court could not be legally held.

In *Brannon* v. *Commonwealth,* 162 Ky. 350, 172 S. W. 703, L. R. A. 1915D, 569, it was held that it is a criminal contempt for one under several indictments, in one of which the jury is out, but eventually returns a verdict of guilty, with another yet to be tried, to commit a battery on a witness who testified against him in the pending case and is to be called in a subsequent one, for the purpose of punishing him for the testimony given and intimidating him for the future. The court said:

"For one to commit, as was done by the appellant in this case, an assault and battery upon the witness as a

punishment for giving testimony against him in an action or criminal prosecution then pending, though in part disposed of, or as a means to intimidate him and influence his testimony expected to be given in the future trial of an action or criminal prosecution then pending, is a criminal contempt, because such conduct is as much an interference with the authority and dignity of the court and an obstruction of justice as would be the intimidation or bribery of a witness, or any contempt committed in the presence of the court. The evidence clearly proves appellant's guilt of such a contempt; and, this being true, it was within the power and jurisdiction of the court to proceed against him by rule and summarily to try him, as was done in this case."

It was also insisted in that case that the court erred in telling the jury that it might find defendant guilty if his motive for committing the assault and battery was to punish Cook, the person assaulted, for testifying in the case just tried. This contention rests on the ground that, if the assault was committed on this account, it would not constitute a contempt in the meaning of the law. The court held that, as the case tried must be regarded as pending in court at the time of the assault upon the witness, the assault, if committed by way of punishment for the testimony given by Cook in the case, was as much a contempt as if it had been committed for the purpose of intimidating Cook as a witness in a future trial to be had of the other indictment, which had been continued to the succeeding term of court.

The power of the court to punish for contempt consisting of an assault upon one of the attorneys in a pending case has been recognized in *United States* v. *Barrett*, 187 Fed. 378. It was there held that where, after an action had been tried before a jury in a Federal Circuit Court, and the jury had retired to consider the case, two persons interested in the corporation defendant made an unprovoked assault upon plaintiff's attorney because of his argument, on the street, in full view of the jury room, they were guilty of contempt. Judge Speer said

that it was the constitutional privilege of parties to have counsel, and that the occupation of counsel in the interest of his client in trying the case must be uninterfered with by violence. Continuing, the learned judge said:

"He has the right to argue his client's case. If he violates the proprieties of the courtroom, and the attention of the court is called to it, he will be immediately stopped. If he is guilty of impertinent defamation, the courts are open by due process of law to the party defamed, in order to recover righteous damages, and there would be no difficulty in maintaining such a case. It is not within the proper power of the parties to the litigation to take the law into their own hands, and assault the counsel when they have been offended, or imagine that they have been offended. The counsel in a case is a minister of justice. He is the counselor of the court. Without his aid the court cannot get along. Can it be possible that, in our country, the court must regard as trivial an unprovoked assault upon counsel, who has done his duty as he saw it, upon a controversy which necessarily involved the question of the veracity of the contending parties, to deny him the right, in a general way, to insist that his client was truthful and that the other side was not truthful? This would be to deny the plaintiff his day in court, and to deny him due process of law. If the attorney was offensive, or if the party thought he was offensive, the means of redress is not by resorting to violence, but by appealing to the law of the land."

We think this is a full, clear and comprehensive statement of the reason for the rule. In the case at bar the verdict of the jury had been returned into court, and counsel for the plaintiffs had obtained leave for an extension of time within which to file a motion for a new trial. The court had taken a recess at the noon hour, and the judgment in the case had not been entered of record. Counsel for the plaintiffs had a right, and indeed it was their duty, to see that a proper judgment was entered in the case. Hoskins testified that he was assaulted and

severely beaten by Pace on his way back to the courtroom, within a short time after he had left it after making the closing argument in a damage suit in which the defendant's wife was a witness. Hoskins stated positively that Pace told him that he was going to assault and beat him because of the remarks he had made concerning his wife in his closing argument. Under these circumstances the circuit court was justified in finding that the assault and battery by Pace upon Hoskins was in contemplation of an argument made during the pending trial, and was calculated to obstruct the administration of justice and to degrade the authority of the court, and to contaminate the purity of its proceedings. Hence it had the power and authority to punish Pace for contempt of court. See *In re Hand,* 89 N. J. Eq. 469, 105 Atl. 594.

This brings us to a consideration of whether the punishment was excessive or not. According to the testimony of Pace, he had become very much angered and excited because he had been informed that Hoskins had applied a vile epithet to his wife and some other nurses who were witnesses for the defendants in a damage suit in which Hoskins was attorney for the plaintiffs. It is true that it turned out that Hoskins had applied no vile epithet to the wife of Pace, but Pace did not know this at the time he made the assault. He had been advised that he must wait until after the trial was over before seeing Hoskins about the matter. He accidentally met Hoskins during the noon hour of the court recess, after the trial was finished, and Pace was under great mental stress and excitement at the time. Under these circumstances we think a milder penalty will serve the ends of justice, and that the jail penalty should be remitted. *Baker* v. *State, ante* p. 13. Therefore it will be ordered that the judgment be modified by remitting the jail sentence and allowing the fine of $50 to stand. Otherwise the judgment will be affirmed. It is so ordered.

AVERY POWER MACHINERY COMPANY *v.* MCADAMS.

Opinion delivered June 11, 1928.

W. A. Leach, for appellant.

G. W. Botts, for appellee.

HART, C. J., (after stating the facts). Appellants seek to reverse the decree upon the authority of *Wheeler & Motter Mercantile Co.* v. *Knox,* 136 Ark. 95, 206 S. W. 46, and *Falls* v. *Driver, post* p. 703, in which it was stated that the court adheres to the doctrine that the real estate of an intestate descends directly to the heirs upon the death of the ancestor, subject to the statutory exceptions, and that there is no statute incumbering an heir's interest in real estate with his indebtedness to his ancestor. In other words, it may be stated as the settled rule in this State that, except where the indebtedness be held an advancement, the distributive share of an heir or devisee in the real property of the estate is not chargeable with the heir's or devisee's indebtedness to the estate, either as against the land itself or the proceeds of the sale thereof; but the indebtedness must be collected in the same manner as any other indebtedness due the estate. We do not think, however, that this rule is applicable under the facts presented in the case at bar.

In a case-note to 1 A. L. R., p. 1009, it is said that, irrespective of the attitude of the courts in any particular jurisdiction, on the question where a legacy be retained in satisfaction of a statute-barred debt owed to the tes-

tator, it is uniformly held that, where a testator directs that any debts due, or owing to him, from legatees, shall be brought into the division of the estate, or deducted from the share of the one so indebted, the debt must be deducted, though barred by the Statute of Limitations. *Holt* v. *Libby* (1888), 80 Me. 329, 14 Atl. 201; *Baker* v. *Safe Deposit & T. Co.* (1901), 93 Md. 368, 48 Atl. 920, 49 Atl. 623; *Cummings* v. *Bramhall* (1876), 120 Mass. 552; *Allen* v. *Edwards* (1883), 136 Mass. 138; and *Gillingham's Estate* (1908), 220 Pa. 353, 69 Atl. 809.

The reason is that the legatee or devisee is a mere volunteer, and must take the bounty of the testator upon the terms upon which it is bestowed. In other words, where a devisee elects to take under the will of the testator, he must take subject to all conditions the testator has seen fit to impose. In this connection it may be stated that the Supreme Courts of the States of Maryland and of Massachusetts are among those holding that the share of an heir in the real estate of the intestate is not chargeable with a debt from the heir to the estate. The holdings of these courts are in accordance with our own holding on the subject; and their decisions, that a testator may make his own debts, due from devisee, a charge to be satisfied out of his portion, and which must therefore be met before the devisee is entitled to the devise, would have peculiar force with us.

In *Foulkes* v. *Foulkes,* 173 Ark. 188, 293 S. W. 1, it was held that one electing to take under a will must take under the terms of the will, and, if he elects to take the property, he must do so under the conditions expressed in the will.

There would seem to be no good reason why the testator might not impose like conditions in an agreement executed between him and a devisee under his will subsequent to the execution of the will. In the case at bar, after the will had been executed, one of the devisees in the will executed a promissory note to his father, the testator, for a sum which was much more than the value of the part of the estate devised to him. I. T. McAdams,

the signer of the note, executed an agreement with his father that, in the event the note or any part of it remained unpaid at the time of the death of his father, the amount due should be taken from or set-off against any legacy or interest which might be given to him in the last will and testament of his father. It was further agreed that the executor of the will should make said deduction or set-off, and that he should assign the note to I. T. McAdams in full exchange of such amount of his claim as would equal the amount due under the note. It was found that the interest which would have been received by I. T. McAdams under the will was less than the amount of the note which was due at the time his father died. In other words, the debt of I. T. McAdams to the estate of S. M. McAdams, deceased, was much greater than the share of the estate to which he would have been entitled as a residuary devisee under the will of his father. His agreement should be considered as an assignment of his devise as collateral security for the payment of his note. I. T. McAdams, being indebted to S. M. McAdams at the latter's death in an amount greater than his share of the estate under the will, his agreement that such indebtedness should be charged to him upon final distribution is valid, and should be carried out.

The probate court properly so held. That court had jurisdiction to make settlement and distribution of the testator's estate, and, in doing so, might determine the share of each devisee or distributee, and to that end might inquire into and determine the indebtedness of the devisee to the estate, and order a deduction of the same from his share. *Stenson* v. *H. S. Halvorson Co.*, 28 N. D. 151, 147 N. W. 800, Ann. Cas. 1916D, p. 1289, L. R. A. 1915A, 1179.

It follows that the decree of the chancery court was correct, and it will be affirmed.

SWILLEY & SONS *v.* GOODWIN.

Opinion delivered June 11, 1928.

John Carroll, for appellant.

Pope & Jennings, for appellee.

WOOD, J. This action was instituted in the circuit court of Union County by the appellees against the appellants for a writ of certiorari to quash a judgment rendered in favor of appellants against appellees by J. H. Lee, a justice of the peace of El Dorado Township, Union County, Arkansas. It was alleged, in substance, that the judgment of the justice was void because no service had been had upon the defendants, against whom the judgment was rendered in the justice court. It was alleged that the defendants in the action before the justice were not indebted to the plaintiff in that action in any sum, and that they each had a complete and perfect defense to the action.

The writ of certiorari was issued and the docket of the justice judgment was brought before the court. Among other things it recites that a summons was issued against the defendants and delivered to the constable of the township in which the defendants resided. The justice recites that the plaintiff appeared, but that the defendants did not appear, and the judgment was rendered against them by default. The judgment of the justice does not recite that the defendants in the action before the justice were served with process.

A demurrer to the petition for certiorari was overruled. In the answer to the petition for certiorari it was set up, in substance, that all the papers in the original action before the justice, in which judgment was rendered against the petitioners, had been lost, except the docket entries of the justice showing the judgment that

was rendered against the defendants in that action, petitioners herein. Said docket entries of the judgment are set forth, and they recite, in substance, that the plaintiff filed an action on account before the justice in the sum of $139.22; that summons was issued against the defendants, and that on the day set for hearing the defendants did not appear, and judgment was rendered against them by default. The judgment, as above stated, does not recite that summons was served. The docket of the justice also shows that writs of garnishment were issued on the judgment against the Chicago, Rock Island & Pacific Railway Company, and that the defendants filed their separate schedules, claiming that the amounts due them by the railway company were exempt.

The judgment from which this appeal comes contains the following recital: "Whereupon, this cause coming on to be heard on its merits, after hearing all the evidence introduced by the parties herein, the court finds that the judgment rendered on the 18th day of December, 1922, by J. H. Lee, justice of the peace of El Dorado Township, in Union County, Arkansas, in the above entitled cause, is void for want of jurisdiction on the part of said justice of the peace, J. H. Lee. It is therefore ordered and adjudged by the court that the aforesaid judgment entered as aforesaid is null and void," etc.

There is a bill of exceptions in the record setting out all the oral testimony upon which the cause was heard. This bill of exceptions shows that the trial court found that there was no service of process upon the petitioners, Asa Goodwin and Hugh Goodwin, and that the judgment rendered on the 18th day of December, 1922, by J. H. Lee, a justice of the peace of El Dorado Township, Union County, Arkansas, is void for want of jurisdiction on the part of said justice. The record does not show that a motion for new trial was filed.

"Where a case is heard on evidence before the court which it is necessary to bring into the record by a bill of exceptions, there must be a motion for a new trial, setting up and assigning the grounds of error upon which the

motion is predicated, in order to give the court which tried the case an opportunity to review and correct those errors. Where the record before this court on appeal does not show that a motion for a new trial was filed and passed upon by the trial court, there is nothing that this court can review." *Kromer* v. *Central Coal & Coke Co.*, 129 Ark. 86, 195 S. W. 370, and cases there cited.

The error complained of on this appeal does not appear on the face of the record itself. *Burns* v. *Harrington*, 162 Ark. 162, 257 S. W. 729. Therefore, under the doctrine of the case of *Kromer* v. *Central Coal & Coke Co.*, *supra*, a motion for a new trial was necessary in order to enable this court to review the judgment of the trial court for the errors of which the appellants complain. The judgment of the trial court is therefore correct, and it is affirmed.

WATTS *v.* COMMERCIAL PRINTING COMPANY.

Opinion delivered June 11, 1928.

A. J. Johnson and *Bruce H. Shaw,* for appellant.

E. W. Brockman, U. J. Cone and *Jones & Hooker,* for appellee.

SMITH, J. Appellant brought suit to recover damages on account of an alleged libelous article published in the Pine Bluff Commercial, a daily newspaper, by the members of the budget committee of the community chest, in the city of Pine Bluff. The article in question was an advertisement, wherein the community chest reported to the public its activities for the preceding year, and made a statement of the funds which would be required for the ensuing year. The community chest is a fund contributed by the people of a city and community who are interested in the charities and benevolences of the city, and whose contributions go into a common fund, which is distributed to the charitable and benevolent organizations in the proportion previously agreed upon. Representatives of these organizations submit a statement of the estimated operating expenses for the ensuing year to the budget committee of the community chest, and, when it has been determined what the total requirements of all the organizations will be, an organized and concerted campaign is conducted, whereby funds are raised at one time for all the local charities and benevolent organizations, in which friends and supporters of all the organizations cooperate. If the campaign for funds is completely successful, each organization is given the sum allotted to it by the budget committee; but, if not entirely successful, each organization is given its proportionate part. It was contemplated that contributions should be made once for all, that is, the contribution would represent the total amount which the contributor was willing to give to all the charitable and benevolent organizations, and the organizations provided

for would not thereafter take separate or additional public collections.

In the fall of 1925 a campaign was put on in the city of Pine Bluff for the budget of 1925-1926, and among the organizations included in the budget was one known as the American Savings Aid, to which an allotment of $3,000 per year was made. The community campaign did not realize the amount of money required by all the organizations, and it became necessary to reduce the allowance of each, and, as a result of this necessity, the savings aid was paid only $205 per month, instead of the $250 which would have been paid had the amount of the budget been fully subscribed.

Appellant, R. D. Watts, is the chief executive officer of the American Savings Aid, and, when he was advised that the organization which he represented would be allowed only $205 per month out of the community chest, he declined to receive anything further from the community chest, and solicited contributions to his organization, as had been done before the community chest was instituted.

When the campaign for the 1927 funds was put on, the budget committee of the community chest published a full-page advertisement in the Pine Bluff Commercial, wherein there was given a report of the disbursement of the funds raised during the preceding year, showing what money had been paid to each of the organizations for whose benefit the funds had been raised. On this page there appeared in large type, surrounded by heavy black lines, the following statement:

"As to the American Savings Aid.

"Previous to our 1926 campaign, the directors of the American Savings Aid submitted a budget to the community chest budget committee for $3,000 to cover their 1926 expenditures. After the first monthly installment was given Captain Watts, the American Savings Aid withdrew from the community chest of their own volition, claiming that the budget was insufficient to carry on their work. On investigation we found that $100 of this was being paid monthly on a home that was and is now in

the name of Captain Watts. Captain Watts also failed to comply with any agreements made with us, and he continued to collect money from his old subscribers, and also continued his tambourine and house-to-house collections. Captain Watts also failed to make any accounting for any money spent.

"The community chest board believes that Captain Watts should be paid a salary, as every other organization secretary is paid, instead of working under the indefinite term of living expenses, which does not mean any definite amount of money."

Following the publication of this statement, this suit was brought against the persons whose names were signed thereto as the authors thereof, and the publishers of the newspaper.

In the answer filed by the defendants, any intention to reflect upon the plaintiff was disclaimed, and the truth of the statements contained in the advertisement was pleaded as a defense to the action.

Appellant, plaintiff below, offered testimony tending to establish the facts above recited, which we must assume would have been found by the jury to be true, as the court directed a verdict against appellant at the conclusion of his testimony. Appellant also offered testimony to the effect that the article was false, in that he had not used any money in the payment of the purchase price of a home the title to which was in himself, and that he had not violated any agreements with the budget committee of the community chest, and that he had properly accounted for all money received for the use of his society, and that he had not improperly appropriated any of its funds to his own use.

In directing a verdict against appellant, the court charged the jury as follows:

"Gentlemen of the jury, under the view that the court takes of the law of this case, you are instructed by the court to return a verdict for the defendants. Your verdict will be, 'We, the jury, find for the defendants.' The court wants to make this explanation. so you won't go

home wondering why. The complaint in this case charges that the American Savings Aid is a corporation. That it, as a corporation, purchased certain property in the city of Pine Bluff which is used by it as a home. Not as a private home by Captain Watts, but as a building—he lives in it all right—but as a building that is used by the American Savings Aid to carry on its purpose of attempting to help people out who are in trouble for various causes; and then the complaint alleges, that is, at least that part of it which the court would otherwise hold is libelous *per se,* that is, words libelous in themselves, you wouldn't have to make any proof of damages as to those kind of words; all you have got to show is that they were printed. Those words in this particular case are set out as being that, 'after this money was turned over to Captain Watts, he withdrew voluntarily from the Pine Bluff Community Chest, and upon investigation we found out that a hundred dollars a month of it was paid on a home which was and is now in his name.' Now the proof in this case, because the plaintiff introduced what purported to be his articles of incorporation, that the American Savings Aid was not incorporated, for the reason that for some reason or other the court never did make an order incorporating the American Savings Aid. Somebody somewhere along the line fell down on that. The record shows that the clerk merely spread upon the records of the circuit court only the petition for incorporation, the articles of association, and that is all. There is nothing in the record showing that the petition was ever granted by the court, and that is necessary. The clerk of the court cannot incorporate anything. The petition has to be addressed to the court for the attention of the court, and the judge of the court cannot incorporate anything either; that is not the act of the judge; it is the act of the court, and in this instance the record clearly shows that the American Savings Aid was never legally incorporated.

"Therefore it is left in this shape: the property, so the court thinks, at least, is legally in those persons who

attempted to incorporate the American Savings Aid. That is R. D. Watts, his wife, and J. M. Shaw. So, when you get down to the bottom of it, the proof on the part of the plaintiff shows that the property is in the name of R. D. Watts legally, not solely in his name, but so much so that the court thinks there cannot be any libel in the statement published.

"Now, gentlemen, the court directs you to return this verdict: 'We, the jury, find for the defendants.' It doesn't make any difference which one of you sign the verdict; just any of you sign it."

As appears from the statement of the court in directing a verdict for the defendants, an attempt was made, pursuant to chapter 38, paragraph 7 thereof, §§ 1788 *et seq.* C. & M. Digest, to incorporate the American Savings Aid as a benevolent association, and a petition addressed to the circuit court was filed with the clerk thereof, praying that a certificate of incorporation be issued. Accompanying this petition were the articles of association, or constitution, which contained the names of the persons "desirous of becoming incorporated under the provisions of this act," and a statement of the purposes of the society, which were recited to be as follows: "The object and purpose of this association is for the dispensation of aid and assistance to the needy and unfortunate, to house, clothe and nurture them; to provide and care for the widows and orphans in need, and to procure suitable employment for men and women in need of work; to propagate the Christian religion, and engage in rescue and relief work among girls and women who have been abandoned by society, and assist them to reform into useful Christian women, and to that end they may do any and all things reasonable and consistent therewith."

The constitution or articles of association further provided that: "The American Savings Aid shall have an advisory board, composed of five citizens of Pine Bluff, the first two of whom shall be chosen by the incorporators, and the remainder by themselves, and which board

shall also be known as a board of publicity, and who shall formulate a set of by-laws for the government of the American Savings Aid, not inconsistent with the purposes and intent of the corporation."

The articles provided for the election or appointment of a commander-in-chief, who became the executive officer of the society, whose tenure of office should be during good behavior, but who might be removed by the incorporators or their successors for cause, and his successor appointed by them, with the advice and consent of the advisory-publicity board.

The constitution or articles of association also provided that: "The American Savings Aid shall adopt and use a seal, crests, and uniform; and no property shall be bought or sold by the American Savings Aid, except with the advice and majority consent of the advisory-publicity board; and the signature of the commander-in-chief, under the seal of the association, shall be sufficient to pass title, or receipt for money and property. The regular meetings of the advisory-publicity board shall be not less than twice a year, six months apart, but special meetings may be held at any such time as the commander-in-chief and two members of the advisory-publicity board may deem necessary, upon four hours' notice to the other members of the advisory-publicity board."

Upon filing the above petition and the constitution or articles of association with the clerk of the circuit court, that officer, without calling the attention of the circuit court to the petition for action, and without any action on the part of the court having been taken, proceeded to enter of record, under § 1790, C. & M. Digest, the "said constitution or articles of association and accompanying petition," and issued a certificate showing that he had done so.

The incorporators, assuming that they had complied with the law and had become a benevolent association, under the sections of the statute referred to, proceeded to function as such, and, pursuant to the constitution or articles of association, elected or appointed appellant

Watts as commander-in-chief, and selected a publicity board of five members. Under the supposed authority of the constitution, the publicity board and its commander-in-chief proceeded to raise funds by public contributions to carry out the purposes of the association. In furtherance of this purpose the association contracted to purchase a home in the city of Pine Bluff, for which it agreed to pay the sum of $4,500, of which $1,000 was paid in cash, the balance to be paid within four years, and in discharge of this obligation payments of $100 per month were made to the association's grantor. A deed to the home was made to the American Savings Aid and its successors and assigns, and this deed was duly recorded.

The court below was correct in holding that the statute had not been sufficiently complied with to make the association a corporation *de jure,* the statute giving the clerk of the circuit court no authority to incorporate the petitioners as a benevolent association. The approval of the circuit court was required, and this was not obtained.

The court was in error, however, in holding that appellant was the owner of the property purchased in the name of the American Savings Aid because of the failure to comply with the law in the matter of its incorporation. There was an attempt to incorporate, and representations were made to the public that there was a corporation, on the faith of which solicitations were made to and contributions were received from the public, with portions of which payments were made on the purchase price of the home used by the association for its professed corporate purposes.

Under plainest principles of equity, appellant Watts and his associates would have been estopped to question the corporate existence of the American Savings Aid as a benevolent association or to assert title to the property in themselves individually.

It may be true that appellant, as commander-in-chief of the association, had the authority, under the seal of the association, to convey title to its property, but, if

so, this could not be done "except with the advice and majority consent of the advisory-publicity board."

In the case of *Whipple* v. *Tuxworth,* 81 Ark. 391, 99 S. W. 86, Mr. Justice BATTLE discussed the difference between corporations *de jure* and *de facto,* and, after stating that a substantial compliance with the statute in regard to incorporating was sufficient to create a corporation *de jure,* he proceeded to say: "The requisites to constitute a corporation *de facto* are three: (1) a charter or general law under which such a corporation as it purports to be might lawfully be organized; (2) an attempt to organize thereunder; and (3) actual user of the corporate franchise."

These essentials are all present here. There is a statute under which such a corporation as the American Savings Aid purports to be might have been organized; there was an attempt to organize thereunder, and there has been an actual user of the supposed corporate franchise.

The American Savings Aid is such a corporation *de facto* as might be alleged, in an indictment, to be the owner of property which one was charged with having stolen from it. The crime of larceny or embezzlement could be committed by taking its property with a felonious intent, although it was only a *de facto* corporation. *Meadors* v. *State,* 171 Ark. 705, 285 S. W. 380; *Pearrow* v. *State,* 146 Ark. 182, 225 S. W. 311.

The humiliating and degrading effect of a libelous accusation would be as great in the case of a *de facto* corporation as in the case of one *de jure,* the essence of the action for libel in either case being the charge that one had wrongfully converted funds contributed to a charity. We conclude therefore that the court was in error in directing a verdict in defendant's favor.

Moreover, the charge that appellant had misapplied funds of the American Savings Aid to his private use is not the only charge declared upon. There are other charges declared upon by appellant in his complaint which a jury might find to be libelous, and which, accord-

ing to appellant's testimony, were shown to be false, these being that appellant had failed to comply with his agreements or account for money spent. *Skaggs* v. *Johnson*, 105 Ark. 254, 150 S. W. 1036; *Murray* v. *Galbraith*, 95 Ark. 199, 128 S. W. 1047.

The judgment of the court below must therefore be reversed, and it is so ordered.

ROBINSON *v.* STATE.

Opinion delivered June 11, 1928.

Stewart & Oliver, for appellant.

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

SMITH, J. Appellant was tried upon an indictment charging him with the crime of murder in the first degree, which was alleged to have been committed by striking and beating J. H. Brock with a certain blunt instrument, the true nature of which was to the grand jury unknown, and he was found guilty of the crime charged, and from the judgment of the court imposing the death penalty is this appeal.

For the reversal of the judgment it is first insisted that the indictment was demurrable, because it was not signed by the prosecuting attorney.

It is customary for the prosecuting attorney to sign indictments, and it is certainly the better practice that he should do so, but, in the case of *Watkins* v. *State,* 37 Ark. 370, it was held that "an indictment need not be signed by the prosecuting attorney. It is sufficient if found by the grand jury and indorsed by their foreman" (Citing authorities).

It is next objected that the indictment does not allege that Brock was dead. The indictment does charge, however, that defendant "did kill and murder one J. H. Brock," and this allegation sufficiently alleges the death of the person charged to have been killed. *Fisher* v. *State,* 109 Ark. 456, 160 S. W. 210.

It is next objected that the indictment did not allege that deceased died within a year and a day after the infliction of the wound, but in the case of *Fisher* v. *State, supra,* it was said: "Neither was it defective in failing to specifically allege that the deceased died within a year and a day after the infliction of the wound. It is true our statute (Kirby's Digest, § 1774) provides that, in

order to make the killing murder or manslaughter, it is requisite that the person injured die within a year and a day after the wound was given, but, under other statutes, stating what indictments shall contain and providing that none is insufficient for 'any defect which does not tend to prejudice the substantial rights of the defendant on the merits,' it is immaterial that no specific allegation is made of the death resulting within such time after the mortal wound, since murder has a technical meaning, and, when it is sufficiently alleged in the indictment, the defendant is put upon notice that death resulted within the time specified by law to make the offense of that grade'' (Citing authorities).

Error is assigned in the admission of certain testimony of witness Carl Burley. This witness testified that he was the night fireman at a sawmill at which he and deceased were employed; that deceased was a clock puncher, or night watchman, and was required, as such, to punch twelve clocks, one each hour; that, after making his rounds punching the clocks, deceased was accustomed to return to the boiler room, where witness was employed. Deceased made one of these rounds shortly after ten o'clock P. M., and failed to return. Witness knew that deceased usually carried considerable money with him, and, a night or two before the killing, witness saw deceased count his money, which amounted to $310. After waiting awhile for deceased's return, witness took a lantern and went in search of him. He found on the tram a pool of blood, and about sixteen feet away he found deceased's body. Deceased was not then dead, but was groaning in agony, as he had been struck twice over the head with some blunt instrument. Deceased was not conscious, and did not regain consciousness before his death, which occurred at the hospital, where he was taken after an alarm was given. Witness testified that the appearance of the tram indicated that deceased's body had been dragged along the tram about sixteen feet to an opening between two piles of lumber, where the body was thrown off the tram.

There was no error in the admission of this testimony. The statement that the body had been dragged from the place where the pool of blood was discovered was not the expression of an opinion, but the statement of a physical fact; but, if it were a mere opinion, there could be no prejudice in it. Deceased was struck and killed. Some one murdered and robbed him. The pool of blood was at one place and the body was sixteen feet away, and it could not be material whether the body was dragged from one place to the other. The witness Burley naturally suspected that robbery was the motive of the crime, and a search of the body by him disclosed that the roll of money which deceased was known to carry was missing.

Error is assigned in admitting a confession which appellant is said to have voluntarily made. In this confession the details of the revolting crime were told. Shortly after the killing, appellant was seen spending money freely, and, when arrested, he gave a false explanation of his possession of the money he had on his person. In his confession appellant told where he had hid the balance of the money, which was found at the place named by him, and among other bills there were found two twenty-dollar gold certificates of the kind deceased was known to have had on his person.

The testimony on the part of the State was to the effect that the confession was freely and voluntarily made, and there was no testimony to the contrary, except that of another negro, who had been arrested along with appellant, but who was later released. This witness testified that he and appellant were separately questioned by the officers at the jail, but he did not testify that he or appellant had been threatened or coerced, or otherwise intimidated, or that a promise of any kind was made to him or appellant. Appellant himself did not testify.

In regard to this confession the court charged the jury as follows:

"1. The court instructs the jury that, before any admission or statements made by the defendant can be

used against him as evidence, such statements or admissions must have been freely and voluntarily made, and where such statements, if any, are induced by threats of harm, promises of favor, or show of violence, or inquisitorial methods are used to extort a confession, then the same is attributed to such influence, and cannot be used against the defendant; and if the jury shall believe that any such threats or promises were made, or violence shown or manifested, or methods used, the jury will not consider or give any weight to such admissions or statements of the defendant."

This was a proper instruction, and conforms to the correct practice in such cases. *Spurgeon* v. *State,* 160 Ark. 112, 254 S. W. 376.

This confession, in connection with the other testimony in the case, is sufficient to sustain the conviction. Section 3182, C. & M. Digest.

It is finally insisted that the court erred in refusing to give an instruction defining the crime of manslaughter. No error was committed in refusing this instruction, as there was no testimony upon which to base it. In the case of *Clark* v. *State,* 169 Ark. 717, 276 S. W. 849, it was said that this court has repeatedly held that, where an indictment charges murder in the first degree, and the undisputed evidence shows that the accused, if guilty at all, is guilty of that crime, it is not error to refuse to give an instruction authorizing the jury to return a verdict of guilty of any of the lower degrees of homicide, and the reason there stated was that, "if there is no evidence to establish a lower degree of homicide than murder in the first degree, the court, in properly giving the law, must of necessity determine whether there is any evidence at all to justify a particular instruction, and it is the duty of the jury to take the court's exposition of the law" (Citing authorities).

As no error appears, the judgment must be affirmed, and it is so ordered.

GATE CITY BUILDING & LOAN ASSOCIATION *v.* CROWELL.

Opinion delivered June 11, 1928.

Arnold & Arnold, for appellant.

John D. Arbuckle, J. M. Carter and *B. E. Carter,* for appellee.

HUMPHREYS, J. This is a proceeding instituted in the chancery court of Miller County by appellants against appellees to foreclose a deed of trust executed by Walter E. Crowell and wife to it on May 21, 1921, on lots 1 and 2, in block 67, in Kirby's Addition to the city of Texarkana, Arkansas, to secure money borrowed by them from the Gate City Building & Loan Association, evidenced by note of even date therewith. It was alleged

that the lien created by the deed of trust was prior and paramount to a lien claimed against said property under a deed of trust subsequently executed by the Crowells on said property to the Home Building & Savings Association of Fort Smith, Arkansas. It was also alleged that a balance of $838.28 was due on the note under the terms of the contract.

The issues joined by the pleadings and proof presented questions of whether appellants were estopped to collect a balance due upon the note from the Crowells and to foreclose the deed of trust against their property, and, if so, what amount was due under the terms of the contract; and, if not estopped, whether the lien to the Gate City Building & Loan Association was prior and paramount to the lien of the Home Building & Savings Association; and whether the amount due the Home Building & Savings Association by the Crowells should be abated by the amount, if any, of the amount of the recovery by the Gate City Building & Loan Association.

The cause was submitted upon the issues joined by the pleadings and testimony introduced by the parties, which resulted in a judgment and decree of foreclosure in favor of appellants against the Crowells for $670.63, from which appellants appealed, because less than claimed, and from which the Crowells and the Home Building & Savings Association took a cross-appeal; and a judgment and decree of foreclosure against the Crowells in favor of the Home Building & Savings Association, but abated the judgment by the amount of the judgment in favor of the Gate City Building & Loan Association. The Home Building & Savings Association took an appeal from the order abating its judgment in the amount from the recovery in favor of the Gate City Building & Loan Association.

Briefly stated, the facts reflected by the record are as follows: On May 21, 1921, the Crowells borrowed $1,200 from the Gate City Building & Loan Association on the usual building and loan plan, executing a note for the amount and a deed of trust on the property hereto-

fore described, to secure the payment of same. The note and deed of trust provided the plan for ascertaining the amount due in case of default. The instrument contained practically the same provisions relative thereto as the instruments did in the case of *Roberts* v. *American Building & Loan Association,* 62 Ark. 572, 36 S. W. 1085; 33 L. R. A. 744, 54 A. S. R. 309; and the *Gate City Building & Loan Association* v. *Frisby.* Dan Dewberry was the local agent of the Home Building & Savings Association at Texarkana, Arkansas, and solicited the Crowells to transfer the loan they had from the Gate City Building & Loan Association to the Home Building & Savings Association. Crowell procured his abstract to the property from the Gate City Building & Loan Association, telling its secretary at the time that he was going to transfer the loan to Dan Dewberry. Application was then made to the Home Building & Savings Association for a loan of $1,500, which was made in May, 1926. The money was sent to Dan Dewberry by the Home Building & Savings Association in the form of a check payable to the Crowells and to "Dan Dewberry, agent," with instructions to him, as its agent, to see that the deed of trust to the Gate City Building & Loan Association was satisfied and to turn the balance of the proceeds of the check over to the Crowells. When the check arrived, the Crowells indorsed it, and Dewberry gave them his personal check for the amount coming to them. He then indorsed and collected the check himself, but did not pay the Gate City Building & Loan Association or procure the satisfaction of its deed of trust, as per instructions and in accordance with his promise to the Crowells. Instead, he notified the Gate City Building & Loan Association that he had taken over the Crowell loan personally, and continued making monthly payments thereon under the contract until November, 1926. After that time he failed to make the monthly payments, and fled the country in the spring of 1927, without paying off the loan. It was then discovered that he had handled quite a number of loans in the same manner as he had

the Crowell loan. Between November, 1926, and the time he fled, no delinquent notices of failure to pay monthly installments on the loan were sent to the Crowells by the Gate City Building & Loan Association. The secretary of the Gate City Building & Loan Association testified that he did not know that Dewberry was getting the money from the Home Building & Savings Association with which to pay the Crowell loan and other loans to his company and appropriating the money to his own use; that he accepted the statement of Dewberry that he had taken the loan over personally, and allowed him to continue to pay the monthly installments under the provisions of the Crowell contract. Evidence was introduced tending to show that the secretary and office force of the Gate City Building & Loan Association knew how Dewberry was handling this and other loans. The chancellor found the Gate City Building & Loan Association did not know that Dewberry had got the money from the Home Building & Savings Association to pay the Crowell loan, and we cannot say that the finding is contrary to a clear preponderance of the testimony.

Under the facts reflected by the record, the Gate City Building & Loan Association is not estopped to enforce payment of its note for the balance due against the Crowells and to foreclose its lien under the deed of trust to pay same as against the Crowells and the Home Building & Savings Association. Its lien against the property was prior and paramount to the lien of the Home Building & Savings Association. Under the finding of the chancellor, which is not contrary to a clear preponderance of the testimony, the Gate City Building & Loan Association did not know or have reasonable grounds to believe that Dan Dewberry had obtained money from the Home Building & Savings Association with which to pay the Crowell loan, and that it allowed him to appropriate same to his own use in case he would make monthly payments in accordance with the Crowell contract. On the contrary, the chancellor found that the Gate City Building & Loan Association allowed him to keep up the

monthly payments on the Crowell loan, upon his statement that he had taken over the loan personally, meaning, of course, that he had bought Crowell's equity in the property, subject to or by the assumption of the payment of the Crowell indebtedness and lien. The assumption of the mortgage would not release the Crowells from their liability for the indebtedness.

Another question arising on the appeal is whether the Home Building & Savings Association judgment against the Crowells should be abated by the amount of the recovery of the Gate City Building & Loan Association against the Crowells. The manner in which the Home Building & Savings Association sent the money to the parties put it in the power of Dewberry to perpetrate the fraud. He was instructed to pay the Crowells their part of the proceeds out of the check and to satisfy the indebtedness due by the Crowells to the Gate City Building & Loan Association. The Home Building & Savings Association by this act constituted Dan Dewberry its special agent for handling the proceeds of the check, and, having put it in his power to perpetrate the fraud, must bear the loss. This particular question was involved in the case of *Midland Savings & Loan Company* v. *Home Building & Savings Association.* It was ruled in that case that Dan Dewberry was the agent of the Midland Savings & Loan Company, and it must bear the loss. The check was made payable to the Shields and Dan Dewberry, agent, with instructions to Dan Dewberry to see that the mortgage lien upon the property in favor of the Home Building & Savings Association was paid and satisfied.

The next and last question arising on the appeal is whether the court adopted the correct formula in ascertaining the amount due under the contract. The formula or rule adopted by the trial court was the formula or rule adopted by it in the cases of the *Gate City Building & Loan Association* v. *Frisby,* recently decided by this court. It was decided in that case that the rule in *Roberts* v. *American Building & Loan Association,* 62

Ark. 572, 36 S. W. 1085, was the correct rule by which the amount due should be determined, and, in reiterating the rule that should govern, this court said that the chancellor "seems to have proceeded upon a wrong conception of what was decided in the Roberts case." The court then reiterated and interpreted the rule which should govern in cases of this kind.

On account of the court's failure to adopt and correctly apply the rule in ascertaining the amount due, the decree must be and is reversed, and the cause is remanded with directions to ascertain the amount due under the rule in the Roberts case, as interpreted by this court in the case of *Gate City Building & Loan Association* v. *Frisby*. In all other respects the decree is affirmed.

McCLAIN *v.* PATTERSON.

Opinion delivered June 11, 1928.

Rice & Dickson and *Blansett & Combs*, for appellant.

Duty & Duty, for appellee.

HUMPHREYS, J. Appellee brought separate suits upon notes in the circuit court of Benton County, against each of the appellants, upon a note which each had executed to J. W. Baker for amounts representing balances due Baker for automobiles which he had sold each of them, and which notes J. W. Baker had assigned and

transferred, before maturity, for a valuable consideration, to him. J. W. Baker was made a party to each suit. The notes bore interest at the rate of 8 per cent. per annum from maturity until paid. The notes were payable in monthly installments, and each was credited with certain payments. The suit against Johnson was numbered 1202 in the trial court, the one against Baker 1205, and the one against Cowan 1206. There is no dispute about the amount due upon each note at the time of the trial, the only issue joined being whether appellants were liable upon the respective notes executed by each. The amount due upon the R. C. Johnson note was $456.18, including interest, the amount due upon the McClain note $254.79, and the amount due upon the Cowan note $393.03.

Appellants filed separate answers, and interposed the defense that the respective automobiles were taken from them by order of the United States Court for the Western District of Arkansas upon the claim that they had been stolen from their rightful owners, and that Baker acquired no title thereto, and that no title passed from him to either of the appellants for the automobile bought by him, and that there was no consideration for the execution of said notes. Appellants denied that appellee was the owner and holder of the notes for value before maturity, and without notice of the infirmity in each, and charged the fact to be that appellee ought to have known, from all the facts and circumstances, that Baker had no title to said automobiles.

The suits were consolidated for the purposes of trial in the circuit court, and the consolidated cause proceeded to a hearing upon the issue joined and the testimony adduced. At the conclusion of the testimony the court instructed a verdict in favor of appellee against each of the appellants upon the respective notes, and rendered a judgment in accordance with the verdicts against R. G. Johnson and J. W. Baker, in case numbered 1202, for the sum of $456.18; and against J. P. McClain and J. W. Baker, in case numbered 1205, for

$254.79; and against J. W. Baker and Clarence Cowan, in case 1206, for the sum of $393.03; from which an appeal has been duly prosecuted to this court.

The notes were introduced in evidence, and their execution admitted. Appellee testified that he bought each note for a small discount, before maturity, and that he paid cash for them; that he had no knowledge whatever that they were given for stolen automobiles, or no information from which he could draw such an inference; that he had been buying notes of that kind for five or six months, having handled over $27,000 worth of such paper; that his arrangement with Baker was for Baker to collect one-third of the purchase price of the automobiles in cash and to take notes and chattel mortgages for the balance of the purchase price; that he furnished Baker with blank notes and mortgages for that purpose; that he did not file the chattel mortgages, but just took chances on collecting the money; that he made no investigation of the financial standing of the respective purchasers; that occasionally he turned down Baker's proffered paper when he did not think the automobile was worth what it was represented to be, and sometimes when the proper initial payment had not been made on it; that, if everything was regular and right, he accepted the paper, and did so without investigation; that the notes and chattel mortgages were executed to Baker and indorsed by Baker on a printed form on the back of the notes and mortgages; that, several months after he had purchased the notes in question and upon which he had brought suit, he received a notice through the mail from a Mr. John Boyd, advising him not to buy a note which he had given for a stolen automobile, and that he complied with his request, and turned the note back to the Farmers' Bank, which had advanced the money to Baker on it; that the bank afterwards collected the note from Boyd.

In the course of the trial appellants offered to prove that the automobiles which they bought from Baker and for which they executed their notes were stolen. The

court refused to admit the testimony unless they would introduce proof tending to show that appellee actually knew that the automobiles had been stolen, or was in possession of facts and circumstances tending to show that such was the case, at the time he purchased the notes, and ruled that up to that time they had not introduced any such testimony. Appellants claimed that the business between appellee and Baker was out of the ordinary and sufficient under all the circumstances to justify the submission of the issue of good or bad faith on the part of appellee in buying the notes, and entitled them to prove that the automobiles had been stolen. The court ruled that the business between them was not out of the ordinary, and that no facts or circumstances had been introduced which tended to show that appellee was not an innocent purchaser of the notes. Appellants objected, and excepted to the ruling of the court, and preserved their objection and exception in their motion for a new trial.

At the conclusion of the testimony, appellants requested the court to submit the issue to the jury whether, under all the facts and circumstances in evidence, appellee was an innocent holder of the note before maturity, for value, in the usual course of business, without notice of infirmities therein. The court refused to submit the issue to the jury, but, on the contrary, instructed a verdict for appellee against each of the appellants, as heretofore stated. Proper objections were made and exceptions saved to the action of the court.

The sole question presented by this appeal is whether the trial court erred in excluding testimony showing that the automobiles sold by Baker to appellants had been stolen, and returned by them to the true owners under order of the Federal Court for the Western District of Arkansas, and in peremptorily instructing a verdict.

The rule of evidence is that, before the fraudulent character of a transaction may be shown in an effort to defeat negotiable paper executed in consideration thereof, which had been transferred to third parties for

value before maturity, evidence must first be introduced tending to show that the purchaser of the paper was not an innocent purchaser. The evidence first offered must tend to show that the purchaser either had actual knowledge of the infirmity or defect, or tend to show that he had knowledge of such facts that his action in purchasing the paper amounted to bad faith. *Bothell* v. *Fletcher,* 94 Ark. 100, 125 S. W. 645. When such evidence has been introduced, then it would be proper to admit proof of the fraudulent transaction and send the issue to the jury upon all the evidence for determination. *Holland Banking Co.* v. *Booth,* 121 Ark. 183, 180 S. W. 978. Appellants contend that the failure to investigate the value of the security and to file the chattel mortgages were transactions out of the ordinary and circumstances tending to show a knowledge on the part of appellee of the infirmity and defect in the paper, and justified the introduction of proof showing that the automobiles had been stolen and recovered by the true owners, thereby destroying the supposed consideration for the notes. Appellee required Baker to collect one-third of the sales price of the automobiles in cash and to take notes and chattel mortgages for the balance of the purchase money, payable in substantial monthly installments. The cash payment and substantial monthly installment payments obviated any real necessity of personally investigating the value of the security and financial responsibility of the purchaser. It is a common thing for banks and individual investors to handle automobile paper without personal investigation of the value of the automobile securing same or the financial responsibility of the purchaser. It will be remembered that the automobile is always described in the mortgage, and, of course, its value may be determined from the description. It perhaps would have been better business to have filed the mortgages, but the filing would not have protected or strengthened the title to a stolen automobile. Appellee testified that he never filed any of his mortgages, but just took chances on making collections. We do not think this circumstance rendered the

proof of the fraudulent transaction admissible, or that the evidence introduced, when considered in connection with the fact that the automobiles were stolen, was sufficient to carry the issue of good or bad faith of appellee in purchasing the notes to the jury for determination. In other words, the undisputed evidence introduced, if reinforced by proof that the automobiles had been stolen, would not have tended to show that appellee purchased the notes in bad faith.

It was the duty of the court to instruct verdicts against appellant under the undisputed evidence. The judgments will therefore be affirmed.

DYE *v.* STATE.

Opinion delivered June 11, 1928.

Virgil D. Willis, for appellant.

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

HUMPHREYS, J. Appellant was indicted, jointly with others, at the September term, 1926, of the Cleburne County Circuit Court, in an indictment containing two counts, one for possessing a still and one for making mash. At the February term, 1927, he was tried and convicted on both counts, and adjudged to serve a term of one year in the State Penitentiary on each count, from which is this appeal.

His first assignment of error for a reversal of the judgments is that the verdicts upon which same were based were contrary to the evidence. The testimony introduced by the State was, in substance, to the effect that, in the Wolf Bayou community, several miles from the town of Drasco, it was impossible to conduct Sunday-school and church without disturbances, due to the illicit manufacture and sale of whiskey; that this condition induced certain citizens to search the neighborhood for stills, and that, in making the search, they found two stills running in the neighborhood, one back of Paul Elms' and one back of W. A. Tatum's field, who were jointly indicted with appellant; that large quantities of mash and whiskey were found at each still; that, as they approached the last still, they recognized appellant and two of his associates, who immediately ran away; that some of them remained at the still while others went to notify the sheriff to come to the scene; that, while waiting at the still for the sheriff to come, appellant and five companions, jointly indicted with him, returned, cursed them and told them that what was in the woods belonged to them; that thereupon they withdrew some 200 yards, and were followed by appellant, who had a gun.

Appellant interposed an alibi as a defense, and introduced six witnesses, who testified that he was at Drasco, working upon his car, at the time the citizens

made the search for illicit stills. Appellant argues that he established an alibi by six witnesses, which necessarily destroys the integrity of the theory of the State that he was present at the still when discovered by the searching party. The conflicting testimony made an issue for the jury. The credibility of the witnesses and the weight to be attached to their testimony was purely a question for determination by the jury. The verdict indicates that the jury believed the witnesses introduced by the State and disbelieved those introduced by appellant to establish an alibi, and, as there is sufficient substantial evidence in the testimony introduced by the State to sustain the finding of the jury, the verdict will not be disturbed by this court on appeal.

The second assignment of error for a reversal of the judgments is the admission of testimony to the effect that the community could not have Sunday school and church without disturbances. This testimony, as we understand the record, was detailed by the several witnesses in explanation of their action in making the investigation for illicit stills in the community, and was merely a preliminary statement as to the cause of their search, and did not in any way prejudice the rights of appellant. The explanation was admissible for that purpose.

The next and last assignment of error for a reversal of the judgments is that the court erred in refusing to give appellant's requested instructions numbered 4, 5 and 6. Appellant's requested instruction number 4 is as follows:

"You are instructed that, if you believe there were stills being operated in the section and about which the witnesses have testified, it is no evidence against this defendant, unless he was aiding, assisting, abetting in the operation of same, or aiding, assisting or abetting in the making of mash, as charged in the indictment."

This instruction was fully covered by appellant's requested instruction number 2, which the court gave. The court is not required to multiply instructions covering the same point.

Appellant's requested instruction number 5 is as follows:

"You are instructed that the burden is on the State of Arkansas to convince you, beyond a reasonable doubt, that the defendant is guilty as charged in the indictment, and if you find that there are two lines of evidence equally strong, one leading to conviction and the other to acquittal, then, under the law, you must adopt the one favorable to the defendant."

The jury was told in other instructions to acquit appellant unless convinced of his guilt beyond reasonable doubt. It was unnecessary therefore to give appellant's requested instruction number 5. *Martin* v. *State,* 163 Ark. 103, 259 S. W. 6, 33 A. L. R. 133.

Requested instruction number 6 related to the character of circumstantial evidence necessary to convict one charged with crime. This instruction was not appropriate, because the State did not rely upon circumstantial evidence alone for conviction. The testimony relied upon by the State for a conviction was positive and direct to the effect that appellant was one of the men who was discovered at the still and ran away, and who later returned and claimed to be the owner of the still, mash and whiskey.

No error appearing, the judgments are affirmed.

TEBBETTS *v.* TUNE.

Opinion delivered June 11, 1928.

Morris & Barron, for appellant.

R. E. Wiley, for appellee.

MEHAFFY, J. Louise E. Tebbetts, the appellant, brought suit in the Pulaski Circuit Court against Howard A. Tune and Fred J. Reutelhuber, representing the members of the widows' and orphans' fund, alleging that the fund had insured the life of Tebbetts in the sum of $1,000 and that the members thereof had jointly and severally bound themselves to appellant, as beneficiary of Tebbetts, for the payment of such sum.

This suit was based on the membership of George S. Tebbetts in the widows' and orphans' fund, the plaintiff alleging that Tebbetts was a member of the fund, and that he had died. Notice of proof and loss and payment of all accrued assessments were alleged. It was also alleged that demand for payment had been made, and that appellee denied liability.

The appellee filed answer, together with a motion to transfer to equity; denied the allegations of the complaint; alleged that Reutelhuber and Tune were trustees of the money raised by voluntary contributions of members; that the imperial council governs the shrine and the members thereof, and that, under the by-laws of the council, a member who was suspended in a consistory was automatically suspended in his temple, said by-law being made part of the appellee's answer.

Appellees further stated that Tebbetts became suspended in the Arkansas Consistory No. 1 because of nonpayment of dues thereto, and on December 31, 1925, by virtue of being suspended from the consistory, became suspended in the shrine, remaining delinquent therein

until the time of his death, which was in July, 1926. It was further alleged that being suspended from the shrine tainted his membership in the fund, and that he thereby became suspended in the fund from and after December 30, 1925.

The case was transferred to equity, and the chancellor, on January 13, 1928, rendered a decree dismissing the complaint for want of equity, and appellant prosecutes this appeal to reverse said decree.

The facts are substantially as follows: No one can become a member of the Shrine Temple unless he is either a member in good standing either in a commandery of the Order of Knights Templar, or a consistory of the Ancient and Accepted Scottish Rite. Tebbetts was a Scottish Rite Mason, and therefore eligible to membership in the shrine. Under the laws of the organization, any one suspended or expelled from the Scottish Rite body stands suspended or expelled in the Shrine Temple.

On the 31st day of December, 1925, Tebbetts was suspended from the Scottish Rite body, and thereby became suspended in the Shrine Temple. The widows' and orphans' fund was composed of members of the temple. As a member of the temple, in good standing and in good health, Tebbetts was entitled to subscribe to the widows' and orhans' fund, and the application signed by him, addressed to the widows' and orphans' fund, states that he is a member in good standing of Al Amin Temple, and in general good health. The by-laws provide that, in order to be eligible to membership in the widows' and orphans' fund, one must be a member of the temple in good standing, and in general good health.

Section one of the by-laws of the fund is as follows: "All members of Al Amin Temple in general good health and in good standing are eligible to membership in the fund, on the conditions herein named."

The agreed statement of facts covers several pages of the transcript, and is too lengthy to be set out in full. But it is agreed that Tebbetts was a member of the fund,

and that the appellant is his widow and beneficiary; that on December 31, 1925, Tebbetts was delinquent in his dues to the Arkansas Consistory No. 1, and suspended in accordance with its by-laws; that he had received notice that he was suspended on account of nonpayment of dues amounting to $18; that he was suspended from the consistory, and that such suspension automatically suspended him from the shrine. The suspension continued until his death. He was never reinstated in the consistory, and did not pay his dues in Al Amin Temple for 1926. That he died from an injury received in an accident on July 18, 1926. That the widows' and orphans' fund was notified of his death, and payment demanded. The widows' and orphans' fund, through its officers, refused to recognize the validity of the claim. That, at the time of his death, he had on deposit with Fred J. Reutelhuber, secretary of the widows' and orphans' fund, the sum of $8.80, the balance of the amount deposited with the secretary by Tebbetts, with the direction that it be drawn on from time to time in paying regular assessments or death contributions; that the constitution of the imperial council provided that a noble can hold active membership in but one temple, and, to retain membership in a temple, he must be in good standing in one or the other prerequisite Masonic bodies; that, in case he holds membership in but one and is suspended or expelled, he stands suspended or expelled in the temple until restored to good standing by the prerequisite body suspending or expelling him.

It is further agreed that membership in the widows' and orphans' fund is confined to members of Al Amin Temple. Before one can join the fund he must be in good standing in Al Amin Temple, and in general good health. The by-laws of the widows' and orphans' fund, together with the certificate, are made a part of the agreed statement of facts. It is not compulsory on members of the temple to become members of the widows' and orphans' fund. Some of the members of Al Amin Temple are not members of the widows' and

orphans' fund. Tebbetts did not pay his death contributions in the usual way. He would mail his check for $15 or $20 to Reutelhuber, secretary, who would cash same and deduct amount of current assessment, and deposit the balance to the credit of Tebbetts in the widows' and orphans' fund. When another assessment became due to the widows' and orphans' fund, the secretary would draw from that account. When there was not enough money, he would notify Tebbetts, and Tebbets would again send him a check for $15 or $25. After Tebbetts had been suspended from the consistory and the temple, on December 31, 1925, he had to his account in the widows' and orphans' fund department $8.80, being a balance of $22 previously deposited. This sum was not refunded, but was retained in the account of Tebbetts in the widows' and orphans' fund, and the name of Tebbetts was carried on the books of the widows' and orphans' fund. The secretary, Reutelhuber, did not return the $8.80 because he thought Tebbetts would reinstate himself in good standing in the temple, which he could do by paying his delinquent dues. Between the date of Tebbetts' suspension and the date of his death there occurred eight deaths of the members of the widows' and orphans' fund, and several assessments were collected from the membership, but Tebbetts was not called on to pay any of them. On July 29 the secretary of the widows' and orphans' fund sent a check for $8.80 to appellant, which she has not cashed or returned.

The agreement further states about the organization of the temple and the widows' and orphans' fund, but we deem it unnecessary to copy that in this statement.

It is also agreed that the constitution and by-laws of the national body show that the imperial potentate is the executive officer, and that he has authority to suspend, until the next session of the imperial council, any officer of any temple for certain things. It is also provided in the constitution that no applications shall be received unless the applicant is a regular Knight Templar in good

standing in the commandery, or a regular 32 degree Mason in good standing in a consistory of the Ancient Accepted Scottish Rite. It is also provided in the by-laws that no appeal from the decision of the illustrious potentate shall lie to the temple, but an appeal may be taken to the imperial potentate, whose decision shall stand until the same shall be revoked or approved by the imperial council.

Parties also make the by-laws of Al Amin Temple a part of their agreement. Article nine of the by-laws of the temple provides that all questions, other than those provided for the edicts and regulations of the imperial council, shall be decided by a vote of those present at any regular meeting of the council.

The agreed statement of facts further shows the organization of the widows' and orphans' fund. And the minutes of the meeting of the temple, among other things, contains the statement: "All members of Al Amin Temple A. A. O. N. M. S. in good standing and in good general health are eligible and may become members of the order."

It is further provided in the by-laws that assessments shall be made and that the amount due beneficiaries shall be paid upon satisfactory evidence, etc., and provides for the application to become members of the fund.

The agreed statement of facts is quite lengthy, as also is the testimony, but the above is a substantial statement of the material facts.

Appellant's first contention is that the agreement between the widows' and orphans' fund and Tebbetts rests upon the basis of a contract, and stamps it as an ordinary insurance policy, and calls attention to many authorities, but we deem it unnecessary to discuss the authorities at length. The authorities as to what constitutes an insurance contract are in hopeless conflict, but it is immaterial whether we call this an insurance contract or simply call it a contract, because the only question necessary to be considered and which is decisive of this case is the question whether the subscriber to

the widows' and orphans' fund must remain in good standing in the temple, or whether being suspended or expelled from the temple disentitles the member to the privileges and benefits of the widows' and orphans' fund while so suspended or expelled. If a suspension for nonpayment of dues in the Scottish Rite body, which operates as a suspension in the temple, does not suspend him as a member of the fund, then appellant is entitled to recover. If, on the other hand, he must remain in good standing in the temple to be entitled to the privileges and benefits of the widows' and orphans' fund, appellant is not entitled to recover. It is expressly provided in the by-laws that, in order to become a member of the widows' and orphans' fund, one must be a member of the temple in good standing.

The Massachusetts court, in deciding the case of *Burbank* v. *Boston Police Relief Association,* where there was a change of beneficiary, and the instrument designating the change was under seal, attested by two witnesses and the treasurer of the corporation, the court said:

"It is to be assumed that this was done at a meeting of the directors. But it does not appear that any action was taken by the directors upon it. There is no ground for the contention that the defendant is bound by these acts of its officers or is estopped to deny that Morey was a member. Neither the treasurer nor the directors had authority to continue Morey a member. The by-laws declared that he was not a member, and the corporation itself could not vote to give him the rights of a member." *Burbank* v. *Boston Police Relief Assn.,* 144 Mass. 434, 11 N. E. 691.

"This is a corporation which does not make contracts of life insurance with strangers, but arranges a system of payments for the benefit of the relatives of its deceased members. It adopts by-laws to determine the relations of members to one another and also their rights against the corporation. The principles which apply to ordinary mutual insurance companies in regard to the waiver of

by-laws by officers are equally applicable to this corporation. * * * It is well settled that the officers of a mutual insurance company have no authority to waive its by-laws which relate to the substance of the contract between an individual and his associates in their corporate capacity. * * * The officers of the defendant were agents with a limited authority. The corporation, by the law which it laid down for the government, received into association with its members and to participate in its benefits all persons of a particular class. John O. McCoy did not belong to that class, and he could not become a member of the corporation without appropriate action by the corporation itself." *McCoy* v. *Roman Catholic Mutual Insurance Co.*, 152 Mass. 272, 25 N. E. 289.

The widows' and orphans' fund, by its by-laws, received into its membership only persons of a particular class. That class was members of the temple in good standing. Membership in the temple in good standing is a prerequisite to membership in the widows' and orphans' fund. And only persons who are members in good standing, both in the temple and in the consistory, can become members of the widows' and orphans' fund. Counsel for appellant, however, insist that, while membership in good standing is a prerequisite to becoming a member, there is nothing in the by-laws that requires one to remain in good standing in the temple in order to retain his membership in the widows' and orphans' fund, and that this is a contract which is binding on both parties.

The cardinal rule in the interpretation of contracts is to ascertain the meaning and intent of the parties and give effect to that intent if it can be done consistently with legal principles. And it is the duty of one construing a contract to ascertain the meaning and intent of the parties, and, if it can be done, to find out this intent as expressed by the language used by the parties. It was evidently the intention of the parties that beneficiaries in the widows' and orphans' fund should be confined to

those persons who are members of the temple in good standing. It is true there is nothing in the by-laws or the application that states in so many words that a member must remain in good standing in the temple. It is also true that there is nothing in the by-laws or application that states that he must remain a member of the temple. If Tebbetts had been expelled instead of suspended, the argument that the law did not require him to remain a member, but only required him to be a member when he joined, would be as applicable and as plausible as the argument that he is not required to remain in good standing. Tebbetts could have been reinstated by paying his dues; not by paying his dues or assessments to the fund, but by paying his dues to the consistory. The situation is very different from that of a person owing dues to a lodge and the lodge having money on hand sufficient to pay said dues. It has been many times held that, under such circumstances, the lodge cannot forfeit the rights of the party while it has money in its possession that it could apply to the payment of his dues. But, in the instant case, the widows' and orphans' fund could not have applied the money that it had on hand to the payment of Mr. Tebbetts' dues in the consistory. It had no authority to do this. Moreover, there was not sufficient funds to pay his dues.

The agreed statement of facts in this case is that the suspension of Tebbetts continued until his death; that he was never reinstated in the Arkansas Consistory, and did not pay his dues to the temple for 1926 which became due and payable January 1 of that year.

If appellant's contention was correct, a member could be expelled from the consistory and the temple and still be a member of the widows' and orphans, fund, although this fund is organized for the benefit of persons who are members of these orders in good standing.

Section one of the by-laws of the fund provides that all members of Al Amin Temple in general good health and in good standing are eligible to membership in the fund.

Section ten of the by-laws provides that they may be changed or amended at any lawful meeting of the temple. But it also provides that, at the request of any member of the fund present, the voting may be confined to the members of the fund. Therefore, if a person could remain a member of the fund after having been expelled from the temple, he could still vote on the by-laws of the fund and could, by his own request, prohibit any member of the temple, other than members of the fund, from voting. Any member of the fund can, by keeping his dues paid in the consistory and temple, remain a member; or, if he has been suspended, can be reinstated by the payment of his dues.

Appellant says that the fund is self-governing in its own sphere, for, according to its by-laws, it makes its own rules and regulations exclusively through its own membership. And we think that this strengthens the position that the member must remain in good standing in the consistory and temple. If the fund is self-governing and makes its own by-laws, then it is conceivable that the persons expelled from the consistory and the temple could make the laws of the fund, if appellant's contention is correct.

Our conclusion is that the suspension of a member by the consistory suspends him from the fund, and that the only way he can be reinstated is to pay his dues in the consistory.

The decree of the court is affirmed.

MATHENY *v.* PATTON.

Opinion delivered June 11, 1928.

[redacted]

Coleman & Reeder, for appellant.

J. Paul Ward, for appellee.

McHANEY, J. On June 18, 1926, appellant purchased from the Moore Motor Company an automobile, and executed his note for part of the purchase price, payable in monthly installments of $26.45 each. This note was assigned by indorsement by the Moore Motor Company to the Kirkpatrick Finance Company of St. Louis, Missouri, without recourse. Payments were made on the note from time to time, leaving a balance of $132.31. The Kirkpatrick Finance Company assigned the note to appellee by the following indorsement: "For value received, pay to the order of R. H. Patton. (Signed) Kirkpatrick Finance Company."

Appellant failed to pay the balance due, and appellee brought this suit in the justice court, where judgment was rendered against appellant, and an appeal was taken to the circuit court, where it was tried *de novo* before the court, without a jury, and judgment again rendered for appellee.

The only defense made to the note in the court below was that it is usurious. Appellant testified: "Q. You are not much interested in any phase of this case except just

beating it, are you? A. That is all; just beating it right squarely on usury, here. I trusted them to put their interest in there at 10 per cent., and any amount over that was not understood nor agreed to by me. That is all. I knew they told me in plain English that I had to pay 10 per cent. interest and insurance, that is all."

This issue was found against appellant by the circuit court, and he does not raise the question here.

The only question presented for our consideration is whether appellee was a proper party plaintiff. He insists that the note was assigned to Kirkpatrick Finance Company, which is the real party in interest, and that it alone had the right to sue upon the note, and that it could not maintain the action because it is a foreign corporation transacting business in this State in violation of the laws of this State relating to foreign corporations. But the question was not raised in the court below.

Appellee was the only witness who testified in this case, and if there is any evidence in the record showing that the Kirkpatrick Finance Company is a Missouri corporation, or a corporation of any kind, there is nothing in the abstract presented by appellant to show it. Neither is any such assignment of error contained in the motion for a new trial, there being only three assignments, that the verdict is contrary to the law, to the evidence, and to both the law and the evidence. These assignments of error are insufficient to present the question now raised for the consideration of the circuit court, and are therefore insufficient to raise the question here.

Moreover, if it be conceded that the Kirkpatrick Finance Company is a foreign corporation doing business in this State in violation of law, of which there is no evidence in the record, still the assignment by indorsement to appellee, being a valid indorsement, constitutes him a valid holder of the instrument, with power to sue in his own name, and therefore with the right to maintain this action.

The Negotiable Instruments Law, § 7761, Crawford & Moses' Digest, defines the word "holder" as "the

payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof." By § 7817 it is provided that "the holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument."

Appellee was the holder of the note in question, and, under the above sections of the statute, had the right to maintain this action. Whether appellee was the agent of the Kirkpatrick Finance Company, and whether appellant would have had the right to plead a set-off or counterclaim in this action against the Kirkpatrick Finance Company, are questions not necessary for us to decide, as it is not contended that the appellant had any right of set-off or counterclaim against it.

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

PYRAMID LIFE INSURANCE COMPANY *v.* BELMONT.

Opinion delivered June 11, 1928.

Brooks Hays and *Marsh, McKay & Marlin,* for appellant.

Coulter & Coulter, for appellee.

MEHAFFY, J. Appellant brought this suit in the Union Circuit Court to recover from the appellee the sum of $1,611 and interest upon a note, said note having been given for first premium on a life insurance policy.

Defendant answered, specifically denying the allegations of the complaint, and denied that policy was ever delivered to him by the company, or that it was ever intended by the parties to be delivered. He further alleged that the note was obtained on the fraudulent representation that it was necessary that the note accompany appellee's application for life insurance; that it was fraudulently represented to him that, in the event of a failure to issue and deliver the policy, said note would be canceled and returned to him; that no policy of any kind was ever issued or delivered to defendant. He further alleged that it was fraudulently represented to him that stock in the Pyramid Life Insurance Company in the sum of $1,000 would also be delivered to him, and that no stock of any kind had ever been delivered, and that there was a total failure of consideration for said note; that this suit was begun by plaintiff with a full knowledge of the above facts, and that no cause of action existed on the note; that, notwithstanding they knew all the facts, and knew there was no liability on the note, they sued out a writ of garnishment, and wrongfully, illegally and maliciously impounded his funds, and that he was damaged in the sum of $2,000.

The appellant introduced the following note:

"$1,611. El Dorado, Ark., 5-22, 1926.

"On or before ninety days after date, I, we, or either of us promise to pay to the order of myself or legal holder, one thousand six hundred eleven and no 100 dollars, for value received, negotiable and payable, without defalcation or discount, at the office of....., with

interest from date at the rate of 6 per cent. per annum, and at the rate of 10 per cent. per annum after maturity until paid. The makers and indorsers of this note hereby severally waive presentment for payment, notice of non-payment and protest.

"This note is given for premium for life insurance policy which has been issued in the form applied for and delivered to the maker of this note.

"Henry B. Belmont

"Garrett Hotel, P. O. El Dorado, Ark."

Indorsed at bottom of note in pencil: "Claude Hollan, 1027." Indorsed on back: "H. B. Belmont."

The appellee introduced the following testimony:

Brooks Hays testified that he was sales director and local counsel for the plaintiff. He had actual supervision of the sales contracts of the company. The original contract has been in the possession of Mr. Hollan ever since the date of issuance. Mr. Hollan is the local agent of the company. Does not know that he has seen the original policy. Might have looked at it in the court room. Hollan had it last spring in the court room, and tried to get appellee to take it, and he would not. The grace period had not expired at that time. The thirty days had not elapsed, and it was in force at that time. Twelve months had elapsed when witness tendered it to Mr. Coulter for the defendant. Witness did not become associated with the company until after this policy had been held by Mr. Hollan for some time. According to the company's viewpoint, the policy had been delivered. It held it for Mr. Belmont's benefit. This, referring to exhibit to pleadings, is a copy of the policy, and this is a photostatic copy of the application. The original application is very likely in their files, but this is an exact copy. The policy was not to be in force until it was delivered to applicant in good health, and premium paid. The premium was paid by note. The policy and application which is made a part of the policy is the usual contract of insurance, the parts of which that are material to the issues in this case are as follows:

"B. That every declaration hereinabove contained is true. That there shall be no contract of insurance until a policy shall have been delivered to me and the first premium paid to said company, or its duly authorized agent, during my lifetime and good health."

"I hereby declare that I have paid to Claud L. Hollan sixteen hundred eleven dollars in cash, and that I hold his receipt for same.

"Henry B. Belmont.
(Signature of applicant).

"Dated.....

"Rec. note, $1,611."

The policy was sent to Belmont about September. No part of the note had been paid.

The appellee testified that he made application to Mr. Hollan for his policy of insurance. He stated: "About May of last year Hollan came to me and started talking about insurance, and I wouldn't listen to it; I told him I didn't have the money; and he kept on talking to me about it. If I would take out a policy he would give me some stock in the company, but I didn't have any money at that time, and he says, 'Well, you don't have to pay on your policy now, and the stock will be delivered to you.' He says: 'I will give you stock equivalent to $1,000,' and I says, 'Well, I will talk to you about it later'; so I took the matter into consideration, and he come back in the evening again, and I says, 'I will take out a policy for $25,000,' and he says, 'Well, the company don't write any more than $20,000 to one person,' and I told him, 'I want a $25,000 policy,' and he made up the application and passed it over for me to sign, and I thought he made it out like I told him to. He wrote up the application, and had me examined; and I says, 'When are you going to send me the policy?' and he says, 'You will get it in thirty days, the company will send it to you.' I didn't have any ready money, and I executed the note for the premium. Thirty days went by, and I never got nothing, and I met him and asked, 'Say, what is the matter with the policy?' and he said he would write to

the company and find out what was the matter. Ninety days went by, and I never got the policy. I asked him a dozen times about the policy, and in October I stopped him and says, 'Why didn't I get the policy? I haven't got it yet,' and he says, 'Is that so?' and I says, 'No.' A few days later he says he had the policy. He never did anything about it. In February he showed me the policy; that was nine or ten months after I made the application. When he showed me the policy I asked him if it was for $25,000, and he said no, it was for $20,000. I told him that was not the policy I ordered. He said the policy was in force when I paid the first premium, and said after the second premium was paid I would be entitled to $8,000, and I told him I did not order any policy like that. He told me it would be in force when I executed the note for the face of the policy. I asked him about the stock, and he said I would get it. I told him it was not satisfactory. He took it from my hand and put it in his envelope, and he never delivered it to me, and he never delivered me any stock. Two days later the bellboy came with a note with a check written out. I wouldn't sign the check, and then he told me he wanted me to sign the check; "it is important to the company; we want to put that paper in advertising." I did not sign the check nor anything. No one ever delivered to me this policy. I would not have accepted it if they had delivered it. It is not the kind of policy I bought. At the time they sued out a writ of garnishment in this cause I had checks outstanding. They were turned down on account of my money being garnished.

"I talked to Mr. Hollan about the policy, and I told him I wanted $100,000. I finally told him I would take $25,000, and we talked about $25,000 all the time. He said if I would sign the note my policy would be delivered in 30 days, but it was never delivered. Did not have a conversation in the Garrett Hotel, in the presence of Cubage and Claud Hollan, when he tendered me a policy for $20,000, and did not tell him as soon as a judgment was paid me I would pay it. Had conversations with

them, and knew Cubage. I told Hollan I would not have anything to do with it."

This witness testified at length, but the substance of it was that he wanted a policy for $25,000, and never did agree to take a policy for less than $25,000; that he understood the face of the policy was to be paid, and afterwards found that the policy that Hollan had was for $20,000 only, and that it only provided for the payment of a portion the first year, a larger portion the second year, and the face of the policy after that.

Claud Hollan testified that he represented the appellant, writing insurance for it, taking applications. That Belmont did not apply for $25,000, but applied for $20,000. That the note sued on was the one executed by Hollan at the time, and he also executed a receipt which was introduced in evidence, which showed that Belmont had paid to Hollan $1,611, and on the bottom of it was written, "Note $1,611," signed "Henry B. Belmont." Took Belmont's application and sent it to the company, and it was in the neighborhood of 90 days before he got policy back from the company. When he got the policy the note was due. He called on Mr. Belmont and told him he had his policy and his note was due, and Belmont said he could not pay the note. "I told him to pay the interest and we would renew the note, and he said he couldn't pay anything until he got his money, and then he would pay the whole thing in advance. I told him it would be three years before he got his stock, and he said he wanted to pay all three years up when he got his money. I had this conversation with Belmont at the Garrett Hotel, in August, and then, in the latter part of September, tendered him the policy. Belmont stated, 'You hold the policy here.' " Witness sent the note back to the company.

Witness said he met Belmont in the lobby of the hotel, took him up to his room, and asked him about the payment of the note, and Belmont said he was drilling a well out south of town, and he says, "Just as soon as I get the money out of that well, I will pay you, or if I

get it out of my suit I will pay you." At that meeting, when he assured witness he would have the money in a few days, witness asked him if he did not want to buy $100,000. He said, "No, I have got $25,000 on the other," and I says, "No, not $25,000, but $20,000," and he just folded the policy up and handed me the policy, and he says, "You keep the policy until I can make enough to pay off the note, but I won't take any more insurance now." Mr. Belmont at the second meeting read most of the policy over. The policy was issued between 40 and 90 days after the application was signed. The insurance was in effect at the time the note was taken. The insurance company is in Little Rock, and the re-insurance company is in Des Moines, Iowa. "I gave him the policy with the Pyramid Life Insurance Company just like the other people receive. I offered to deliver this policy in August. His note was due at that time. Belmont handed the policy back to me to hold it until he paid the note. I was not holding it as security upon the note. The insurance was in force during all that time. When I gave him the policy, he kept it long enough to read it, and handed it back to me."

Cubage testified that he was in the Garrett Hotel, and heard a conversation between Hollan and Belmont, in which Hollan said, "When you bring in that well, I want to write you a policy for $100,000." Mr. Belmont said no, $25,000 was enough for him, and Mr. Hollan said he only had $20,000, and went and got Belmont's policy. Mr. Belmont said he thought it was $25,000, and said he did not want any more now. Mr. Belmont told Hollan just to keep the policy until he got his money, and he would get the money soon, and he need not worry about it.

We have set out the substance of the evidence, but it would serve no useful purpose to set it out in detail, but enough is set out to show the intention of the parties and the issues.

The court, at the request of the appellant, instructed the jury as follows:

"1. You are instructed that, the defendant having admitted the execution of the note sued on, the burden is upon him to show by a preponderance of the evidence in this case that the same is without consideration, and, unless you find from a preponderance of the evidence in this case that no consideration was given for the note sued upon or passed from the payee to the payer, then you will find for the plaintiff.

"2. You are instructed that if you find from the evidence that the insurance policy was issued by the plaintiff company on the life of Mr. Belmont, and that the same was tendered to him by the agent of the plaintiff company, and that the defendant asked the plaintiff's agent to keep the same for him until the note was paid, then you will find for the plaintiff the amount of the note sued upon."

"7. In determining whether or not there was a delivery of the policy in question, you are instructed that it is the intention of the parties and not the manual possession of the policy which controls, and if you find that an insurance policy was issued in the form applied for and was accepted by the insured, being thereafter treated as in force by the parties, the delivery is complete, though it remain in the hands of the insurer's agent, and if you do find that it was the intention of the parties that the contract should be considered in force, then your verdict should be for the plaintiff."

And the court refused to give the following instructions requested by appellant:

"3. You are instructed as a matter of law that the consideration for the note given was the issuance of the insurance policy referred to, by the plaintiff upon the life of the defendant, and if you find that said insurance policy was issued and was tendered to the defendant, that is sufficient consideration to support the note, and you will find for the plaintiff.

"4. You are instructed that, when the insurance company issued its policy of insurance as applied for upon the life of H. B. Belmont, defendant in this case,

it became bound to pay the same in the event of his death, and whether there was manual delivery and actual taking possession of the policy by H. B. Belmont is not material to the validity of the note sued upon, and if you find that said policy was so issued upon the application of the defendant, and that the defendant was notified thereof, then your verdict will be for the plaintiff.

"5. You are further instructed that the test as to whether there was a valid consideration for the note is whether or not the insurance company, plaintiff herein, became bound to the beneficiary named in the policy at any time to have paid the amount of the policy in event of the death of the defendant, and if the insurance company was bound to have paid the policy in the event of his death, then your verdict will be for the plaintiff.

"6. You are further instructed that, if the insurance company, plaintiff in this case, acting upon the application of the defendant, H. B. Belmont, and in consideration of the note sued upon, actually executed the policy of insurance, and tendered it to the defendant, then the company was liable for the amount of the policy in the event the defendant died during the life thereof, or the period for which said note was given to pay the premium, and your verdict will be for the plaintiff."

The following instructions were given at the request of the appellee:

"2. You are instructed that, unless you find from the evidence that plaintiff, Pyramid Life Insurance Company, issued to defendant a policy or certificate in the form applied for, and that the same was delivered to and accepted by defendant while he was in good health, your verdict should be for the defendant."

"4. You are instructed that, if you find from a preponderance of the evidence that the agent of plaintiff life insurance company made any material misrepresentations to the defendant by which he was induced to execute the application for insurance, either with reference to the terms and conditions of the policy or certificate itself, or with reference to the issuance and deliv-

ery of stock in the plaintiff company, such misrepresentations, when discovered by defendant, would be a complete justification for his refusing to accept such policy or certificate; and if you find that such representations were made, your verdict should be for the defendant."

The jury returned a verdict for the defendant, and the plaintiff filed motion for new trial, which was overruled, exceptions saved, and this appeal prosecuted to reverse the judgment of the circuit court.

The appellant's first contention is that, under the undisputed testimony in this case, the contract of insurance was consummated upon the approval of the application by the company's medical director and became a complete and binding contract without the issuance or the delivery of the policy. In the application signed by Belmont, which is made a part of the policy, is the following clause: "That there shall be no contract of insurance until a policy has been delivered to me and the first premium paid to said company, or its duly authorized agent, during my lifetime and good health."

The appellant says that this was a part of the policy. It was attached to the policy, and it was therefore the intention of the parties expressed in writing that there should be no contract of insurance until the policy was delivered. It therefore appears clear from the contract entered into that there was to be no contract of insurance until the policy was delivered.

Suit was brought on a policy that contained the following statement in the application: "That if this application is accepted, the policy issued hereunder shall not take effect until the first premium shall have been paid to and accepted by said company or its authorized agent and such policy delivered to and accepted by me, and all during my continuance and while I am in good health." The court, in construing this policy, said: "It is elementary that delivery, either actual or constructive, of an instrument of writing of the character of this policy is essential to give it legal effect, and the stipulation quoted from the application for the policy in express

terms was that the policy should not take effect until it should be actually delivered to and accepted by the applicant. This was a clear and explicit agreement, the effect of which could not be varied by Stewart's intention that the policy should be effective as soon as he executed it. If he had actually tendered the policy, yet, under the terms of the agreement, it would not become a completed contract until accepted by Melton, and there was no evidence to show that he even intended to accept it until after he was fatally ill, and which illness precluded his right then to demand its delivery, according to the terms of his agreement with the company." *American Home Life Ins. Co.* v. *Melton,* 144 S. W. 362.

In the instant case substantially the same agreement was made in the application signed by Belmont. It was expressly agreed that there should be no contract of insurance until the policy was delivered. It therefore seems clear that the contract made by the parties and the agreement signed by Belmont and accepted by Hollan for the company were to the effect that there should be no contract of insurance until the policy was delivered, and it was not offered to be delivered for about 90 days. The understanding was that it should be delivered in 30 days.

We do not agree with appellant that the contract of insurance was consummated upon the approval of the application by the company's medical director and became a complete and binding contract without the issuance and delivery of the policy, because the application itself expressly stated that it should not be a contract of insurance until the policy was delivered. Therefore, if Belmont had died after his application had been approved by the medical director of the company, he could not have recovered the amount of the policy.

But appellant argues that a parol contract of insurance was entered into by the parties, which was binding upon the company when the application was approved by the medical director, and that the issuance of the policy and delivery to Belmont were not essential to the com-

pletion thereof. This contention is in the face of the policy itself, or the application which is attached to and made part of the policy.

It is a well established rule that, whatever agreements may be made or whatever conversation or statements precede a written contract, when the writing is signed, as it was in this instance, it takes the place of all the discussions and propositions preceding it. It is admitted by appellant that there is nothing in the application or in the policy to the effect that the insurance was to become effective upon the approval of the application by the medical director, but it insists that it was agreed that it should be effective from the date of the note and application. And the application provides for the medical examination, as well as the delivery of the policy, before it can become effective.

It is true that contracts of insurance may be made by parol, and delivery of the policy is not essential to the completion of the contract in such cases; but that is where the minds of the insured and insurer, for a valuable consideration, have met on all the terms of the contract, the contract is complete and enforceable, even though it was intended by the parties to be evidenced by a policy which might not be delivered before the death of the party. But that is where the intention of the parties is to make a contract of insurance by parol. Here it is expressly stated by the parties that this was not to be done. Besides, the minds of the parties must meet before any valid contract can be made.

The appellee testifies positively that he made application for, and expected to get, a policy for $25,000; that no such policy was ever offered him. A part of the consideration for the note was also $1,000 stock in the company, which he never did get. The evidence is not disputed that the stock was to be given, and it is not disputed that the policy was to be delivered within 30 days. There is a dispute about whether the policy was to be for $20,000 or $25,000, and this was a question of fact for the

jury. Then, besides that, one of the instructions given at the request of the appellant was as follows:

"You are instructed that, if you find from the evidence that the insurance policy was issued by the plaintiff company on the life of Mr. Belmont, and that the same was tendered to him by the agent of the plaintiff company, and that the defendant asked the plaintiff's agent to keep the same for him until the note was paid, then you will find for the plaintiff the amount of the note sued upon."

It will be seen from this instruction that the question was submitted to the jury, the very contention made by the appellant in the case, and the jury found against it.

Appellant also asked, and the court gave, the following instruction:

"In determining whether or not there was a delivery of the policy in question, you are instructed that it is the intention of the parties and not the manual possession of the policy which controls, and if you find that an insurance policy was issued in the form applied for and was accepted by the insured, being thereafter treated as in force by the parties, the delivery is complete, though it remain in the hands of the insurer's agent, and if you do find that it was the intention of the parties that the contract should be considered in force, then your verdict should be for the plaintiff."

So, whether it was the intention of the parties to make the contract by parol or not, was submitted fairly to the jury. As we have already said, the application, which was a part of the policy, said that there should be no contract until the policy was delivered. But, notwithstanding this, the court submitted the question to the jury whether there was an intention for it to be in force before delivery, and told the jury that, if this was the intention of the parties, they should find for the plaintiff.

Appellant calls attention to the case of *Jenkins* v. *International Life Ins. Co.,* 149 Ark. 258, 232 S. W. 3. It is true that the court said in that case: "The general

doctrine is that contracts of insurance may be made by parol, and, such being the case, of course delivery of the policy is not essential to the completion of the contract of insurance; and, where the minds of the insured and the insurer for a valuable consideration have met upon all the terms of the contract, the contract is complete and enforceable, even though it was intended by the parties to be evidenced by a policy, but which, because of some fortuity, was not delivered before the death of the insured." The court further said in the same case: "But, of course, the parties may agree, as a condition precedent to a complete and enforceable contract of insurance, not only that there shall be a delivery of the policy, but also a delivery while the insured is in good health."

Numbers of authorities are cited in the above case, and there is no question about the rule in this State. But the record shows that the parties in the instant case agree that there should be no contract of insurance until the policy was delivered.

Appellant also calls attention to the case of *Mutual Life Ins. Co.* v. *Parish,* 66 Ark. 612, 52 S. W. 438. In that case the court said:

"Whether a contract for insurance has been completed depends upon the question whether the respective parties have come to an understanding upon all the elements of the contract—the parties thereto, the subject-matter of insurance, the amount for which it is to be insured, the limits of the risk, including its duration in point of time and extent in point of hazards assumed, the rate of premium, and, generally, upon all the circumstances which are peculiar to the contract and distinguish it from every other, so that nothing remains to be done but to fill up the policy and deliver it on the one hand, and pay the premium on the other."

Some of the issues in this case, about which there is a conflict of evidence, were the terms of the contract. And these questions were submitted to the jury, and its verdict is controlling here.

Appellant next calls attention to Cooley's Brief 442, and to *Ætna Life Ins. Co.* v. *Short,* 124 Ark. 505, 187 S. W. 657, but there is nothing in either of these authorities contrary to the rules above announced.

Another case, and the last one to which appellant calls attention, is the case of *Huntington Ins. Agency* v. *Wyoming County Court,* 98 W. Va. 352, 127 S. E. 64, 41 A. L. R. 642. In that case the court said, among other things:

"Whether an insurance policy has or has not been delivered, after its issuance, so as to complete the contract and give it binding effect, does not depend upon its manual possession by the assured, but rather upon the intention of the parties, as manifested by their acts or agreements. The manual possession of the thing which it is intended to deliver is a matter of little consequence. Such possession may exist without any legal delivery, and it may not exist where a legal delivery has been effected. The controlling question is, not who has the actual possession of the policy, but who has the legal right of possession."

And, as we have already shown, the question of the intention of the parties was submitted to the jury by instructions requested by both parties, and the finding of the jury is conclusive here.

In the notes to the above case, to which attention is called, a number of Arkansas cases are cited.

Appellant argues that the undisputed testimony shows that the contract was completed, and insists that it appears that the company issued the kind of policy applied for, but we do not agree with appellant in the contention that the undisputed proof shows there was a completed contract, nor that the undisputed proof shows that the kind of policy applied for was issued. There is a sharp conflict in the testimony of Belmont and Hollan. Belmont swears very positively that it was not the kind of policy he applied for, and Hollan testified it was. This was one of the issues submitted to the jury. The application and agreement to take a $25,000 policy is not

met by an offer to deliver a $20,000 policy. The minds of the parties must meet on all the essential terms of an insurance contract, just as they are required to meet on the terms of other contracts. And, according to the testimony in this case, there was a dispute as to whether the minds of the parties met.

The court properly instructed the jury, and there is substantial evidence to support the verdict.

The judgment is therefore affirmed.

BUCHANAN *v.* COMMERCIAL INVESTMENT TRUST.

Opinion delivered June 18, 1928.

McRae & Tompkins, for appellant.

Bush, Bush & Bush, for appellee.

HART, C. J., (after stating the facts). We will first take up and determine the rights of the parties on the cross-appeal of the Commercial Investment Trust, because it is based upon the motion of the Commercial Investment Trust to dismiss the appeal of A. S. Buchanan in the circuit court on the ground that the appeal taken

by him from the judgment of the court of common pleas was not taken within the time prescribed by statute.

The Legislature of 1893 passed an act to establish a court of common pleas in Nevada County. Acts of 1893, p. 190. The act provides for quarterly sessions of said court in the town of Prescott, and the judge of the county court was made the judge of the court of common pleas. The clerk of the circuit court was made ex-officio clerk of the court of common pleas. Section 12 of the act provides that any party aggrieved by the judgment rendered by the court of common pleas might take an appeal to the circuit court at any time within thirty days from the rendition of the judgment, by filing a proper affidavit with the clerk of the court and giving the bond prescribed by the statute, in case it was desired to suspend the judgment. The judgment by default was rendered in the court of common pleas on the 16th day of November, 1927. According to the testimony of the judge of the court of common pleas, the attorney for A. S. Buchanan exhibited what he called an affidavit for appeal and bond for appeal in the office of the judge of the court of common pleas on the 19th day of November, 1927. He laid the papers down on the desk of the judge, and there was some discussion between the attorneys as to the proper form of the judgment. The clerk was not there at that time, but came in later with some of the original papers in the case. Subsequently the papers became lost, and there was some effort made to substitute copies of all the original papers in the case. A few days after the thirty days since the rendition of the judgment had expired, the judge of the court of common pleas found the original affidavit and bond for appeal in his office, and attempted to indorse thereon the file mark of a date within thirty days from the rendition of the judgment. The affdavit and bond for appeal, in fact, however, did not have any file mark on them.

The circuit court properly overruled the motion to dismiss the appeal. The act of leaving or depositing the paper in the proper office constitutes a filing of it. A

paper is filed within the meaning of the law when it is delivered to the proper officer and received by him to be kept on file. The file mark is evidence of filing, but is not the essential element of the act. *Eureka Stone Company* v. *Knight,* 82 Ark. 164, 100 S. W. 878. Hence the circuit court was justified in finding that the affidavit and bond for appeal were left in the proper office to be filed, and that the act of leaving them there within thirty days after the rendition of the judgment constituted a filing within the legal meaning of the word, although there was no indorsement on the affidavit and bond for appeal that they had been filed.

It is earnestly insisted that there was no filing with the clerk as required by the statute. It is true that the clerk was not in the room at the time the attorney for Buchanan first laid the papers on the desk of the presiding judge and told him that he was intending to take an appeal, but the clerk came in later with some of the original papers in the case, and it is fairly inferable that he knew that the affidavit and bond for appeal had been deposited in the office for the purpose of being filed. They were afterwards found by the presiding judge among the original papers in the case, and it is fairly inferable that they were placed there by the clerk. The original papers were subsequently lost, and a *bona fide* effort was made by the attorneys on both sides to supply them; but, before this was done, the judge of the court of common pleas found the original papers, and the affidavit and bond for appeal were among them. In this state of the record the circuit court was justified in finding that the affidavit and bond for appeal were deposited by the attorney for Buchanan in the place where the official record and papers of the court of common pleas were usually kept, and were placed there for the purpose of being filed in accordance with the provisions of the statute creating the court of common pleas.

In this connection it may be stated that the attorneys on both sides of the case testified about the matter, but we do not deem it necessary to set out their testimony.

They are both men of high standing in their profession, and we deem it proper to say that there is nothing in the testimony of either of them which would tend to reflect in any way on their honesty or integrity. On the contrary, their testimony reflects credit on their official character as lawyers, and justifies the continuance of the former good opinion in which each of them is held by this court.

This brings us to a consideration of the appeal on the merits. In a case-note to Ann. Cas. 1916A, p. 90, it is said that, if a vendor makes a conditional sale of goods to a retailer for the express or implied purpose of resale, the vendor will not be permitted to maintain title thereto as against a person who buys in the ordinary course of trade from the retailer; and decisions of numerous courts of last resort in the United States are cited in support of the text.

Again, in the case-note to 47 A. L. R., at page 87, it is said that, where goods are sold on conditional sale, with express or implied authority to the buyer to resell them, a purchaser from the buyer obtained good title thereto, and numerous cases are cited in support of the text.

In the reported case of *Gump Investment Co.* v. *Jackson,* 142 Va. 190, 128 S. E. 506, 47 A. L. R. 82, it was held that an automobile financing company, which permits a dealer to keep a new car in his salesroom after a pretended sale under a recorded conditional sales contract, the note representing the purchase price of which, and the contract securing the same, it has purchased, must bear the loss, where the dealer sells the car to an innocent purchaser for cash, which he retains, and becomes insolvent without satisfying the note.

This is in accordance with our decisions. It has been decided in this State that, if a person makes a mortgage of automobiles to another for the purpose of being re-sold by him as retail dealer, the original seller cannot retain title thereto as against a *bona fide* and innocent purchaser from the original purchaser. *Coff-*

man v. *Citizens' Loan & Investment Company,* 172 Ark. 889, 290 S. W. 961. Again, in *Commercial Credit Company* v. *Hardin,* 175 Ark. 811, 200 S. W. 434, it was held that, in an action by one who had purchased an automobile left with the dealer by the owner to sell, in which it was shown that the car had been transferred to another before plaintiff purchased, and note and sales contract had been taken by the dealer and sold to a credit company, evidence tended to show that the first transfer was fraudulent as to the owner.

In the application of this rule to the facts in the record in the case at bar, the court erred in excluding from the jury the testimony of Horace J. Estes, to the effect that he told the representative of the Knight Overland Company, when he purchased the car in question, that he was buying the car for the purpose of selling it in his business. The witness had already testified that he was a retail dealer in Willys-Knight automobiles at Prescott, Arkansas, and that he had purchased between forty and fifty cars from the Knight Overland Company. This results from the application of the rule above declared. The excluded testimony would have tended to show that the seller of the car in controversy knew that the purchaser was a retail dealer in automobiles and was buying the car for the purpose of selling it in his business. It is true that, in his written statement, he said that he was buying the car for his own use, but the excluded testimony would have tended to show that his written statement might not be true, and would have tended to show what the real agreement between the parties was.

A case directly in point is *Spooner* v. *Cummings,* decided by the Supreme Court of Massachusetts, 151 Mass. 213, 23 N. E. 839. In that case it was held that a purchaser from a vendee in possession of a chattel under a written contract, by which the title to remain in the vendor until the price was paid, and to which the purchaser was not a party, may, in replevin by the vendor under a general denial, contradict the contract by show-

ing the real agreement of the parties thereto. In that case the plaintiff had sold a horse to one Pope under a conditional agreement that the title should remain in plaintiff until the horse was paid for; and Pope, without paying for the horse, sold it to the defendant, who was an innocent purchaser. It was held that, evidence tending to show that, according to the course of dealing between the plaintiff and Pope, it was expected that Pope was to resell the horse, was admissible, and that, if it appeared that the plaintiff expressly or impliedly authorized the sale, the defendant, having bought it in good faith from the appellant owner, acquired a good title by estoppel.

In the present case the undisputed evidence shows that Buchanan bought the automobile in good faith from Estes and paid him therefor, believing that he was acquiring a good title to the automobile. The excluded testimony would have tended to show that Estes had at least implied authority to resell the automobile, notwithstanding he had declared in his written statement that he was purchasing it for his own use.

For the error in excluding the offered testimony the judgment will be reversed, and the cause will be remanded for a new trial.

TURNER *v.* CITIZENS' BANK OF HICKORY RIDGE.

Opinion delivered June 18, 1928.

Cooley, Adams & Fuhr, for appellant.

Ogan & Shaver and *Hawthorne, Hawthorne & Wheatley,* for appellee.

HART, C. J., (after stating the facts). Counsel for the defendant Turner earnestly insist that the circuit court erred in overruling his motion to dismiss the complaint. Counsel for defendant contend that the answer of the defendant to the suit instituted against him in the circuit court of Craighead County was also a counterclaim, and that the court erred in dismissing the cause of action. Counsel contend that, although the matter set up in his counterclaim constituted a defense to plaintiff's cause of action, it was also of a nature that entitled defendant to affirmative relief, and that the plaintiff could not affect the right of the defendant to a trial on his counterclaim by a dismissal of its complaint. They rely upon the principles decided in *Lay* v. *Collins,* 74 Ark. 536, 86 S. W. 281, and *Church* v. *Jones,* 167 Ark. 326, 268 S. W. 7, and other cases of like import.

Conceding that counsel for the defendant is right as to the law on this branch of the case, still the court did not err in refusing to sustain his motion to dismiss the complaint. It appears from the record that the circuit court of Craighead County for the Jonesboro District dismissed the whole cause of action in that court, and this included what the defendant Turner called his counterclaim. If the court erred in dismissing the cause of action, the remedy of the defendant Turner was to appeal from the judgment. He could not allow a judgment to be entered dismissing the cause without prejudice, and then plead it in bar of a subsequent action. The judgment of the circuit court was that the cause of action should be dismissed without prejudice, and this was tantamount to holding that the plaintiff could take

a nonsuit, and that he had the right to bring a subsequent suit on the same cause of action.

At most, it could only be said that the judgment of the circuit court dismissing the cause of action *in toto* was erroneous. In doing this the court did not regard the plea of the defendant Turner as a counterclaim. To be such, it must amount to an independent cause of action which the defendant, if he had not been sued, might have enforced as plaintiff against the bank. The circuit court had jurisdiction to determine that the plea of the defendant Turner was not a counterclaim by allowing the cause of action to be dismissed; and, as above stated, if Turner thought the judgment was erroneous, he should have appealed from it. Not having done so, he is bound by the terms of the judgment, and cannot in a subsequent action have it reviewed. It follows that the judgment of the circuit court in refusing to dismiss the complaint of the plaintiff was correct.

The notes sued on were introduced in evidence, and the record shows that they were duly transferred to the plaintiff bank. Hence the court correctly rendered judgment in favor of the bank against Turner on the notes. Therefore the judgment will be affirmed.

LANEY-PAYNE FARM LOAN COMPANY *v.* GREENHAW.

Opinion delivered June 18, 1928.

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

Woods & Greenhaw, for appellee.

HART, C. J., (after stating the facts). This court has steadily adhered to the rule that the findings of fact made by a chancellor will not be set aside on appeal unless they are clearly against the preponderance of the evidence. Tested by this rule, it cannot be said that the decree of the chancery court is erroneous because the finding of fact made by the chancellor is clearly against the weight of the evidence.

According to the testimony of appellee, W. H. Laney, one of the appellants, induced him to purchase the stock in the Booneville bank upon the false representation that said bank was solvent, when in fact it was not. If the testimony of Greenhaw was true, the chancellor was justified in finding that Laney made statements to him of the value of the stock in the Booneville bank, based on his own knowledge of fact and not upon information received from third persons. If a person makes an assertion of facts of which he is ignorant, whether such

assertion is true or false, he becomes responsible in a civil action as if he had asserted to be true that which he knew to be untrue. The value of the stock was a material fact which induced appellee Greenhaw to enter into the contract which is the basis of this action; and if Laney represented as of his own knowledge that the stock of the Bankers' Joint Stock Land Bank was worth above par, when in fact he had no such knowledge, then he would be responsible in damages. In other words, it is the settled rule of this court that, if a representation is made by the seller of the nature of which he had no knowledge, or which he knows to be false, it will constitute fraud. *Hunt* v. *Davis,* 98 Ark. 44, 135 S. W. 458; *Bell* v. *Fritts,* 161 Ark. 371, 256 S. W. 53; *Myers* v. *Martin,* 168 Ark. 1028, 272 S. W. 856; *Stroud* v. *Henderson,* 171 Ark. 338, 284 S. W. 45; and *Joyce* v. *McCord,* 123 Ark. 492, 185 S. W. 775.

In discussing alleged false representations to induce a person to buy stock in a bank, in the case last cited, the court said:

"These representations were evidently made to assure the buyers of the value of the stock and induce them to purchase without any further investigation of the matter. If the representations were false, and knowingly made by the seller to induce the purchaser to rely thereon to his injury, and such was their effect, then they were fraudulent, and the seller could be required to answer in damages for the injury to the buyer by reason thereof."

It is true that Laney denied having made the representations to Greenhaw; but the chancellor found that he did make such representations, and it cannot be said that his finding is against the clear preponderance of the evidence. If he did make them, he either knew them to be false, or made them recklessly without knowing the facts in the case, and in any event, under the authorities above cited, would be liable in damages.

It is claimed that the representations were not false, and that there is no proof in the record tending to show

that the bank was insolvent in August, 1923, at the time when the representations about the value of the stock were made. The bank went into liquidation in May or June, 1924, and was never able at any time after the contract was entered into to furnish the money on any of the loans applied for through Greenhaw. Therefore the chancellor was justified in finding that the bank was insolvent at the time the representations were made. Greenhaw testified that he relied on the representations of Laney as to the value of the stock, and that this induced him to enter into the contract in question and to pay the $1,000 in cash for said stock, and to give Laney two notes for the balance of the purchase money thereof; therefore the court rightly rendered judgment for Greenhaw against Laney in this sum.

We are of the opinion, however, that the court erred in rendering judgment in favor of Greenhaw against Laney for $500, claimed to have been expended by him in advertising and traveling expenses. According to the testimony of Greenhaw, he worked throughout a period of eight months in securing applications for loans, and claimed expenses in the sum aggregating $500. He admits that during this time he was also soliciting insurance for his insurance company, and makes no attempt whatever to give an itemized statement of the money paid out by him in securing farm loans under the contract sued on. If Greenhaw intended to recover his expenses as a part of his damages for an alleged breach of the contract, it was his duty to have rendered an itemized statement of his expenses, and he is not entitled to recover by just stating a lump sum extending over a period of eight months. Therefore we are of the opinion that he failed to establish his claim of $500 for expenses, and that the court incorrectly allowed the same.

It follows that the court erred in rendering a decree in appellee's favor against appellants for the sum of $500, and in this respect the decree will be reversed and appellee's cause of action dismissed. In other respects the decree of the chancellor was correct, and it will be affirmed.

AYDELOTTE *v.* STATE.

Opinion delivered March 22, 1926.

Rogers & Robinson, for appellant.

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

WOOD, J. G. W. Aydelotte was indicted for the crime of murder in the first degree by the grand jury of Pulaski County in the killing of one H. D. Edwards in Pulaski County, Arkansas. The testimony adduced by the State at the trial tended to prove that Aydelotte, on the night of September 24, 1925, came over from Memphis, where he resided, to Little Rock after his wife, who, with their two children, was visiting his

mother-in-law living at 1214 Rock Street, Little Rock, Arkansas. When Aydelotte arrived at the home of his mother-in-law, he ascertained that his wife was out with another man. He armed himself with a pistol and remained at his mother-in-law's house until his wife and Edwards came there. He met them on the sidewalk a short distance from the house. An altercation took place between him and Edwards, and the shooting occurred. Edwards was killed by Adyelotte. Witnesses for the State say that just before the shooting occurred they heard Mrs. Aydelotte say, "Oh, my God, Grady, don't do that!" and ran through the house. Then five shots were heard—first one shot and then four others in succession. After the shooting a lady's voice was heard to ask Aydelotte, "Why did you do that?" and he replied, "I don't know." After the shooting the police were summoned. They arrived in about ten minutes. Aydelotte came up to them and said, "I am the man who did the shooting. My God, I am sorry, but I had to shoot the boy; let's go and find him." They walked up the street together and found Edwards dead, lying in front of the corner house. An examination of the body showed that he was shot by a .32 pistol carrying steel-jacket bullets. One bullet entered his left side about an inch from the spine. There were five wounds, and Edwards died as a result of those wounds. There were no powder burns on Edwards' coat or trousers. Aydelotte told one of the officers that he shot Edwards; that the gun used by him belonged to his mother-in-law, and he said he was taking the gun home. He told another officer that he did the shooting—didn't know who the man was that he shot; that he killed the man on account of his wife—killed him because he was with his wife, and said, "You would have done the same thing." The officers asked him if Edwards had tried to kill him or assault him, and Aydelotte replied, "No." After the officers took him down to headquarters, he asked what the charge was against him, and they told him that it was murder, and he then stated that Edwards had jumped on him

and tried to kill him. The statements he made were voluntary. He also stated that the man jumped on him and caught him by the throat. One officer stated that the pistol with which the killing was done would have to be five or six feet away from the party killed or else it would show powder burns on him; at a distance of three feet it would show powder burns on the clothes. If the clothes were light, it would be more distinct than on dark clothes. Edwards had on dark clothes. There was no weapon of any kind found on Edwards.

Aydelotte gave one of the officers the pistol with which the killing was done. The doctor who examined the body of Edwards at the City Hospital stated that one bullet wound was in the middle of the back about the ninth or tenth vertebra, one or two in the lumbar region over the kidneys or liver, and one through the hip or thigh. This witness also testified that he didn't observe any powder burns on Edwards' clothing.

The testimony adduced by Aydelotte tended to prove that Mrs. Aydelotte was at the home of her mother, Mrs. Morse, where she had been about six weeks. Edwards had visited the house as often as four times a week. A witness who occupied a room down stairs next to the room of Mrs. Aydelotte heard conversations between Mrs. Aydelotte and Edwards. Mrs. Morse testified that Aydelotte married her daughter. He was living in Memphis, and his wife had been visiting witness for about six weeks. They received a telegram from Aydelotte, stating that he was coming to Little Rock, and his wife expected to return to Memphis with him. Aydelotte arrived about 7:15. His wife had left about ten minutes of seven with Edwards. Aydelotte wanted to know where his wife was, and witness told him that she was out, but didn't tell him whom she was with. Aydelotte went out twice trying to find her, and witness had tried to locate her several times, and finally told Aydelotte that his wife was with Edwards, and that Edwards had been going with her frequently. Edwards had threatened Aydelotte when witness had asked him to remain away from the

house; that Aydelotte might meet him there, and Edwards replied that he would be ready for him. When witness told Aydelotte these things, he seemed to be very nervous. The gun that Aydelotte shot Edwards with belonged to witness' husband. It had been in witness' trunk. She didn't see Aydelotte get the gun. Witness and Aydelotte were sitting on the front porch when Aydelotte's wife and Edwards came walking up the street together. Edwards had his arm around Mrs. Aydelotte, and kissed her. She was trying to get away from him, and pushed him away. They were advancing toward witness' home, and witness said to Aydelotte, "There is Hortense" (the name of Aydelotte's wife). When witness and Aydelotte started off the porch, Mrs. Aydelotte exclaimed, "There is my husband!" Just at that time she ran towards witness, and exclaimed, "Oh, my God." Aydelotte met Edwards and spoke to him, and Edwards grabbed at his throat. They struggled and fell to their knees, and two shots were fired. After a slight intermission the other shots were fired. This witness denied that she or Mrs. Aydelotte asked Aydelotte why he did it, and stated that he did not answer "I don't know." Witness told Aydelotte that Edwards' visits to his wife were frequent, and witness saw Edwards caress and kiss Aydelotte's wife. Witness didn't see Edwards with any weapon. When the first two shots were fired, Aydelotte and Edwards were facing each other. Edwards had grabbed Aydelotte by the collar and they had clinched before any shots were fired.

Several witnesses testified that Aydelotte's reputation as a peaceable, moral and law-abiding citizen was good.

Aydelotte himself testified that he came over to Little Rock for his wife and two babies, who had been visiting his mother-in-law, Mrs. Morse. His testimony is substantially the same as that of Mrs. Morse as to the threats, the meeting with Edwards, and the fatal rencounter. He stated that Mrs. Morse told him that Edwards had said to her, "If he ever catches me with his

wife, I will be prepared and ready for him." Witness went into Mrs. Morse's trunk and got the pistol. Witness stated that when he faced Edwards he had never seen him before, and asked him what he was doing with his wife. Edwards didn't say a word, but grabbed at witness' throat, and it looked to witness like his other hand went to his hip pocket. Witness thought he was going after something, and pulled out the gun. Edwards then grabbed the gun with the hand he had on witness' throat, and witness fired two shots. They were on their knees when the last shots were fired. Witness didn't intend to use the pistol, and did so only because Edwards grabbed at him and tried to kill him. Witness didn't know where the bullets struck the deceased and didn't know what position he was in. Witness denied that he told the officers that the pistol was brought from Memphis and didn't tell them he shot Edwards because he was with witness' wife.

The court instructed the jury on its own motion, and among other prayers for instructions asked by counsel for Aydelotte was the following:. "No. 7. You are instructed that a person about to be attacked is not bound to wait until his adversary gets 'the drop on him or draws a bead on him' before he takes steps to prevent those occurrences from taking place. When a person apprehends that some one is about to do him great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, he may safely act upon appearances, and even kill the assailant, if that be necessary to avoid the apprehended danger, and the killing will be justifiable, although it may turn out afterwards that the appearances were false." The court refused this instruction, to which the defendant at the time saved his exceptions. The cause was submitted to the jury and taken under consideration. On the third day of the trial the jury had not reached a verdict, and the court, on its own motion and over the objection of appellant a few minutes after it convened, gave to the jury an additional instruction

designated No. 1. This is a long instruction, and the view we have reached concerning it makes it unnecessary to set it out.

The bill of exceptions recites the following: "After the court had twice instructed the jury, and while the court was in session, not trying another case, but waiting for the verdict, and while the jury was in the jury room deliberating, the Rev. A. J. Ashburn, foreman of the jury, left the jury room and went out into the hall and sent word to the court by the deputy sheriff that the foreman of the jury wanted to see the court. The court immediately went out into the hall where the foreman was, not knowing what he wanted, and answered the foreman's question, telling him that the jury could give less than one year for the lowest degree of homicide, according to the instructions twice given to the jury. Counsel for defendant was standing within about thirty feet of the court and the foreman of the jury, and could see them, but could not hear what was said. The foreman returned to the jury room, and the court immediately walked to where counsel for defendant was standing and told him what had been said. Counsel replied, "All right," but that he wanted to save his formal exceptions of record, to which the court consented. The court did not tell counsel for defendant that he was going to answer the foreman's question, and the first that counsel knew of the occurrence was when he saw the court standing in the hall, not in the court room, talking to the foreman of the jury. Counsel could not have anticipated anything of the kind, and had no opportunity to object before the occurrence took place, and he had no opportunity to request that the answer to the foreman be put in writing before it was given. When the verdict was returned into court, and before it was received, the court told all the jury the foregoing, and inquired if this was their understanding of what happened, and they said that it was. The court then asked them if the conduct of the judge and the foreman had exerted any influence what-

ever on them in reaching their verdict, to which they answered that it had not."

The jury returned a verdict finding Aydelotte guilty of involuntary manslaughter and left his punishment to be fixed by the court. The court entered a judgment sentencing Aydelotte to ten months' imprisonment in the State Penitentiary, from which is this appeal.

1. The court did not err in refusing appellant's prayer for instruction No. 7. All the law bearing upon the subject-matter of this instruction was fully covered and more accurately stated in instructions given by the court on its own motion. The court very fully and correctly declared the law on the degrees of criminal homicide and on self-defense in its instructions. We deem it unnecessary to incumber the record by setting forth these instructions. They are in conformity with the law as announced by this court in many cases. Appellant's prayer for instruction No. 7 is not an accurate and complete statement of the law in regard to the rights of a defendant under his plea of self-defense to act upon appearances of danger. The instruction is more or less argumentative in form and its peculiar phraseology cannot be approved as a precedent.

2. The first part of the court's instruction No. 1 given on the court's own motion after the jury had been considering the cause is entirely cautionary and does not invade the province of the jury. This portion of the instruction comes well within the bounds of the court's province to give the jury cautionary instructions where such instructions are not so framed as to express the court's views or conclusions on the facts of the case, and are so worded as not to intimate to the jury any opinion of the court as to the verdict that should be rendered by them.

The succeeding portions of this instruction No. 1 are merely explanatory of instructions already given by the court, and are couched in language so carefully guarded and selected by the trial court as not to invade

the province of the jury by passing upon the issues of fact. The recalling of trial juries, after the case has been submitted to them for decision, for additional instructions by the trial court on its own motion, where such additional instructions are in effect but a repetition of instructions already given before the jury retired to consider of its verdict, is not a practice to be commended. Unless the trial judge, under such circumstances, proceeds with extreme caution and is exceedingly careful in the language employed in thus instructing the jury, his conduct is likely to be interpreted by one or the other of the parties to the litigation as manifesting a bias, prejudice, or partiality in the cause and as an effort on his part to argue the case and to unduly influence the jury in its deliberations. The judge should scrupulously avoid any act calculated to impress the parties to the cause with the idea that he is not holding the scales of justice in equipoise and weighing their respective rights with a fair and impartial hand. Necessarily the presiding genius of the trial is vested with large discretion to determine when the ends of justice require the recall of trial juries on his own motion to repeat instructions, or to give additional instructions, and, unless there is a manifest abuse of such discretion, his ruling in this regard, when challenged, will not cause a reversal of the judgment. After the most careful scrutiny of the additional instruction No. 1 given by the trial court in this cause, we are convinced that it is not open to the criticism made by counsel to the effect that it was but the expression of an opinion on the part of the trial judge that the appellant was guilty. Although the instruction, as we have stated, was a repetition of the law that had been previously correctly announced by the court, it was couched in language which on its face was wholly free from any expression of opinion of the trial judge on the merits of the cause. Every presumption, to be sure, must be indulged in favor of the utmost impartiality of the trial court so far as the manner of the delivery of his charge to the jury is concerned, and there

is nothing in this record to justify the criticism of counsel that this additional charge of the court was delivered with such emphasis and tone of voice as to convey to the jury the impression that the court was of the opinion that the appellant was guilty of the crime of manslaughter, and that such instruction had the effect of turning the scales against him and caused the jury to return a verdict finding appellant guilty of manslaughter. Additional instruction No. 1 contained several different propositions of law, and it occurs to us they are all correct, but, if some were correct and others erroneous, still only a general objection to the instruction was urged by counsel at the trial. In *Darden* v. *State,* 73 Ark. 315, 84 S. W. 507, we said: "The objection extended to the whole instruction, consisting of four paragraphs, and, one or more of these being sufficient, it should not have been sustained." See also *Bruder* v. *State,* 110 Ark. 402, 161 S. W. 1067.

3. The most serious question in this case is whether or not the court erred in telling the foreman of the jury in the hall of the courthouse, apart from his fellows, in answer to a question propounded to the judge by the foreman, that the jury could give less than one year for the lowest degree of homicide according to the instruction twice given to the jury. If this were all the record showed, it would undoubtedly be reversible error because contrary to § 3192, C. & M. Digest, which provides: "After the jury retires for deliberation, if there is a disagreement between them as to any part of the evidence, or if they desire to be informed on a point of law, they must require the officer to conduct them into court. Upon their being brought into court the information required must be given in the presence of, or after notice to, the counsel of the parties." The provisions of the above statute are mandatory, and where the facts call for an application of its provisions, unless the rulings of the court comply with the statute, they will constitute prejudicial error. The design of the lawmakers in the

enactment of this statute was to protect defendants on trial as well as the State, after causes have been finally submitted to the jury for its deliberation and verdict, against any further steps being taken in the case in regard to the evidence or the law unless in open court and after notice to the counsel of the respective parties. While the records show that the communication between the foreman of the jury and the trial judge occurred in the hall of the courthouse, yet the record further shows that appellant's counsel was standing within thirty feet of the judge and the foreman of the jury at the time, and, immediately after the communication, the judge informed appellant's counsel of such communication. The counsel stated to the judge it was all right, but he wished to save his formal exceptions. Even this would not have been a compliance with the statute if nothing further had been done, but, after the jury had returned into court with its verdict, and before the court had received the same, the court informed the jury of the communication that the judge had with the foreman, and inquired of them if such was their understanding of what had happened, and asked them if the conduct of the judge and the foreman had exerted any influence on them in reaching their verdict, and they answered that it had not. Thus it appears that the communication between the judge and the foreman of the jury was repeated in the presence of the jury and counsel in the court room before the verdict was received and announced. Counsel for the respective parties were thus notified of what had taken place, and what was then taking place, in open court, and they were then given an opportunity to register any objection they had or might have had to the procedure, and they offered none. Counsel for appellant was immediately informed by the presiding judge of the communication between him and the foreman, and given an opportunity then to request that the jury be brought into open court and that the same information be there given the jury as had been given to its foreman, and counsel for appellant did not make such request.

It occurs to us that the error of the trial judge in communicating with the foreman of the jury in the hall of the courthouse was fully cured by repeating the communication in the presence of counsel and jury in open court before the jury's verdict was received and announced, when appellant's counsel were given an opportunity to then and there offer any objection they had to the communication. *Wawak & Vaught* v. *State,* 170 Ark. 329, 279 S. W. 997. The statute was complied with both in letter and spirit, and therefore no prejudicial error resulted.

There is no reversible error in the record, and the judgment must therefore be affirmed.

SHUE *v.* STATE.

Opinion delivered June 11, 1928.

Elmo CarlLee, for appellant.

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

WOOD, J. Charlie Shue was convicted on a valid indictment charging him, in the first count, with the crime of grand larceny, and in the second count with the crime of receiving stolen property knowing same to be stolen. He was tried on both counts, and was found guilty on the count of receiving stolen property, and, by judgment of the court, was sentenced to imprisonment in the State Penitentiary for a period of two years, from which judgment he prosecutes this appeal.

1. The appellant contends that the testimony was not sufficient to sustain the verdict. The testimony of Jack Troy and Clarence Bayliss was to the effect that they were employed by the appellant; that they delivered five hogs to the appellant, among which was the hog belonging to W. F. Wiggins mentioned in the indictment. According to their testimony, they were employed by the appellant to catch the hogs, and he was to give them $10 for each hog delivered to him at a certain place designated by the appellant, in Woodruff County, on the hard-surfaced road between appellant's place of business and Memphis, Tennessee. They delivered the hogs to the appellant about twelve or one o'clock at night, in Woodruff County, Arkansas. The appellant put them in a truck, and went with them toward Memphis. These wit-

nesses stated that the appellant told them where to catch the hogs and where to deliver them. The witnesses used the appellant's wagon to convey the hogs to the place designated by the appellant, where they were to deliver the same to him. It was shown that one of the five hogs was the property of W. F. Wiggins. He found the hog in the stock pens at Memphis, Tennessee.

Wiggins testified that, in a conversation with the appellant, appellant stated that the hogs were delivered to him on the pike road, and that it was dark, and appellant could not see the marks; that he drove on until daylight, when he looked and discovered that one of the hogs was in witness' mark. Witness lost the hog in Woodruff County, Arkansas.

The testimony of the appellant, in substance, was to the effect that he bought the hogs from Jack Troy and Clarence Bayliss. The transaction took place in appellant's store. He told Troy and Bayliss that he would have to get a wagon, or that they would have to get one, and bring the hogs to him. He hired them a wagon and team, and they agreed to bring the hogs to the pike road. They met the appellant at the pike road about two o'clock in the morning. They had five hogs. Appellant put the five hogs in his truck, and took them to Memphis and sold them. After appellant got back from Memphis, Bayliss and Troy came to get their money, but appellant refused to pay them, because he had heard, in the meantime, that the hogs were stolen, and appellant told them that he could not pay until he found out whether or not they had been stolen. Appellant's business was farming, raising live stock, and trading. He had a little store. It was appellant's custom to haul hogs to Memphis at night. Everybody hauled hogs at night, so they would not get too hot.

There was other testimony, but it is unnecessary to set it out. It will be seen from what we have already set forth that the testimony was sufficient to sustain the verdict. To be sure, there was a sharp conflict in some respects between the testimony of the appellant and Jack

Troy and Clarence Bayliss. But the jury were the sole judges of the evidence and the credibility of the witnesses. While Bayliss and Troy were accomplices, yet their testimony was sufficiently corroborated in essential particulars by the testimony of the appellant himself to justify the jury, where their testimony was in conflict with that of the appellant, to accept their testimony and reject his. It is unnecessary to comment further upon the testimony, as we are convinced that the testimony was sufficient to sustain the verdict.

2. The appellant assigns as error the giving of the following instruction: "You are instructed that the unexplained possession of property recently stolen is a fact from which an inference of guilt may be drawn, but the weight to be given the testimony on this question and the inference to be drawn therefrom are questions for the jury; and it is a matter for you to determine the reasonableness and sufficiency of the explanation given by the defendant as to his possession of the stolen property." We cannot concur in the view of learned counsel for the appellant that the instruction is an invasion of the province of the jury. The instruction is in harmony with the law on this subject as declared by this court in many cases, some of them quite recent. *Long* v. *State,* 140 Ark. 413, 216 S. W. 306; *Pearrow* v. *State,* 146 Ark. 182, 225 S. W. 311; *Gilcote* v. *State,* 155 Ark. 455, 244 S. W. 723; *McDonnell* v. *State,* 165 Ark. 411, 264 S. W. 961; *Yelvington* v. *State,* 169 Ark. 360, 275 S. W. 701; *Thomas* v. *State,* 175 Ark. 279, 298 S. W. 1027. In the last case we quoted approvingly the rule as laid down in R. C. L. as follows:

"The rule is, without doubt, that the possession of the property by the defendant, soon after the commission of the alleged crime, is merely an evidentiary fact tending to establish guilt, which should be submitted to the jury, to be considered in connection with all the other facts and circumstances disclosed by the evidence. It does not in any case raise a presumption of law that the defendant committed the alleged larceny, although the

unexplained exclusive possession of stolen goods shortly after the commission of a larceny may, and often will, be sufficient evidence to justify a jury in finding the possessor guilty." See also *Harrell* v. *State,* 169 Ark. 1038, 278 S. W. 45.

3. The bill of exceptions recites: "The cause was submitted to the jury at 5 P. M. and was deliberated upon by the jury until 6:45 P. M., at which time the court recessed until 8 P. M., at which time the jury reconvened for further consideration of a verdict, and deliberated upon the same until 10:30 P. M., at which time the court had them called into the court room, and asked if they had a verdict, and they replied in the negative; thereupon the court gave the following additional instructions: 'Under the law, gentlemen, if you should find the defendant guilty of either one of the counts in the indictment, then you could not find him guilty of the other. You can find him guilty only on one count, for he could not be guilty of both stealing the property and receiving the same, under the evidence in the case. In case you should arrive at a verdict of guilty upon either one of the counts in the indictment, and are unable to agree on the amount of punishment to be inflicted, then you may return a verdict of just guilty on whichever count you may so find is justified under the evidence in the case, and the court can fix the punishment; but if, on the whole case, you entertain a reasonable doubt as to the guilt or innocence of the defendant, then he would be entitled to the benefit of that doubt, and you should acquit him.' "

The above instruction is the law, and it is proper for the court to so declare in cases of this kind. While larceny and knowingly receiving stolen property are kindred offenses, and may be charged in one indictment (§ 3016, C. & M. Digest), they are nevertheless not the same offense, and the conviction of one would necessarily preclude a conviction of the other. Only a general objection was made to the instruction. The instruction therefore should be considered as a whole, and not in separate paragraphs, as learned counsel for appellant urge. When

the concluding portion of the instruction is read in connection with the other portion, it is manifest that counsel are in error in assuming that the court intimated his opinion of the guilt of the defendant. On the contrary, the instruction leaves the guilt or innocence of the defendant to be determined by the jury on either of the two counts in the indictment. Even though the instruction was not embodied in the court's charge when the cause was sent to the jury for its deliberation and verdict, this was not error. The court had omitted from its charge an essential proposition of law, under the evidence, to guide the jury in its deliberation, and it was proper to give them such direction before the return of their verdict.

In view of the comment of counsel for the appellant upon the above conduct of the trial judge in recalling and instructing the jury as above set forth, it is well to repeat what we said in the recent case of *Aydelotte* v. *State, ante* p. 595, 281 S. W. 369, as follows: "The recalling of trial juries, after the case has been submitted to them for decision, for additional instructions by the trial court on its own motion, where such additional instructions are in effect but a repetition of instructions already given before the jury retired to consider of its verdict, is not a practice to be commended. Unless the trial judge, under such circumstances, proceeds with extreme caution, and is exceedingly careful in the language employed in thus instructing the jury, his conduct is likely to be interpreted by one or the other of the parties to the litigation as manifesting a bias, prejudice, or partiality in the cause, and as an effort on his part to argue the case and to unduly influence the jury in its deliberations. A trial judge should scrupulously avoid any act calculated to impress the parties to the cause with the idea that he is not holding the scales of justice in equipoise and weighing their respective rights with a fair and impartial hand. Necessarily the presiding genius of the trial is vested with large discretion to determine when the ends of justice require the recall of trial juries

on his own motion to repeat instructions, or to give additional instructions, and, unless there is a manifest abuse of such discretion, his ruling in this regard, when challenged, will not cause a reversal of the judgment."

In the case at bar the court, having omitted in its original charge to instruct the jury that they could not, under the evidence, find the defendant guilty on both counts of the indictment, it was the duty of the court to complete its charge by so instructing the jury before the verdict was returned.

The record presents no reversible error in the rulings of the trial court, and the judgment is therefore affirmed.

SMITH *v.* GRABIEL.

Opinion delivered June 11, 1928.

Lewis Rhoton, for appellant.

Carl E. Bailey, for appellee.

PER CURIAM. Appellants are owners of real property situated within a street improvement district in the city of Little Rock, and they brought this suit in equity against the commissioners of the district to attack the assessment of benefits. The suit was not commenced until long after thirty days after the assessment of benefits was made by the commissioners, and the attack upon the validity of the assessment is collateral.

In *Ferrell* v. *Massie,* 150 Ark. 156, 233 S. W. 1083, a motion to dismiss the appeal on the ground that the transcript was not filed within the time required by statute

was sustained. That was a suit for the collection of delinquent assessments in a street improvement district, as provided in the statute, and the owners of real property filed a cross-complaint attacking the validity of the district and the assessment of benefits. It was claimed that the cross-complaint took the case out of the statute with respect to the limitation of time for taking an appeal and filing the transcript, but the court held against that contention.

In *Lewellyn* v. *Street Improvement District of Russellville,* 172 Ark. 496, 289 S. W. 470, it was held that an action instituted by property owners attacking an assessment of benefits in a street improvement district is collateral where it is instituted more than thirty days after approval of assessments at the hearing on notice, pursuant to Crawford & Moses' Digest, § 5658. The court said:

"In a direct attack upon the validity of assessments, it becomes a question of proof whether or not the assessments are correct, but in a collateral attack we must indulge the presumption that the assessors considered all the elements of enhancement of value or detriment which might result from the improvement, and the court is not at liberty to disturb the finding of the assessors, unless the assessment is demonstrably erroneous on its face."

These decisions control here. We have examined the face of the proceedings, and there is nothing to indicate the illegality thereof. If the property owners desired to attack the assessments on grounds which require proof, they should have taken an appeal within the time required by statute, and, not having done so, the motion by appellees to dismiss the appeal must be sustained. It is so ordered.

MEHAFFY, J., dissents.

OLIPHANT *v.* OLIPHANT.

Opinion delivered June 18, 1928.

C. M. Martin and *Gaughan & Sifford*, for appellant.
Pat McNally and *Jordan Sellers*, for appellee.

WOOD, J. This is an action for divorce instituted by the plaintiff, O. C. Oliphant, against his wife, Helen Oliphant. In his original complaint the plaintiff sets up personal indignities by the defendant toward the plaintiff such as to render his condition in life intolerable, specifying same, and in an amendment to his complaint he alleged that the defendant was guilty of acts of adultery, as follows: First, that on the 20th day of April, 1927, the defendant, in company with a male person about thirty-eight years of age, whose name is unknown to the plaintiff, occupied a room in the Sylvia Hotel, in the

town of Smackover, from 10:30 in the forenoon until about noon of the same day; that they were alone in said room, the door to the room being locked, and that the bed of the room had been used. Second, that on or about the fifteenth day of March, 1927, the defendant left the city of Camden, Arkansas, at about 9 o'clock P. M. of said day, in plaintiff's car, in company with a male person about thirty years of age, weighing 135 pounds, having light hair, and being a tall and slender person; that they drove out of Camden on the Stephens Highway, and parked said car near the covered bridge across Two Bayous, and, after parking said car, this defendant, in company with said male person, whose name to this plaintiff is unknown, left the car by the roadside and went into the woods near by and stayed for about one hour, after which time they came back to the car and drove into the city of Camden."

Plaintiff alleged that he had been twice married to the defendant; that, as the issue of the first marriage, there was a daughter eight years of age. The plaintiff prayed for an absolute divorce from the defendant and for the care and custody of their daughter.

The defendant, in her answer, denied specifically the indignities charged in the complaint and the acts of adultery. She alleged that, during their first marriage and after the birth of their daughter, she had procured a decree of divorce from the plaintiff; that, while this divorce proceeding was pending, the plaintiff and the defendant agreed that she would take $1,000 as alimony, and that, in lieu of support and maintenance for their child, he would take custody of the child and support the same until they were remarried; that plaintiff promised to remarry the defendant, but, after the former decree of divorce was granted, had refused to comply with this agreement, telling the defendant that the decree of divorce had given him custody of the child, and she should not have the same. Defendant alleged that she and plaintiff were remarried in January, 1927, and that she had been a dutiful wife at all times. By way of cross-

complaint defendant alleged that, on the 30th of April, 1927, the plaintiff drove defendant from their home at the point of a pistol, without any cause whatever. She further set up that he had repeatedly cursed her and threatened to kill her, and had beaten her several times. She specifically alleged other acts of indignity and cruel treatment. She set up that the plaintiff was of immoral character, and not a fit person to have custody of their child. She alleged that she could and would furnish a good Christian home for the child, if given the custody thereof. She averred that the plaintiff possessed valuable property, describing same. She prayed that she be granted an absolute divorce from the plaintiff, and be given the care and custody of their daughter, Grace, who was then seven years of age, and that of the personal property and real estate of the plaintiff she be given as the law provides.

In his answer to the cross-complaint the plaintiff denied specifically the allegations of the defendant as to his ill treatment of her, and alleged that at all times he had treated her with proper respect and kindness. He renewed the allegations of his amended complaint as to the acts of adultery of the defendant and also as to other indignities heaped upon him by her. Answering her cross-complaint for support and maintenance, the plaintiff alleged that on January 23, 1927, plaintiff and defendant entered into a prenuptial contract by which each agreed that, in the event they separated, the defendant would not ask for alimony or any other expenses from the plaintiff, which contract the plaintiff filed and made an exhibit to his complaint. Plaintiff, in a further amendment to his original complaint, set up that the decree of the Drew Chancery Court granting a divorce to the parties was still in force and effect, and therefore that the last marriage, on January 23, 1927, was void.

The defendant moved to strike this last amendment from the files, which motion the court granted, to which ruling the plaintiff duly objected and excepted.

The cause was heard upon the pleadings and upon the testimony adduced in the form of depositions and also oral testimony, which has been properly brought into the record. The trial court found as follows:

(1) That the appellant failed to establish a single charge of adultery; (2) that appellant was guilty of such cruel and barbarous treatment to appellee that she was entitled to a divorce from him, and the custody of the child. (3) That the antenuptial contract was executed on Sunday, had never been ratified, and is void; and that appellee is entitled to dower in all of the property of appellant. (4) That, in addition to dower, she is entitled to recover from appellant $100 per month for seven months as alimony, and $50 per month thereafter for the support of the child. (5) That appellee is also entitled to recover, in addition to the alimony in paragraph 4, one-third of all of appellant's property, both real and personal.

The court entered a decree according to its findings, from which is this appeal.

1. All the judges have read the abstract of the appellant's counsel. After thus carefully examining the entire record, a majority of the judges have reached the conclusion that the finding of the trial court on the issue as to whether or not the appellee had been guilty of the acts of adultery as set forth in the pleadings and also the other acts of adultery not set forth in the pleadings, but upon which testimony was adduced by the respective parties, is not clearly against a preponderance of the evidence. The testimony is exceedingly voluminous, and a discussion of the facts giving the reason for the conclusion we have reached would serve no useful purpose as a precedent.

In *Leonard* v. *Leonard,* 101 Ark. 528, 142 S. W. 1135, we quoted from 14 Cyc. 693-696, as follows:

"The charge of adultery may be sufficiently proved by evidence of circumstances leading to an inference of guilt. It is impossible fully to indicate the circumstances which will lead to such a conclusion, because they may be

infinitely diversified by the situation and character of the parties and by many other incidental matters which may be apparently slight and delicate in themselves, but which may have most important bearings in the particular case. While the circumstances need not be such that an inference of guilt is the only possible conclusion that can be drawn therefrom, yet the facts must be such as to lead a just and reasonable man to the conclusion of guilt. They are not sufficient if they merely justify a suspicion of guilt, in the absence of other incriminating circumstances. * * * So, where the circumstances adduced in support of the charge are capable of two interpretations, one of which is consistent with innocence, the divorce should not be granted. If an adulterous disposition on the part of defendant and the alleged paramour is shown, and it appears that there was an opportunity for them to commit the offense, these facts are sufficient to establish adultery. * * * To have this effect, the opportunity must occur under incriminating circumstances. * * * Adultery may be established by the fact that the parties occupied the same room at night, or the same bed, in the absence of an explanation of the incriminating circumstances."

The great law writer, Mr. Bishop, in his excellent work on Marriage and Divorce, vol. 2, p. 520-521, §§ 1360 and 1361, says: "Then, remembering that the burden of proof is on the accuser, not the accused, we should be able to discern clearly that adultery, not simply a suspicion of it, is the true solution of all. * * * The inference of guilt or innocence to be drawn from the proven circumstances does not depend on technical rules." The author then quotes what is said by one of the ecclesiastical judges of England, Lord Stowell, in *Loveden* v. *Loveden,* 2 Hag. Con. 1, 4th Eng. Chy. 461-462, and also to the same effect from the eminent Chief Justice Shaw of Massachusetts, in *Dunham* v. *Dunham,* 6 Law Reporter, 139-141, as follows:

"Nor can this course of inquiry and process of reasoning and judging be much aided by technical and artificial rules, or by what are considered established pre-

sumptions of fact from other facts. These rules are useful and convenient in their way, in suggesting general considerations, which are applicable to many cases; but, after all, they are to be taken with so many exceptions and so much allowance that in the result each case must depend mainly upon its own peculiar circumstances. It is impossible therefore to lay down beforehand, in the form of a rule, what circumstances shall and what shall not constitute satisfactory proof of the fact of adultery, because the same facts may constitute such proof or not, as they are modified and influenced by different circumstances."

See also Keezer on Marriage and Divorce, p. 196, § 242; Schuyler on Marriage and Divorce, Separation and Domestic Relations, p. 179, § 1567; 19 C. J., p. 128, § 2.

When the facts of this record are considered in the light of the above authorities, we are convinced that the trial court was correct in finding that the appellant failed to establish a single charge of adultery against the appellee. The appellee, in her answer, denied the specific acts of adultery charged in the complaint, and she sufficiently rebuts in her testimony the testimony brought forward by the appellant to sustain these charges. The other supposed acts of adultery not alleged, but which the appellant sought to prove by the testimony adduced, the appellee also specifically refutes by her own testimony and corroborating testimony, which was sufficient to convince the chancery court, and is sufficient to convince us, that the charge of adultery has not been established.

2. We are likewise convinced that the trial court was correct in finding that the appellant was guilty of cruel and barbarous treatment of the appellee, and ruled correctly in granting her a divorce on such ground. The appellee testified to acts of violence committed by the appellant upon appellee's person, and to profane, abusive and insulting language used by the appellant toward her. She was sufficiently corroborated by the testimony of other witnesses as to this conduct to justify the trial court in finding that the appellant was guilty of such cruel and barbarous treatment of the appellee as to entitle her to a

divorce on the ground that such conduct offered such indignities to the person of appellee as to render her condition intolerable.

3. The court did not err in giving to the mother the care and custody of her daughter, who, at the time of the rendition of the decree, was only eight years of age. If the appellant had succeeded in proving the charge of adultery on the part of the appellee, as set up in his amendment to the original complaint, we would not hesitate to reverse the decree of the trial court awarding the care and custody of the child, Helen Grace, to her mother, the appellee. But, since we have concluded that the appellant has failed to prove that the appellee is an adulteress, it occurs to us that the decree of the trial court was correct in awarding the custody of the child to its mother. The appellant argues that this should not have been done, for the reason that the chancery court of Drew County, in a former decree granting the appellee a divorce from the appellant, had awarded the custody of their child to the appellant, citing the cases of *Wetherston* v. *Taylor,* 124 Ark. 574, 187 S. W. 450; *Nelson* v. *Nelson,* 146 Ark. 362, 225 S. W. 619; *Jackson* v. *Jackson,* 151 Ark. 9, 235 S. W. 47. These cases hold that where, in a decree of divorce, the custody of the child is awarded to one of its parents, such decree is final, unless there has been in the meantime a change of circumstances justifying the court in giving the award to the other parent. But those cases have no application to the facts of this record, for the reason that there has been a change in the circumstances justifying the decree of the trial court in this action in awarding the custody of the child to its mother. Since the former decree of the chancery court the appellant and the appellee have remarried. That, of itself, wrought an entire change in the status of the appellant and appellee toward each other and the circumstances that existed at the time the former decree was rendered and at the time the decree was rendered from which this appeal comes. The remarriage of the parties after the first decree had the effect of establishing the status

of the parties as husband and wife and restoring their relation as such to the child, the same as if there had been no former divorce. The relation of the child to its parents after the second marriage was precisely the same as if the child had been born after the second marriage. The child was the offspring of the first marriage. When the parents were divorced by a decree of the Drew Chancery Court, the custody of the child was changed from their joint custody to the custody of the father, and when the parents were remarried the joint custody of their child necessarily was re-established. See Acts of 1921, p. 317, Castle's Supplement to C. & M. Digest, § 4980 (a). Then, when the appellant sought by this action a divorce from the appellee, he thereby necessarily put in issue the matter of the custody of the child. The appellant recognized that the care and custody of the child was in issue, because he set up in his complaint that the appellee was "an immoral character, and an unfit person to have the custody of their said minor child, and that she is unable to support, maintain and educate said minor," and prayed that he be granted "the care and custody of their said minor child."

In our very latest case changing the custody of a child, which had been fixed by former decree of divorce in one of its parents, to the other parent, we cited *Weatherton* v. *Taylor, supra,* which case cited and quoted 9 R. C. L., p. 476, concluding the quotation as follows: "A decree fixing the custody of a child is, however, final on the conditions then existing, and should not be changed afterwards, 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." *Hamilton* v. *Anderson,* 176 Ark. 76, 2 S. W. (2d.) 673.

Section 3508, C. & M. Digest, provides: "When a decree shall be entered, the court shall make such order touching the alimony of the wife and care of the children, if there be any, as, from the circumstances of the parties and the nature of the case, shall be reasonable."

In *Hamilton* v. *Anderson, supra,* we held: "The custody of a child or children is not awarded for the purpose of gratifying the feelings of either parent, or with an idea of punishing or rewarding either, but, under the statute as well as from considerations of equity, for the best interests of the child or children, and keeping his or their best interests primarily in view." Other cases of our court announcing this doctrine are cited in the opinion in that case. Such is the policy of our law as recognized, not only by the decisions of our Supreme Court, but now also by statute. See Acts of 1921, p. 317, § 3.

We will not incumber the record by setting out and discussing the facts, but simply announce our conclusion to be that the trial court correctly appraised the evidence in this record when it found that the appellee was a fit and proper person to have the custody of her daughter, who, at the time of the rendition of the decree, as we have stated, was eight years of age; and the court ruled correctly in rendering a decree awarding such custody to the appellee. The conditions that existed at the time the decree was rendered unquestionably proved that the mother was the proper one to have the care and custody of this little girl. The conduct of the appellee showed that she loved her child as only a mother can love; the proof shows that the mother and child will have a good home, with far better environment for the daughter than she had at the time of the rendition of the decree. The mother testified that she was in good health and physically able to care for the child; that she was going to live with her father and mother. Here the child would have better home surroundings than she had under the former decree, when the appellant was awarded custody of the child.

4. The trial court found that the prenuptial contract made and entered into by and between the plaintiff and defendant and introduced as evidence in the cause was executed on the Sabbath, and had never been ratified since its execution, and that same was therefore void.

The appellant contends that in so finding and holding the court erred.

The antenuptial contract entered into between the appellant and appellee was executed on Sunday, January 23, 1927. It set forth in substance that the parties had been previously married and divorced, and that the custody of their daughter, Grace Oliphant, by the decree of the court, had been awarded to the appellant; that it was the desire of the parties to reunite in marriage *in order that the child might have the love and personal care of both parents;* that each had certain personal property, and were desirous, in contemplation of their remarriage, to settle their property rights; that, in consideration of $1 *and mutual advantages of the marital relation to themselves and to their daughter,* they agreed that the appellant would bear the family expenses, and, if the appellee should die first, the appellant would not claim any curtesy in her property, real or personal, which she then had or might acquire; and they further agreed that appellee, in lieu of her dower and homestead, would accept the above considerations, and would not claim, either before or after appellant's death, any dower or homestead in the property thereafter acquired, but that same, in case of his death, should belong to his estate.

The appellant testified with reference to this contract that he and the appellee were married on the day the contract was executed. Appellant didn't know that the appellee had no property—never gave it a thought. The reason he had appellee sign the contract was that he was trying to establish confidence in her, and, if she acted as she had before, he wanted to keep her from getting his property. He wanted her to come back and raise his child, and told her that, if she would be the right kind of a wife, he would destroy the papers. Appellant gave appellee a copy of the contract. The appellee told the appellant that she didn't have a copy, but appellant was convinced that she had a copy.

The appellee testified concerning this contract that she had been in Camden a week before the contract was

executed—she went there for the purpose of getting married. She was in appellant's cafe on January 23, and appellant said to her, "I am ready for us to go to Fordyce and be married." They left for Fordyce about 1:30, and, when they got about three miles from Fordyce, appellant stopped the car and said to appellee, "You must sign this paper, or I won't marry you," and appellee replied, "I don't want your property—it is you and the baby I want." Appellee wanted the baby, and she signed both of the contracts, and gave them back to the appellant, and he took both of them and kept them, and knew that she didn't have any property. The contract was executed on Sunday. Appellant suggested to the appellee that she could not have her baby unless she signed the contract. The consideration for signing of the contract was that appellant would marry appellee and she would thereby get possession of her little child. The marriage was performed by a Methodist minister.

Learned counsel for the appellant contend that, although the contract was executed on Sunday, it was ratified by the conduct of the parties to the contract in marrying and in continuing their marital relations until they separated some months later. The contention of counsel as to the ratification of the contract is sound, and, if the contract be otherwise valid, then the court erred in not enforcing same. Counsel claim that the contract should be held binding upon the parties as to the disposition of the property under the authority of *Comstock* v. *Comstock,* 146 Ark. 266, 225 S. W. 621. In that case, among other things, we said: "Marriage was a sufficient consideration for the antenuptial contract. Where such contracts are freely entered into and are not unjust or inequitable, and there is no fraud, they should be liberally construed to effectuate the intention of the parties, and should be looked upon with favor and enforced accordingly." The facts in that case clearly differentiate it from the case at bar, but, under the doctrine of that case, this contract cannot be enforced for the reason that, on its face, it shows that the principal

consideration of the contract was that the appellant and appellee should reunite in marriage *in order that their child should have the love and personal care of both parents.* A further consideration, as stated, was the "*mutual advantages of the marital relation to each of the parties hereto as well as the advantages of the said union to our said daughter.*" These considerations failed when the parties to the contract were divorced; and the contract was breached by appellant when he so conducted himself toward appellee as to entitle her to divorce. See 1 Bishop on the Law of Married Women, § 426. Such considerations are legal, and will uphold an antenuptial contract where entered into in good faith, that is, where the parties at the time of marriage intend to live together until they are separated by death. But an antenuptial agreement in which the parties, or either of them, at the time of entering into such agreement and at the time of their marriage, intend such disposition of the property as is agreed upon only in case there should be a divorce, is void and unenforceable, because such contract is against public policy. See 13 C. J., § 406; 19 C. J., § 585. Antenuptial contracts, to be valid, must be made in contemplation of the marriage relation subsisting until the parties are separated by death. See Peck, Domestic Relations, § 43. If such an agreement is made in contemplation, at the time of its execution, that the parties, or either of them, expect to be divorced, then such an agreement is void *ab initio.* According to the appellant's own testimony, he entered into the antenuptial contract with the appellee because he "was trying to build up a confidence in her." He wished "to deprive her of any of his estate because he didn't think, if she acted as she had before, that she would be entitled to it." At the time he entered into the contract he "didn't believe she would act like she did before," as strong as he believed it at the time he gave his testimony. "He wanted the appellee to come back and live with him and raise their child, and told her that if she would be the right kind of a wife he would destroy the antenuptial contract."

The antenuptial contract, as interpreted by the appellant himself, was absolutely void, because such a contract would be unjust, inequitable, unconscionable, and without mutuality of obligation. He thus placed upon his confiding spouse the brand of his suspicion and held over her head, so to speak, the antenuptial contract as a club to enforce her good behavior, for he says himself, "I told her if she would be the right kind of a wife I would destroy these papers" (meaning the antenuptial agreement). But there is nothing in the contract, as he interpreted it, that also binds him *"to be good"* and to "destroy the papers" —the contract—in case he so conducted himself as to render her condition intolerable. The contract, construed as appellant himself says he intended it, was a fraud on appellee's statutory rights. Section 3511, C. & M. Digest. Under such a contract it was within his power, by his own wrongdoing, to deprive his wife of all her statutory rights of property. Such an unfair, unreasonable and unconscionable contract no court will enforce. 1 Bishop, Married Women, §§ 424, 426. We conclude therefore that the trial court ruled correctly in declaring the contract void, although an erroneous reason was assigned for the ruling.

5. It follows, since the decree was in favor of the appellee, that the trial court did not err in awarding to the appellee one-third of her husband's personal property absolutely and one-third of his real estate as designated in the decree. Section 3511, C. & M. Digest. But the court erred in rendering a decree for alimony in the sum of $100 per month for seven months. The trial court evidently entered its decree for this sum on the theory that the appellant had obtained this sum from the appellee during the marriage, and in consideration or by reason thereof. But such is not the fact, because at the time the appellee let the appellant have the sum of $700 they were not married.

A majority of the court has concluded that the sum of $50 per month allowed for the support, maintenance

and education of Helen Grace Oliphant, their child, while liberal, is not extravagant.

6. There is no merit in appellant's contention that the court erred in striking from the files the amendment to the appellant's complaint, in which he pleaded that the divorce decree of the Drew Chancery Court was still in full force and effect, and that the subsequent marriage of appellant and appellee was therefore void. As authority for this contention, appellant relies upon § 3513, C. & M. Digest, which reads as follows: "The proceedings for annulling a final judgment for a divorce from the bonds of matrimony shall be a joint petition of the parties, verified by both parties in person, filed in the court rendering the judgment, upon which the court may forthwith annul the divorce." A divorce *a vinculo matrimonii* dissolves the marital bonds absolutely and restores each spouse to all rights, privileges and immunities of unmarried persons, just as though there had never been a marriage between them. The effect of such decree, of course, is to place the parties in a situation where they are free to contract marriage with each other again, or with any one else. The statute has no application in cases where there has been a reunion of formerly divorced parties by a remarriage. It evidently applies to cases where the parties become reconciled to each other, and, for this reason, desire to proceed by joint petition under the authority of the above statute to have the former decree of divorce vacated without remarrying. See *Chase* v. *Chase,* 191 Mass. 166, 77 N. E. 782; *Thomas* v. *James,* 69 Okla. 285, 171 Pac. 854. In these cases the courts construe statutes similar to the statute under review, and hold that such statutes do not prohibit persons who have been divorced from remarrying. In these cases it is held that the law favors settlement of domestic difficulties and reconciliation between husband and wife, and that such reconciliations might be effected without a remarriage, and that statutes of this nature were not enacted to prohibit remarriage of persons who

had been formerly divorced, and that such remarriages were not void.

The decree of the trial court will therefore be reversed and modified in so far as it allows the appellee alimony in the sum of $100 per month for seven months, beginning November 1, 1927, and this allowance will be eliminated. In all other respects the decree is correct, and, as modified, it will be affirmed.

SMITH, KIRBY and MEHAFFY, JJ., dissent.

FAULKNER *v.* BANK OF MCCRORY.

Opinion delivered June 18, 1928.

Walter J. Terry, E. R. Parham and *W. R. Morrow,* for appellant.

Roy D. Campbell, for appellee.

SMITH, J. This appeal is from a judgment of the Woodruff Circuit Court, Central District, and the errors complained of for the reversal of the judgment are such that could only be made to appear by a bill of exceptions.

A motion for a new trial was filed August 25, 1927, and was by the court overruled on that day, and 120 days allowed for the filing of the bill of exceptions. The court adjourned for the term on August 26. The bill of exceptions was approved by the trial court on December 27, 1927, which was, of course, more than 120 days after the order of the court had been made allowing that time for filing the bill of exceptions. It does not appear when the bill of exceptions was filed with the clerk of the circuit court, but, since the briefs were filed on the appeal to this court, opposing counsel have

filed a stipulation which contains the following agreement:

"We hereby specifically agree that no question shall be raised or considered in relation to the time allowed for the filing of motion for a new trial and the court's order overruling said motion, and the time allowed for the filing of the transcript and the bill of exceptions, and the court's order thereon. We further agree that the inadvertent date of the judgment misled the appellant; otherwise said bill of exceptions would have been filed within the time allowed by the court, and the same shall be treated as having been so filed. Both parties hereto do not desire to file additional briefs, and the cause may be submitted."

It will be observed that the parties have not stipulated that the bill of exceptions was filed within the time allowed for that purpose, but that it should be treated as having been so filed.

It has been held in numerous cases by this court that the bill of exceptions must be filed within the time allowed by the trial court for filing it, and that it will not be considered by this court unless so filed. This rule is based upon the statute (§ 1318, C. & M. Digest), which provides that "the party objecting to the decision (of the court made during the progress of the trial) must except at the time the decision is made, and time may be given to reduce the exception to writing, but not beyond the succeeding term; * * *" and this statute has always been construed as requiring that the bill of exceptions be filed within the time limited for that purpose.

It is not permissible for the parties litigant to dispense with this statute. Vol. 4 Standard Encyclopedia of Procedure, page 368.

In the case of *Davis* v. *Union Trust Co.*, 154 Ind. 46, 49 N. E. 817, a longhand manuscript of the evidence heard at the trial of the cause was not filed in the office of the clerk of the trial court until after it had been incorporated in the bill of exceptions, and the parties undertook by stipulation to waive this requirement of the statute. In

holding that this stipulation was ineffective to confer jurisdiction, the Supreme Court of Indiana said:

"As a general rule, this tribunal derives its powers or rights to consider and determine a case according to methods prescribed by the law, and not by virtue or reason of any agreement of the parties to the appeal. All cases in this court are tried by the record. It furnishes the only evidence to sustain the alleged errors of the trial court of which a party complains. * * * A bill of exceptions containing the evidence in a case, when filed with the clerk of the lower court, unquestionably is a part of the record of that court. If a certified transcript thereof, under the circumstances in this case, can be dispensed with by the agreement or stipulation of the parties herein, certainly the entire record below may be made up and brought to this court when incorporated into and made a part of the written agreement of the parties. That this is not authorized by the law no one will controvert. We have no power, under the law, to accept the agreement in question and consider it as serving the purpose for which it is intended."

See also *Blair* v. *Curry,* 154 Ind. 99, 49 N. E. 908, and 46 N. E. 672; *Ryan* v. *State,* 6 Ind. App. 196, 33 N. E. 222; *John Church Co.* v. *Spurrier,* 29 Ind. App. 93, 50 N. E. 93.

As there is no bill of exceptions which we may consider, and no error is assigned which could otherwise be considered, the judgment of the court below must be affirmed, and it is so ordered.

HOLCOMB & HOKE MANUFACTURING COMPANY *v.* FISH.

Opinion delivered June 18, 1928.

A. R. Cooper, for appellant.

Patrick Henry, for appellee.

SMITH, J. Appellant is a corporation engaged in the manufacture and sale of machines used in popping corn and roasting peanuts, and sold appellee two machines, one being a popcorn machine, for the sum of $337.50, the other a combination machine intended to pop corn and roast peanuts, for the price of $895. This suit was brought by appellant to collect the balance alleged to be due on each of the machines.

Appellee did not question the balance due on the popcorn machine, but as to the other machine it was alleged that there had been a breach of the implied warranty under which it was sold that it was adapted to its

intended use. It was also alleged that, in an attempt to repair and adjust and use the machine, a large expense had been incurred and much electricity wasted, as the machine was an electrical one. It was also alleged that the machine was worth $450 less than its purchase price or the sum it would have been worth had it been in good condition.

Notwithstanding the fact that the plaintiff offered testimony to the effect that both machines were tested at the factory before they were shipped and were found to be in perfect condition, the jury was fully warranted, under the testimony in the case, in finding that the combination machine was in a defective condition. The testimony was conflicting as to the extent of these defects, but that on the part of the defendant was to the effect that repeated attempts were made to repair and adjust the machine, but with only partial success, and that expenses amounting to about $75 were incurred in these attempts, including wasted electricity, and that they were never able to make it roast peanuts, although, after two electricians had worked on the machine, it could be used for popping corn, and that the machine was worth $450 less than its purchase price.

The jury returned a verdict for appellant for the balance due upon each of the machines, but found also that the balance due upon the larger machine should be credited with the sum of $450, with interest from April 8, 1925, this being the date of the sale, and judgment was rendered accordingly. From this judgment the plaintiff has appealed and the defendant has cross-appealed.

The only error assigned by appellant (plaintiff below) for the reversal of the judgment is that the court erred in the instructions given on the measure of damages. On this question appellant asked the following instruction:

"6. In arriving at the measure of damages which defendant claims he is entitled to recover by reason of the defects in such machine, the court tells you he would

be entitled to the cost of correcting such defects if the machine could be corrected at reasonable expense, or the difference in value between the value of the defective machine and one which was free from defects, and such as was contracted for."

The court modified this instruction by adding thereto the following clause:

"and also for the time of his employees, if any, lost in trying to operate and repair the said machine, and the cost of electricity ineffectively used in the operation caused by the defect, if any, and the sums paid out, if any, in an effort to repair same."

Appellant excepted to this modification, also objected and excepted to the instruction given at the request of the defendant numbered 2, which was to the same effect as the modified 6th instruction set out above.

Under the issues joined in this case we think there was no error in modifying the instruction as indicated. If the machine was defective, and it appeared that these defects might be remedied at a reasonable cost, the purchaser had the right to affirm the sale and make the necessary adjustments, and to recoup the cost thereof when sued for the balance of the purchase money.

In the case of *E. A. Stevens Co.* v. *Whalen,* 95 Ark. 488, 129 S. W. 1081, the purchaser of a pool table, when sued for the balance of the purchase price, sought to rescind the contract for a breach of warranty, after having elected, as the court held, to affirm the sale. It was there said:

"He had no right to keep the property and use it, and at the same time insist on a rescission of the contract. By keeping the property and using it, he elected to pursue the other remedy—that of demanding damages sustained by reason of the defect, which would be the cost of correcting the defect, if it could be corrected at a reasonable expense, or the difference between the value of the defective table and one which was free of defect, such as was contracted for. If the damages found by the jury, by reason of the defective condition of the table,

exceeded the amount of the mortgage notes, then the plaintiff could not recover judgment for possession of the property" (Citing authorities).

At § 1826 of Mechem on Sales, vol. 2, page 1457, it is said:

"Expenses incurred in preparing for what the seller is to do but fails to perform, or in doing that which the seller ought to have done, or in undoing that which he did improperly, fall clearly within the doctrines of the preceding sections, and may be included within the damages to be recovered. For like reasons money expended in a reasonable endeavor to avoid or diminish the injury resulting from the breach of warranty, as, for example, to cure an animal sold as sound, but found to be diseased, may be recovered. Expenses, however, in an unreasonable, hopeless or useless endeavor, or losses caused by continuous use after the defects were patent and evidently incurable, could not be recovered."

The testimony on the part of appellee is to the effect that, while the defects were not entirely remediable, they were partly so, and that, without the work done on the machine, it would neither pop corn nor roast peanuts, but, as a result of this work, the machine could be used to pop corn, although peanuts could not be roasted, and the machine was given a value as the result of the labor expended upon it which it would not otherwise have had.

This right to repair is upon the theory that, by making the repairs, the damages are not only minimized but the cost of the repairs which would place the machine in the condition it was warranted to be would properly measure the damages which the purchaser would be entitled to when sued for the balance of the purchase price. The purchaser would not be required to attempt the repair, and would not be permitted to do so, at the expense of the seller, unless it reasonably appeared, in the exercise of an honest judgment, that the repairs would remedy the defect and at a reasonable cost. If, after such an attempt had been made without success, the machine did not conform to the warranty, the pur-

chaser might, when sued for the balance of the purchase money, recoup, as damages for the breach of the warranty, the difference between the value of the machine as repaired and its sale price.

In the case of *Western Cabinet, etc., Co.* v. *Davis,* 121 Ark. 370, 181 S. W. 273, a purchaser, who was sued for the balance of purchase money due upon a soda fountain, defended on the ground that there was a breach of the warranty of the fitness of the fountain, and in an attempt to repair the fountain certain expenses had been incurred. The trial court gave the following instruction, which was approved by this court:

"1. Plaintiff sues the defendant on a balance on a contract introduced in evidence. The execution of the contract is admitted, and also that there is a balance of $2,311.26 not paid of the amount agreed to be paid under the contract. Defendant, by way of counterclaim, asks damages against plaintiff for alleged defects in the soda fountain (one of the articles sold under the contract), and also damages for expenses in testing the fountain as a suitable article for the purpose for which it was purchased. The burden of proof is on the defendant to sustain his counterclaim by a preponderance of the evidence."

The opinion in the case of *Parrett Tractor Co.* v. *Brownfiel,* 149 Ark. 566, 233 S. W. 706, supports the views here announced. In that case a tractor had been sold for $1,675, and $1,000 of the purchase price paid. In an attempt to repair and adjust the tractor so that it would do the work for which it was intended, the purchaser spent $600, and, when sued for the balance of the purchase price, $675, and the interest thereon, he defended upon the ground that there had been a breach of the warranty, and that he had incurred expense in the repair of the tractor. After announcing the options which a purchaser has where there is a breach of warranty the court said: "The proof showed that the defects in the machine could be corrected by reasonable expenditure, and the correct measure of damages was the expense

of curing defects." (Citing *Western Cabinet Co.* v. *Davis, supra.*

Such is the measure of damages where the defect is remedied; but if, notwithstanding the repair, the defect is not completely remedied so that the article as repaired conforms to the warranty under which it was sold, the purchaser may recoup the difference between the value of the article as repaired and its contract price, together with the cost of the repair. This was what was done in the Parrett case, *supra,* as appears from the statement of facts in that case, as the jury found the amount of damages for the breach of the warranty at an amount equaling the balance of the purchase money, and interest thereon, which amount substantially exceeded the cost of the repairs, and that judgment was affirmed.

The case of *Edwards Mfg. Co.* v. *Stoops,* 54 Ind. App. 361, 102 N. E. 980, announces the principles which are applicable here. It was there decided (to quote a syllabus) that:

"Where metal shingles were warranted fit for use on a certain building, which warranty failed, and effort was made to repair the roof and thus make use of the shingles, but it was found necessary to remove them and supply another roof, the measure of damages was the cost of the metal shingle roof, including the cost of the shingles and the expense of putting them on, less their value after removal from the roof, to which should be added any reasonable expense incurred in attempting to repair and improve the roof so as to make it conform to the warranty, since it was the buyer's duty to minimize the damage as far as possible, and, where things are sold for a particular use, damages for breach of warranty are not confined to the difference of the value of the goods as they were and as they would have been if as warranted, but include all such consequential damages as are the direct, immediate and probable result of the breach."

As to the cross-appeal but little need be said. Appellee (the defendant below) alleged his damages on

account of the defect in the machine to be $450 and his expense to be $75, and there was no reply to his cross-complaint. But he did not move for a judgment for the want of an answer in the court below, and he cannot now be heard to say that no issue was joined in that behalf.

In the case of *Winters* v. *Fain,* 47 Ark. 493, 1 S. W. 711, it was said:

"It is further objected that the decree is wrong because Preddy's answer contained a set-off and counterclaim, which stood practically confessed, as no reply was filed. On the authority of *Gibbs* v. *Dickson,* 33 Ark. 107, we decline to allow Preddy any advantage from this slip in pleading. In that case it is said the correct practice is to move the court for judgment upon the undenied plea; and that if the defendant fails to move, and goes to trial as if the issue was made up, he loses his advantage."

The case of *Young* v. *Gaut,* 69 Ark. 114, 61 S. W. 372, is to the same effect.

Appellee points out that the jury allowed him damages in the sum of $450, with interest from the date of the sale, thus showing that no credit was allowed him for repairs, and that he was allowed only for the difference between the actual value of the machine and its sale price, as the testimony on his behalf was to the effect that this difference amounted to $450. We cannot determine the mental processes by which the jury arrived at its verdict or what sum was allowed on one account or the other. While the testimony supports the verdict returned, it cannot be said that the undisputed evidence would require a larger verdict, and we must therefore affirm the judgment on the cross-appeal, although the testimony would have supported a finding for more damages. *Fulbright* v. *Phipps,* 176 Ark. 356, 3 S. W. (2d.) 49.

As no error appears, the judgment must be affirmed, and it is so ordered.

FIDELITY & DEPOSIT COMPANY OF MARYLAND *v.* CUNNINGHAM.

Opinion delivered June 18, 1928.

[redacted]

John A. Luhn, Chas. H. McComas, W. E. Beloate and *Horace Chamberlin*, for appellant.

Cunningham & Cunningham, G. M. Gibson and *H. L. Ponder*, for appellee.

SMITH, J. Neil Cole was duly elected sheriff and collector of Lawrence County, and assumed his duties as such on January 1, 1923, and he was re-elected for a second term which began January 1, 1925. He gave the usual bond as collector, and practically all of the appellees in this case were sureties on the bond executed for each of his terms. He gave no indemnifying bond to the sureties on his first bond as collector, but the sureties on his second bond required him to give them an indemnifying bond in the sum of $100,000 at the beginning of his second term. This bond was executed by Cole and the appellant, the Fidelity & Deposit Company of Maryland, hereinafter referred to as the company, and at the conclusion of his second term Cole was found to be short in his accounts as collector in a large amount, which was paid by the sureties on his official bond, who, after paying the shortage, brought this suit against Cole and the company on the bond which had been executed to them.

The bond executed by Cole and the company, and herein sued on, provided that "* * * the said principal (Cole) for himself, * * * and the said company, for

itself, * * * jointly and severally do hereby covenant, promise and agree to indemnify and keep indemnified the said assured (the sureties on the official bond of Cole) to the extent of $100,000 collectively, and no further, during the period beginning January 1, 1926, and ending December 31, 1926, from and against any and all loss which they might be put to, incur or suffer, by reason of any personal act or acts of larceny or embezzlement committed by the said principal in the discharge of his duties in said position; the liability of the said company hereunder being expressly limited to loss occasioned said assured by reason of any personal act or acts of larceny or embezzlement committed by the said principal in the discharge of his duties in said position, notwithstanding any provision of the bond or bonds executed by the assured, by which their liability may be enlarged beyond the terms of this bond."

A petition and bond was filed by the company, in which its co-defendant, Cole, did not join, for the removal of the cause to the Federal court, and the cause was removed thereto. Upon the convening of that court the cause was remanded to the Lawrence Circuit Court, in which it originated. Upon the remand of the cause the case proceeded to trial, and at the conclusion of the plaintiffs' case the surety company demanded that Cole put on testimony tending to sustain his defense, but he failed to do so, whereupon the company renewed its motion to remove the cause to the Federal court, upon the ground that, as Cole made no defense, the plaintiffs were entitled to a judgment against him, and the cause of action against the surety company had become a separable one.

This does not follow. Plaintiffs had sued Cole and the surety company upon an identical cause of action, and the same judgment was prayed against each of them, and the right to recover against the defendants, and each of them, and the extent of that right, remained a question for the jury.

No error was committed in refusing to again transfer the cause to the Federal court. It is true the company is a foreign corporation, but Cole is a citizen of the State, and, while the appellees might have sued the company without suing Cole also, they did not elect so to do. They had the right to sue Cole, and have done so, and it was entirely proper to make him a co-defendant in a suit against the company.

A motion was made in apt time to transfer the cause to the chancery court, and an exception was saved when that motion was overruled.

At the trial from which this appeal comes a very large record—one of about nine hundred pages—was made, and the various accounts for which the revenues were collected were inquired into, and there was offered in evidence the record of the county court which cast up the collector's accounts. This settlement was offered in evidence over the company's objection. Cole made a partial settlement of his collections in accordance with this settlement, but defaulted in paying the balance shown to be due by this settlement.

We have concluded that this cause should have been transferred to the chancery court, and that it was error to refuse to make that order, and this conclusion renders it unnecessary to discuss many of the exceptions saved at the trial to various rulings of the court.

It will be remembered that the bond sued on is one of restricted liability. It is wholly unlike the bond which the plaintiffs executed as sureties on the official bond of Cole as collector. That bond required the sureties to pay and make good any shortage occurring in the settlement of Cole's accounts as collector, whereas the bond executed by the surety company herein sued on obligated the surety company to pay only such sums as plaintiffs were required to pay as the result of the personal dishonesty of Cole through larceny or embezzlement.

A similar bond was construed in the case of *United States Fidelity & Guaranty Co.* v. *Bank of Batesville,*

87 Ark. 348, 112 S. W. 957, where it was held that the liability of such a bond is expressly restricted to such acts of fraud or dishonesty as amount to larceny or embezzlement.

The plaintiffs offered in evidence, over the company's objection, a copy of the settlement, which was about seventeen or eighteen feet in length and about eight inches in width, and contained a statement of the many accounts for which Cole had made collections. This settlement included the various accounts for which State and county taxes had been collected, and the taxes collected for the towns in the county, and the numerous school and improvement districts.

It was not sufficient here for the plaintiffs to show that Cole had collected funds for which he had not accounted, but it was essential that the testimony show, and that the jury find therefrom, the amounts of money which Cole had stolen or embezzled. It may be said that the testimony fully supported the finding made by the jury that Cole had misappropriated the public revenues, but the extent of this peculation is a question of more difficulty and one which can be determined only after a careful inspection and audit of the many complicated accounts.

It may be said, in this connection, that it is unnecessary to determine whether Cole, in misappropriating the tax collections, was guilty of larceny or embezzlement, as the surety company is liable in the one case as well as in the other.

The complicated nature of the accounts involved in this litigation is shown by the testimony of R. A. Culpepper, an expert accountant, who made an audit of Cole's accounts and who testified in regard thereto on behalf of the company. According to Culpepper's testimony, Cole's shortage was less than that shown by the settlement made up by the clerk of the county court and the Auditor of State, and for which amount in full a judgment was rendered against Cole and the surety company.

According to Culpepper's testimony, Cole had been overcharged in numerous respects. These charges covered lands redeemed, the county taxes collected, the county road taxes, taxes collected for road improvement districts numbered 4, 5, 6, 7 and 8, and the Western Lawrence County Road Improvement District and the Hoxie-Running Water Road Improvement District. According to Culpepper, Cole had been overcharged in his settlement with the McDonald Drainage District, the Black Spice Drainage District, the Lower Running Water Drainage District, the Rabbit Roust Drainage District, the Flat Creek-War Pond Drainage District, the Caney Creek Drainage District, the Greene and Lawrence Drainage District, the Lower Swan Pond Drainage District, the Running Water Drainage District, and that he was overcharged on account of taxes he collected for the towns of Black Rock, Imboden and Minturn.

Culpepper further testified that Cole had been overcharged on the valuations on which he had collected taxes from various taxpayers. As illustrative of other items of this class, he was charged, according to Culpepper, with having collected taxes from one taxpayer on the basis of a two-thousand dollar assessed valuation, whereas the correct valuation was only two hundred dollars.

The jury returned a verdict for the plaintiffs for the exact amount for which plaintiffs prayed judgment, but it will not do to say that the jury found all these questions of accounting against the company, and that the settlement made up by the clerk of the county court was inerrant. The verdict of the jury indicates, rather, that, in its bewilderment in the maze of figures submitted, it resolved all doubts against the company, and found that the settlement was exactly correct, which we think Culpepper's testimony shows to be demonstrably wrong, in several respects at least.

We think the case of *Hugus* v. *Sanders,* 164 Ark. 385, 261 S. W. 899, announces the rule which should have been followed here. It was there said that "causes are

only transferred from courts of law to courts of equity where the issues are exclusively within the jurisdiction of the latter, or, if concurrent, where the law court cannot afford complete and adequate relief."

The jurisdiction of the circuit court is concurrent with that of the chancery court in a suit upon an intricate account, but we think the nature of the account here sued upon is such that the use of the facilities which a court of equity affords was necessary to a finding approximately accurate as to the extent of Cole's shortage.

The case of *State* v. *Churchill,* 48 Ark. 426, 3 S. W. 352, 880, was a suit upon the bond of the State Treasurer, who was charged with being short in his accounts, and it was there insisted that a suit for the breach of an official bond was cognizable only in a court of law, but in holding against that contention it was there said (to quote a syllabus): "In all cases where mutuality of accounts is claimed as the basis of equity jurisdiction, mutuality is essential only in this, that it indicates intricacy and complication. And it would seem that the difficulty of properly adjusting accounts is that which confers the jurisdiction of accounts upon equity courts, without much regard to their singleness or mutuality."

Having reached the conclusion that the judgment of the court below should be reversed, and that the cause should be transferred to equity upon its remand, we proceed to consider such questions as counsel have discussed which have not already been decided. We have announced our conclusion to be that no error was committed in refusing to again transfer the cause to the Federal court, and that it is immaterial whether, in failing to account for money collected by himself, Cole was guilty of larceny or embezzlement, as the company is liable in either case.

It is insisted that the plaintiffs have no right to maintain this action, for the reason that they have not shown that they have paid the shortage or the amount thereof paid by each of them. The plaintiffs have

shown, however, that when the Auditor's distress warrant issued against them, they executed a joint note, with the proceeds of which they paid the amount of the shortage, and this showing is sufficient to entitle plaintiffs to maintain this suit. The company's bond was executed for the benefit of the plaintiffs collectively, and it is no concern of the company as to the manner in which the note will be paid or the proportion which each maker will be required to pay.

It is insisted that it was error to admit in evidence the record of the settlement of Cole's account as made up by the county clerk; but there was no error in this, as it was essential for plaintiffs to show that there was a shortage. As against the company, this judgment evidences only the fact that it was rendered, and does not determine the amount of the shortage or that Cole had embezzled the money which he failed to pay over. *Biederman* v. *Parker,* 105 Ark. 86, 150 S. W. 397.

It is earnestly insisted that the testimony was insufficient to show that Cole had embezzled any money, and that it was error to admit in evidence proof of his admission that he had in fact embezzled public funds, but this admission was made in the presence of the surety company's representative and in response to the questions of the representative as to what he had done with the money. It was shown also that Cole had stated, while still in possession of his office, that he had used portions of his collections for his own purposes, but in amounts not exceeding a hundred dollars at a time.

It was competent in the trial of this cause to prove this admission, and the proof thereof, in connection with the other facts herein summarized, is sufficient to sustain a finding that Cole was an embezzler. *Russell* v. *State,* 112 Ark. 282, 166 S. W. 540.

It is insisted that the testimony showing that Cole took and used portions of his collections, even in amounts as large as a hundred dollars at a time, for his personal use, did not show that he was an embezzler, as he was entitled, by way of commissions, to a larger

amount than he was shown to have used. If Cole had used only such amounts as were due him as commissions upon making a final and complete settlement, this would not constitute embezzlement, but his personal use of any portions of these funds is a proper circumstance to consider in determining whether he was in fact an embezzler.

In regard to the commissions due Cole as collector, it is insisted that the company should not be charged with certain commissions which would have been due Cole upon making a final settlement and paying over the public funds, for the reason that his sureties were personally liable for the payment thereof, and should, by payment, have saved the loss of the commissions. The plaintiff sureties testified, however, that they were not advised of the shortage until the distress warrant had been issued, and they were therefore unable to make settlement, as the bond which they had executed required them to do, until after the right to make the payment and save the commissions had expired. As plaintiffs paid this money, they are entitled to be reimbursed, provided, of course, that Cole embezzled it. Commissions were allowed on all sums paid over by Cole before the issuance of the distress warrant.

The company claims that Cole was in fact short in certain of his accounts for taxes collected for the preceding year (1924) and that he used taxes collected for the year 1925 in making good his shortage, and that to the extent that this was done there was no embezzlement, as there was no conversion of this money to his own use or intent to deprive the owner thereof. We do not agree with counsel in this contention. Cole had no right to use the taxes collected in 1925 for any other purpose than to make settlement of his collection for that year, and if he diverted these funds to any other purpose, this was an act of embezzlement, and none the less so because the funds embezzled were paid to the credit of a fund with which he was in default, as by the use of this money he was discharging an existing

liability against himself, and that action was a conversion of the funds. A prior embezzlement, if true, did not excuse a subsequent embezzlement. It was his duty in each instance to pay over, and this alleged payment of a 1924 shortage out of the revenues of 1925 amounted to nothing more than a restitution of embezzled funds, and the act of restitution was made by an unauthorized use of tax money for which he and the plaintiffs as sureties on his official bond were liable. In other words, Cole had no right to commit embezzlement, even though he intended to use the funds embezzled to make restitution for a prior embezzlement.

The bond sued upon provided "that the company, upon the execution of this bond, shall not be liable under any bond or bonds previously issued to the assured, or either of them, on behalf of said principal, the acceptance of this bond being a release to the company from any possible liability under such prior bond or bonds, and upon the issuance of any bond subsequent hereto upon said principal in favor of said assured, or either of them, liability hereunder shall cease and determine, and the acceptance thereof shall be a release to the company from any possible liability under this bond."

It is insisted that, if any portion of the 1925 revenues were used by Cole to make good any shortage in his 1924 collections, the provision above quoted will be violated, because the surety company will be required to pay a shortage existing in 1924, whereas it is provided that, by taking the bond sued on, any liability on the previous bond is discharged.

The purpose of this suit is not to recover for any shortage in Cole's accounts through the collections of the 1924 revenues. Plaintiffs seek to recover only such sums as were stolen or embezzled by Cole from his 1925 collections, and we hold that it is an embezzlement of these revenues to use them for any purpose except to pay them over, and that it is none the less so because portions of the 1925 revenues were used to discharge a shortage already existing in the 1924 collections.

Another provision of the bond is that if the assured, or any of them, were aware at the time of its execution of an existing embezzlement or larceny of revenues, that knowledge should operate to discharge the surety company from any liability on the bond; but it is a question of fact whether the assured, or any of them, had this information. Those who testified denied having this information. But this provision of the bond has no application here. If the assured were not aware of the 1924 shortage when the bond covering the 1925 revenues was executed, they had the right to require the surety company to indemnify them for all money stolen or embezzled by Cole from the 1925 revenues, and it was an embezzlement of the 1925 revenues to pay them out for any purpose except to make settlement for that collection.

Other questions are discussed by counsel, but, in view of the fact that a new trial must be had in the chancery court, we deem it unnecessary to discuss them.

No appeal was prosecuted by Cole, but the appeal of the surety company has brought the entire proceeding before us for review, and the reversal of the judgment remands the entire matter for a new trial when the cause has been transferred to the chancery court, including the liability of Cole as well as that of the surety company.

For the error in refusing to transfer the cause to the chancery court the judgment is reversed, and the cause remanded with directions to transfer.

McHaney, J., dissents.

NORMAN *v.* BLAIR.

Opinion delivered June 18, 1928.

George M. Bennett, for appellant.

Evans & Evans, for appellee.

HUMPHREYS, J. Appellants brought this suit in the chancery court of Logan County, Southern District, on behalf of themselves and all other taxpayers in said county, against appellees, consisting of the county judge, clerk, courthouse commissioners and the contractors, to enjoin the construction of a courthouse at Booneville, the county seat of the Southern District, pursuant to the direction of the quorum court, the orders of the county court and the provisions of the contract entered into between the courthouse commissioners and the county judge on the one part, and the contractors on the other, and to prevent the issuance of county warrants to pay for same. The injunction was sought upon two grounds, the first being that the contract was let for an excessive amount on account of being payable in scrip or warrants, in installments of equal amounts, covering a period of fifteen years, instead of being let for cash, in violation of § 1, article 16, of the Constitution of the State of Arkansas, which is 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 (a), 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."

And the second ground being that, after paying the necessary expenses out of the revenues derived from all sources, there will not be sufficient revenue left each year to pay the installments to become due under the contract for the construction of the courthouse.

(1). This court ruled in the case of *Watkins* v. *Stough,* 103 Ark. 468, 147 S. W. 443, that:

"Where a contract for constructing county bridges or other work is let to the lowest bidder, as required by law, the contract price is the measure of the contractor's rights, and not the customary cash market price for materials furnished or work done; and, unless fraud or collusion to increase the price by reason of payment in depreciated warrants be shown, the contractor is entitled to recover the contract price."

In approving and applying the doctrine of the Watkins case to a contract for the construction of a courthouse, this court stated in the case of *Stone* v. *Mayo,* 135 Ark. 127, 204 S. W. 751:

"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 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 any fraud. The complaint sets out the bid, which, strictly construed, on its face calls for the payment of $91,000 in county warrants at '70-125 base,' which would necessitate the issuance of county warrants to the amount of about $118,000. If the contract had been expressed in these terms, there would be grounds for saying that, upon its face, it was a fraud upon the court, but, as already stated, the contract calls for the payment of $91,000 in county warrants, without any increase of the contract price on account of the warrants being below par."

In the instant case a straight contract was let to the lowest bidder, payable in county warrants in fifteen equal annual installments, for the construction of the courthouse, in accordance with plans and specifications therefor. There is no allegation in the complaint nor evidence of fraud or collusion between the contracting parties that the bid should be increased by adding carrying or interest charges thereto and including same in the warrants. The contract does not offend against § 1, article 16, of the Constitution, and is constitutional and valid under the rule announced in the Stone and Watkins cases, *supra.*

(2). The trial court found, from the answer of appellants and the testimony of other witnesses, that, after investigating the income of the county from all sources and the necessary governmental expenses, there will be a margin or surplus left, after paying the necessary expenses of government, if spread over a period of fifteen years, to pay the contract price of $86,273 for the construction of the courthouse. His finding is sustained by the appellee's answer, which appellant agreed stated the facts, and which, by agreement, was inserted in the bill of exceptions as a true statement of the facts. The weight of the evidence of the county judge and commissioner, when read together, also sustains the finding of the trial court upon this point.

No error appearing, the decree dismissing appellants' complaint for want of equity is affirmed.

ADAMS *v.* SIMS.

Opinion delivered June 18, 1928.

[redacted]

Morris & Barron, for appellant.

J. F. Holtzendorff and *Chas. B. Thweatt*, for appellee.

HUMPHREYS, J. Separate suits were brought in the chancery court of Prairie County, Southern District, by D. D. Adams, trustee of the City National Bank of St. Louis, Missouri, against J. F. Sims and Maggie M. Sims; and by D. D. Adams, trustee for the Liberty Central Trust Company of St. Louis, Missouri, against J. T. Sims and Bessie B. Sims, to cancel deeds executed in the year 1926 by Road Improvement District No. 5 of Prairie County and Hazen-LaGrue-Slovak Road Improvement District No. 8 of Prairie County to Maggie M. Sims, to the following described real estate, to-wit: The northeast quarter of block D, Hurst's Addition to the town of Hazen, Arkansas; and to Bessie B. Sims to the following described real estate, to-wit: northeast part of lot 2 and northwest quarter of section 30, township 2 north, range 5 west, containing 10 acres; and to quiet the title to said lands in themselves, and for a writ of assistance to obtain the possession of said land, upon which appellees were residing.

It is alleged, in substance, that the lands acquired from the road district by the Madams Sims were tax deeds based upon forfeitures of the lands constituting the respective homesteads of the Messrs. Sims, who never paid the special improvement taxes for the year 1923, and which it was the duty of the Messrs. Sims to pay, and that at the tax sales the districts bought the lands, and that, after the expiration for the time for redemption, conveyed the respective homesteads to the Madams Sims. It was further alleged that title to the J. F. Sims homestead was acquired by the National City Bank of St. Louis, Missouri, and title to the I. T. Sims homestead was acquired by the Liberty Central Trust Company of St. Louis, Missouri, on the 11th day of May, 1925, under mortgage foreclosure sales on mortgages which J. F. Sims and wife had executed to said bank and I. T. Sims and wife had executed to the trust company on March 29, 1923, to secure large amounts, which they failed to pay at maturity.

Answers were filed to the separate suits, in substance, to the effect that each of the Madams Sims bought her respective husband's homestead from the road districts subsequent to the mortgage foreclosure, with their respective individual funds.

The suits were consolidated for the purpose of trial and heard upon the pleadings and testimony adduced by the respective parties, resulting in a dismissal of each complaint, from which is this appeal.

The facts as revealed by the record are briefly stated by appellants as follows:

"On March 29, 1923, J. F. Sims and his wife, Maggie Sims, jointly mortgaged their homestead to the National City Bank of St. Louis, Missouri, to secure $12,500 and future advances, and on the same day I. T. Sims and his wife, Bessie Sims, jointly mortgaged their homestead to the Liberty Central Trust Company of St. Louis, Missouri, to secure a loan of $15,000 and future advances. They defaulted in payment of the indebtedness secured by these mortgages, and on April 9, 1925, a decree was

rendered in the Prairie Chancery Court, Southern District, awarding to the National City Bank a judgment against J. F. Sims for $14,264.19, declaring it a lien upon his homestead, and a judgment in favor of the Liberty Central Trust Company for $17,552.33 against I. T. Sims, and declared it a lien upon his homestead. The foreclosure suits were consolidated, and the judgments and liens against the Sims and their homesteads were embodied in the same decree. The Sims failed to pay the liens against their respective homesteads, and the court's commissioner, on July 27, 1925, sold same. D. D. Adams, as agent of the National City Bank, became the purchaser of J. F. Sims' homestead for $5,000, and, as agent for the Liberty Central Trust Company, he purchased the I. T. Sims homestead for a like sum. Both of said mortgages foreclosed contain the statutory words necessary to create a warranty of title. The homestead of J. F. Sims and Maggie Sims was occupied by them at the time of the giving of said mortgage, and they have continued to reside therein. The homestead of I. T. Sims and Bessie Sims was occupied by them at the time they mortgaged it, and they have since continued to reside therein. Both homesteads were delinquent for 1923 assessments of Road Improvement District No. 5 of Prairie County and Hazen-LaGrue-Slovak Road Improvement District No. 8 of Prairie County. The districts purchased the homesteads, and in the year 1926, after the time for redemption had expired, conveyed the J. F. Sims homestead to his wife, Maggie Sims, and I. T. Sims' homestead to his wife, Bessie Sims.''

Appellants contend that a duty rested upon the Messrs. Sims, as owners and mortgagors, to pay the taxes accruing against their respective homesteads after they mortgaged them to appellants, and that they and their wives were estopped to subsequently purchase and acquire the tax titles based upon forfeitures for the nonpayment of special improvement road tax for the year 1923, except as a redemption thereof from the forfeiture and sale. The special road improvement taxes accrued

after the mortgages were executed by the Messrs. Sims and their wives to appellants, and forfeitures for the nonpayment thereof occurred prior to the foreclosure of same. It was clearly the duty of the Messrs. Sims to pay the road improvement taxes when same became due, and, failing to do so, it was their duty to redeem the lands from the sales. This court is committed to the doctrine that the mortgagor must pay the taxes upon the mortgaged property, and that for this reason he cannot allow said property to be sold for the nonpayment thereof and acquire title by purchase at the sale antagonistic to that of his mortgagees. His purchase at such a sale must be regarded and treated as a redemption of the mortgaged property from the forfeiture and tax sale. *Drake* v. *Sherburne,* 57 Ark. 563, 22 S. W. 430; *Randolph* v. *Nichol,* 74 Ark. 93, 84 S. W. 1037; *Wade* v. *Goza,* 99 Ark. 543, 139 S. W. 639. We do not think the foreclosure of a mortgage in the interim between the accrual of taxes and sale under the forfeiture should change the rule. If the foreclosure of the mortgage in the interim reversed the rule, a mortgagor would reap a benefit from his own wrong and neglect in failing to pay the taxes. It is true that a foreclosure decree and sale of mortage lands extinguishes the relationship of mortgagor and mortgagee, but the cessation of such a relationship certainly cannot place the mortgagor in a position to take advantage of his own neglect and failure to pay taxes which were levied and which became payable before the mortgage foreclosure and sale of the mortgaged property. It would be otherwise in tax sales for taxes which became payable after the mortgage foreclosure.

Appellees argue, however, that no duty whatever rested upon the wives of the Messrs. Sims to pay the taxes which accrued before the mortgage foreclosure, and that therefore they had a right to purchase the lands with their separate funds at the tax foreclosure sales which occurred after the mortgage foreclosures. This court ruled in the case of *Herrin* v. *Henry,* 75 Ark. 273, 87 S. W. 430, (quoting syllabus) that "where an insolvent

debtor permitted his land to forfeit for taxes, and bought it in his wife's name and with her means, the transaction will be treated, so far as his creditors are concerned, as, in effect, a redemption of the land by him.'' The argument of appellees is completely answered by this case, without further comment by us.

On account of the error indicated the decree is reversed, and the cause is remanded with directions to the trial court to cancel the road improvement district deeds to Maggie M. Sims and Bessie B. Sims, and to quiet the title to said property in appellants as against appellees, and to issue a writ of assistance for the possession of said property.

LAVENDER *v.* BUHRMAN-PHARR HARDWARE COMPANY.

Opinion delivered June 18, 1928.

T. B. Vance, for appellant.

John D. Rogers and *Pratt P. Bacon,* for appellee.

KIRBY, J. The undisputed testimony shows that application was made by appellant for the loan through Dewberry, the local agent of the loan company, that the application was approved, and the loan granted at its

home office in Colorado. The bond for the loan and the mortgage securing it and the agreement to purchase stock, along with a draft in payment of the loan, made payable to the appellants, mortgagors, and Dan Dewberry, agent, were sent to Texarkana for signature of the mortgagors and delivery to them of the money loaned through Dewberry, upon the completion of the transaction. It was further shown and the court found that the names of the mortgagors, payees in the draft or check, were forged by Dewberry, agent of the loan company, and the other payee in the draft to whom it was sent for delivery of the money to the mortgagors upon the execution of the necessary papers. Appellants having denied, in accordance with the statute (§ 4114, C. & M. Digest), their indorsement of the draft, payable to their order and Dan Dewberry, as agent, by whom it was claimed the money loaned was paid to them, and alleged that their signatures were forgeries and not genuine, the draft could not be read in evidence as a receipt of the money, or in anywise binding against them for its payment, and the burden of proof devolved upon the loan company to show the delivery of the money loaned to the mortgagors. *Ohio Gal. Co.* v. *Nichol,* 170 Ark. 16, 279 S. W. 377. See also *Terrill* v. *Fowler,* 175 Ark. 1010, 1 S. W. (2d.) 75.

Lavender testified that the signatures of himself and wife indorsed on the draft were forgeries, and the court found such to be the case He also testified that none of the money which was attempted to be borrowed from the loan company, payment and delivery of which was attempted to be made by said draft, payable to the order of appellants, mortgagors, and Dan Dewberry, agent, and sent and delivered by the loan company to its said agent Dan Dewberry, and cashed by him upon his own and the forged signatures of appellants, had ever been delivered to or received by them. Certainly the loan company could not collect the note given for the loan nor foreclose the mortgage given to secure the payment thereof, when it had never in fact made such loan by delivering the money to the makers of the note and mortgage. The undisputed

testimony shows that Dan Dewberry was the local agent of the loan company, authorized to submit applications, procure the signatures of the applicants to the papers necessary for completion of loans, and deliver the money loaned to the mortgagor or borrower, and also that the draft for the money constituting the loan was made payable to the mortgagors and to Dan Dewberry, agent, and sent to him for final disposition. The loan company made it possible, by this procedure, for its agent to cash the draft and collect the money upon his own indorsement and the forgery of the signatures of the other payees, and, having done so, must bear the loss resulting from the agent's failure to deliver the money loaned to the mortgagor in accordance with the contract made therefor. See *Gate City Building & Loan Ass'n* v. *Crowell, ante,* p. 539. The consideration for the execution of the bond and mortgage never having been paid to the makers of the bond, the mortgagors, failed utterly, and the mortgage could not, of course, be foreclosed and the property subjected to the payment of such note and mortgage.

The court held, however, that, notwithstanding such failure of consideration of the note given for the loan, the mortgagors having sold and conveyed to Sparks and wife the property mortgaged, after the amount of the loan was in fact received by the agent of the loan company, Dewberry, who embezzled the money, requiring, as part of the consideration therefor, the assumption and payment of their bond or obligation to the loan company for the amount of said loan, and the payment of three or four installments thereof by such purchasers, estopped appellants to plead a failure of consideration of their note to the loan company. This, notwithstanding the proof showed that appellants had no knowledge whatever, at the time of said conveyance and of the payment of the installments upon the property, that the money applied for as the loan from the loan company had ever been forwarded or received by its agent at Texarkana, which said agent in fact had denied that it ever had been received by him, according to the testimony in the case.

This holding was erroneous. There was no change of conduct or position by the loan company because of such sale or transfer of the property to Sparks and wife, nor was it misled to its injury in any way thereby, and certainly there could have been no estoppel by this act of appellants to deny that the consideration for the bond and mortgage given by them for the loan, the money for which had never been delivered to them, had failed.

The consideration for the note having failed, the mortgagors were entitled to have the note and mortgage canceled, and the court erred in holding otherwise, and that they were estopped to plead such failure of consideration. Appellants having sold and conveyed the property to Sparks and wife, requiring the payment, as part of the consideration thereof, of the amount that would have been due the loan company under their bond and mortgage, if it had been valid and enforceable, were also entitled to recover the amount as part of the purchase money due from Sparks and wife to them, and to enforce a vendor's lien for the payment thereof in accordance with the terms of the contract of sale.

The decree is reversed as against appellants in favor of the loan company, and, it appearing that the vendees of appellants, Sparks and wife, failed to answer and defend the cause, and that the property has already been sold and purchased by the appellee, the loan company, the cause will be remanded with directions to enter a decree canceling appellant's mortgage and note or bond to the loan company, and decreeing them a vendor's lien for the entire amount of the unpaid purchase price against Sparks and wife, for foreclosure of the lien, and a sale of the property in satisfaction thereof, and payment of the proceeds, after payment of the amount of the lien for materials furnished by appellee, Buhrman-Pharr Co., to appellants, with costs.

It is so ordered.

VANEMBURG *v.* DUFFEY.

Opinion delivered June 18, 1928.

Cole & Poindexter, for appellant.

S. M. Casey, for appellee.

MEHAFFY, J. This suit was brought by appellant to recover $2,375, being 5 per cent. of the sale price of lands which appellant claims as commissions for making the sale for appellees.

Appellant is a broker, engaged in procuring purchasers and selling real estate in Independence County and surrounding territory, with offices at Batesville, Arkansas, and has been so engaged for a number of years. The appellees were owners of a tract of land in Independence County, known as the Gainor farm, which they desired to sell. Appellant alleges that they employed him to make a sale of said land, and that he did make the sale to one Ben Desha for the price fixed by appellees. He alleges that he was acting under the orders and at the instance of the appellees, and that he sought and found a purchaser, and that appellees knew these facts. He alleges that, by reason of such employment and the result of which was accepted by the appellees, he is entitled to a fair and reasonable brokerage commission, and alleges that the customary commission is 5 per cent. on the sale price.

The appellees filed answer, denying all the material allegations of plaintiff's complaint, and, the regular judge being disqualified, Hon. T. D. Wynne of Fordyce was elected special judge to try the case, and, by agreement of parties, a jury was waived and the case was tried by the judge sitting as a jury.

The appellees knew appellant, and knew the business in which he was engaged. According to appellant's testimony, he had a conversation with one of the appellees, Gainor Duffey, something like a year before the sale of the land. He knew Duffey, and was familiar with the Gainor farm, the tract of land involved, and he testified that this conversation he had with Duffey was in the latter part of 1924 or the first part of 1925. That Duffey asked him if he had any one interested in river bottom farms, and he replied that he did. Duffey told appellant that he had a farm for sale, and fixed the price at $60,000. Appellant testifies that, immediately after that, he commenced talking to Mr. Desha, who was interested in it, and stated that it was worth $40,000. He testifies that he told Duffey this, and Duffey replied that he would not consider $40,000 at all.

Appellant then testifies that, on the 20th day of November, 1925 or 1926, he thinks it was 1925, he met Duffey on Main Street, in the morning about 9 o'clock, and told Duffey, if he would get down to brass tacks, he was in touch with a party to sell his farm to. Duffey asked him what he meant by brass tacks, and appellant told him they were going to build a bridge there, and that it would make his farm worth less, and the principal part of this conversation was about the depreciation in the value of the lands because of the building of the bridge. But appellant told him, according to his testimony, that he was in touch with a party that he believed would give $43,000, and Duffey told him he would not take it. Appellant then said he might be able to get $45,000, and Duffey said he did not think he would take $45,000. But he testifies that Duffey said he would take it up with Mrs. Fitzhugh, and that they would take it up with Mrs. Ponder, the sisters of Duffey, who were interested in the land. He also testifies that Duffey said for appellant to try to get in touch with his party and see how high he could pull them up, and he would see him in the morning. The next morning he was standing over there in front of the stairway in front of the building where appellant's office is, and Duffey came down the street, and asked appellant what he knew. Appellant told him he was pretty sure the parties that he was figuring with would give $45,000, and Duffey said he would not take it. He then told him he believed he could pull them up to $47,500, and Duffey replied that there had been a person figuring with him for twelve months, and that he thought it was the same fellow appellant had in mind, that it was Desha Lester. Appellant told him it was not Desha Lester, and Duffey then said if it was not Lester he would hold the man off from renting the place until 4 o'clock. Appellant then, according to his testimony, went up to the office, and was making preparations to go over to see Mr. Desha. That Mr. Desha soon came in town, and appellant took him up to his office and told him if he wanted to buy the farm now was the time

to buy it. That he could sell it to him for $47,500. That Desha said he did not think he would go over $43,000, that $45,000 was a big price. Appellant told Desha that $47,500 might be a little high, but it joined Desha's other land, and he did not think he would let $2,500 stand in the way, and then Desha said to tell them he would accept the property. Desha agreed to meet witness and Duffey at one o'clock, and they met at Judge Bone's law office to have the contract written, and appellant testified that he said: "I have sold Mr. Duffey's farm to Mr. Desha, and want you to write the contract for us," and that Desha said he was buying the farm for his nephew, Desha Lester.

The above is the substance of the testimony of appellant, and Ernest Morris, witness for him, corroborated him as to the conversation on the street in front of appellant's office, and Ben Desha also testified about the conversation that occurred in Judge Bone's office. The contract was written by Judge Bone, and the place was sold to Desha Lester for $47,500.

Appellees deny that they ever employed appellant to make the sale, and state that they had been negotiating with Desha Lester for more than a year, and that the place was sold to Desha Lester.

We think it would be useless to set out the testimony in detail. There was considerable conflict in the testimony of appellant's witnesses and the witnesses for appellees, and it was purely a question of fact as to whether there was a contract or not.

A contract with a broker to sell real estate is like any other contract. It may be express or implied, and may be either written or oral. But, whatever may be its form, it must appear that there was an offer and an acceptance. There must be an agreement of some kind. It would not be necessary, of course, that they agreed on the amount of the commission, but there must be an understanding that the appellant would undertake to sell the property for appellees and that appellees accepted

the services of the appellant with the understanding that the appellant would be paid for his services.

Appellant's first contention is that the contract need not be in writing, and in this contention appellant is correct. The statute of frauds has no application.

It is next stated by appellant that Duffey and Mrs. Fitzhugh knew that appellant was a real estate broker. The testimony is undisputed as to this proposition. They knew he was engaged in the real estate business as a broker.

It is next contended by appellant that Mrs. Fitzhugh knew that her brother was dealing with appellant in this matter and relies on the following testimony of Mrs. Fitzhugh to support this contention:

"Q. You knew your brother was negotiating this sale, did you not? A. He came in Friday, and told me Mr. Bee Vanemburg had stopped him in the street and wanted to know what the lowest price was."

Certainly the above did not indicate to her that her brother had employed Mr. Vanemburg, or that she was under any obligations to him for selling the place.

The next question raised by appellant is, Did appellee, Duffey, employ appellant to sell this land? We have already quoted the testimony of the appellant substantially, and there is some conflict in the testimony, although the testimony of the appellant himself on the question of any agreement is very meager, and does not show any agreement to pay for appellant's services; that neither party sought him, and that he was endeavoring to get the sellers to take less than they offered and endeavoring to get the purchaser to pay more than he offered, and that he finally got them together, according to his testimony.

Appellant calls attention to and quotes from a good many authorities on the question of the liability to pay a commission where a broker had been employed to sell property. There is no conflict in the authorities as to the liability for commissions where one has employed a broker to sell property. If one employs a broker to sell

property and he sells it, the broker is entitled to his commission. But the question here is whether the broker was employed to sell the property and whether there was ever any implied agreement to pay him a commission. The burden was on appellant to establish by a preponderance of the evidence that he had been employed.

The rule is stated in Mechem on Agency, as follows:

"To entitle the broker to commissions for his services; he must make it appear that the services were rendered under an employment and retainer by the principal, or that the latter accepted his agency and adopted his acts, under circumstances reasonably indicating that the principal knew the services had been rendered on his account and in reliance upon his obligation to pay for them. If the broker rendered the services as a mere volunteer, without any employment, expressed or implied, he cannot recover commissions, even though he brought the parties together and was the efficient means of procuring the consummation of the bargain." Mechem on Agency, 2426.

Corpus Juris states the rule as follows:

"To entitle a broker to compensation, he must have been employed to negotiate the transaction in connection with which his services were rendered. In the absence of such employment, or, in other words, where the broker acts as a mere volunteer, he is not entitled to compensation, although his services are the efficient cause of bringing the parties together and result in a sale or other contract between them." 9 C. J. 554.

"As it takes two to make a bargain, a broker is not entitled to be compensated for his services unless they were rendered pursuant to the express or implied request of his employer. To warrant a recovery upon his part, he must have been actually employed by the person he is seeking to hold liable, for otherwise there would be no legal basis for his claim to compensation, notwithstanding the fact that a purchaser may have been found through information furnished by him. The calling of a broker is not preferred, in the eye of the law, to that of other

occupations, and he is no more entitled to remuneration for services voluntarily rendered without any employment, express or implied, than any other member of the community. While a contract of employment may be implied from subsequent acts of ratification on the part of the alleged principal, to warrant the inference of a previous request, the owner must say or do something tending to prove that he accepted the broker as his agent in the matter—something more than merely selling to the party whom the broker, while acting as a volunteer, brought to him. Of course, the fact that a vendor accepts the benefits of a broker's efforts does not render him liable to the broker for commissions on the theory of ratification, where he did not know that the broker was working in his behalf, but, on the contrary, the circumstances of the broker's endeavors indicated that he was working in the interest of the purchaser. * * * Furthermore, it is practically universally held that the mere asking and receiving the price of property does not of itself make the broker the agent of the owner, entitling him to commissions, although he finds a purchaser, or the owner subsequently disposes of the property to one with whom the broker had negotiated." 4 R. C. L. 298.

In a recent and well considered case it was said:

"The broker, like other agents, derives his authority from the appointment of his principal, and, in order to obtain rights himself, or establish liability to others against his principal, or to incur liability to his principal, the fact of his appointment must be made to appear. * * * The principal cannot be bound by, or be made liable for, services rendered by a broker which are purely voluntary on the part of the latter, and performed without the express or implied consent of the principal; but, even in such cases, the principal may, by availing himself of the benefits of the services, not only ratify and confirm the acts done, but render himself liable to the broker for their value. * * * To entitle the broker to commission for his services, he must make it appear that the services were rendered under an

employment and retainer by the principal, or that the latter accepted his agency and adopted his acts, under circumstances reasonably indicating that the principal knew that the services had been rendered on his account and in reliance upon his obligation to pay for them." 49 A. L. R. 919.

In the same case the court also said: "But a contract of employment and an agreement to pay commissions will not be implied from the mere fact that the owner of property consents to the rendition of services by a broker which result in a sale of the property, especially where the owner had no knowledge that the broker was acting as such before the sale was consummated, or where he had previously refused to employ the broker."

Again, it was said in the same case: "A ratification of his act, where the original employment is wanting, may, in some circumstances, be equivalent to an original retainer, but only where there is a plain intent to ratify. An owner cannot be enticed into a liability for commissions against his will."

We think that the most that can be said in this case is that the owner of the property consented to the rendition of services, and that the parties really had no knowledge that the broker intended to charge them any commission. At least, it was a question of fact for the trial court to determine whether or not there was a contract with the understanding that appellees would pay a commission, or whether the circumstances were such as to justify the conclusion that a contract was in fact made.

The law is so well settled in this State that it is unnecessary to cite authorities or to review the authorities cited by parties at any length. It is the rule in this State that, if one employs a broker to sell real estate and nothing is said about the commission or the amount of it, then the broker, if he makes the sale, is entitled to the customary commissions. But it is also well settled by the decisions of this court that, before he is entitled to commissions for making a sale, there must have been a contract or an agreement, either express or implied, that he

was acting for the owner of the land, and expected pay for his services.

The testimony in this case, as we have already said, is conflicting, the appellees testifying that they never employed the appellant. And the testimony of the defendants contradicts that of the appellant in several particulars.

This court has said: "While the testimony of the plaintiff on this point was contradicted by that of the defendant, the finding of the circuit court in favor of the plaintiff is conclusive upon us upon appeal." *Courtney v. G. A. Linaker Co.*, 173 Ark. 777, 293 S. W. 723.

The finding of the trial court sitting as a jury, on questions of fact, is as conclusive here as the finding of a jury. And the rule is that, if there is any substantial evidence to support the findings of the trial court, its findings will not be disturbed.

In this case there was substantial evidence to support the finding of the trial court, and the judgment is therefore affirmed.

KLEINER *v.* PARKER.

Opinion delivered June 18, 1928.

W. A. Leach, for appellant.

John L. Ingram and *L. P. Biggs*, for appellee.

MEHAFFY, J. This suit was brought by appellant, on behalf of himself and other taxpayers of Arkansas County, against the county judge, county clerk, commissioners and contractors, for the purpose of enjoining the defendants from constructing a courthouse in the Northern District of said county, and to enjoin them from proceeding under the orders of the court or the contract, and to prohibit the clerk from issuing warrants, and the plaintiff asked that the contract be declared void.

The levying court appropriated the sum of $50,000 for the purpose of building a courthouse at Stuttgart, in the Northern District of said county, payable in warrants $5,000 a year out of the county revenues until the $50,000 was paid.

The county court appointed the commissioners for the purpose of contracting and supervising the construction of the courthouse. The commissioners reported at the October term of the county court, and submitted plans and specifications for the building to be erected. The report of the commissioners was approved, and they were ordered to advertise for bids for the construction of said building, at a cost not to exceed $50,000, and to enter into a contract for the erection of said building according to the plans and specifications, with persons

who would agree to do said work at the lowest price, not exceeding the amount appropriated. Commissioners were ordered to take a bond for the performance of the work, as provided by law.

Ogletree & Barrett bid and offered to do said work for $50,000, payable in county warrants, and this bid was the lowest bid made, and was accepted by the board, and a contract entered into. Their action was reported to the county court, and the court approved the contract and ordered the commissioners to proceed with the work of construction.

The appellant in his complaint alleged that the orders of the levying court and the county court were void, first, because said order was made on the 19th day of February, 1927, which was not a day of the regular term of said court, and no meeting for said day was legally called; second, that the Northern District of Arkansas county had no courthouse, and has never had, and it is alleged that the county court has no authority to contract for the erection of a new courthouse by warrants payable in the future; third, it is alleged that the annual income or revenue of the county is insufficient, after meeting the necessary expenditures for the life of the contract, to meet the payment of the warrants as they become due. It is also alleged that the courthouse could be built, according to plans and specifications, for $34,000 or $35,000, instead of $50,000. And the evidence showed that the courthouse, which will, if built according to plans and specifications and paid for in warrants payable over a number of years, cost $50,000, could be built for $34,000 or $35,000 cash.

Appellant's first contention is that the order of the county court was void because there was no emergency. The statute provides that, in case of an emergency, the county court may call a meeting of the quorum court, and said quorum court shall have authority to act upon any matter designated in the order of the county court calling for such meeting. It is admitted that the quorum court was called under § 1977 of Crawford & Moses'

Digest, and that the right to do so was based on the fact that an emergency existed.

Appellant insists that there is no emergency, because the Northern District of Arkansas County had no courthouse, has never had a courthouse, and that it has no authority to contract for the erection of a new courthouse by warrants payable in the future.

The order of the court calling a meeting of the quorum court recites, among other things, that the county's lease on the building in Stuttgart which it has been using as a courthouse in the Northern District, has expired, and that the county is forced to procure other quarters in which to hold court and keep its records in said district. And it further appears that, from year to year, the county is paying for rents on buildings for courthouse purposes large sums of money, which will, if continued, in a few years amount to enough to build a courthouse. The judgment of the county court recites:

"It is the opinion of the court, in view of the fact that the county is the owner of valuable lots, suitable and well located, that an appropriation should be made and a courthouse be constructed in Stuttgart on said lots as soon as practicable. And the court, being well advised and the premises being fully seen, hereby finds and declares that an emergency exists, and a meeting of the levying or quorum court is hereby called to meet at the courthouse in DeWitt, Arkansas, on the 19th day of February, 1927, at 10 o'clock A. M. on said day, for the purpose of considering and voting an appropriation for the construction of a courthouse in said district," etc.

Unless the county court can build a courthouse, it would have to make arrangements to rent or lease a building in which to hold court and keep the records, and the finding of the county court is that the county would soon pay enough in the way of rent to build a courthouse. Besides that, the county owns, according to the undisputed proof, valuable lots suitable and well located for a courthouse. It is true that the fact that

the county has the lots suitable for a courthouse and needs a courthouse would not justify the calling of the quorum court for the purpose of building a courthouse, unless an emergency existed. And the contention here made is that no emergency existed for calling the quorum court, under § 1977 of Crawford & Moses' Digest; that, even if the county had authority to build a courthouse and the money with which to build it, provision for building same would have to be made at a regular term of the quorum court, unless an emergency exists, and that no emergency is shown to exist.

Emergency, as used in the statute quoted, simply means a pressing necessity. And the county court having found that there was an emergency, and no proof being offered tending to disprove or contradict the findings and judgment of the court, a majority of the court is of the opinion that the facts found by the county court constitute an emergency.

While the writer does not believe an emergency existed under the facts in this case, it is the opinion of the court that there does exist a pressing necessity or emergency, and that therefore the county court had a right to call a meeting of the quorum court to act upon the matters designated in its order.

As to what constitutes an emergency, see *Colfax County* v. *Butler County,* 83 Neb. 803, 120 N. W. 444; *United States* v. *Sheridan-Kirk Contract Company,* 149 Fed. 809; *Mallon* v. *Board of Water Commissioners,* 144 Mo. App. 104, 128 S. W. 764.

The appellant says that, while he does not waive the question of the proper meeting place, he believes it was held at the proper place. We think that this is a correct conclusion.

Act 63 of the Acts of the General Assembly of 1913 establishes two judicial districts in Arkansas County, and it provides for the holding of circuit, chancery and probate courts and the court of common pleas in each district. But it does not provide for holding any county court at Stuttgart, in the Northern District. Therefore

the only place where county court can be held is at DeWitt, the county seat.

It is next insisted by the appellant that the order of the county court and the contract are void because the courthouse, under the contract awarded, will cost $50,000 in county warrants, payable $5,000 a year, when the evidence shows that the same courthouse could be built for $34,000 or $35,000 in cash. And it is insisted that this is in violation of § 1 of article 16 of the Constitution, which, among other things, prohibits any county from issuing any interest-bearing evidences of indebtedness.

The undisputed evidence in this case shows that the county advertised for bids according to law and that the contract was let to the lowest bidder, and there is no contention in this case and no evidence of any fraud or collusion. This is not a contract to pay interest, but it is a contract to build a courthouse for a specified sum of money, to be paid in annual installments, and this question has been settled by several decisions of this court, and it is no longer open to question whether a contract of this kind is valid.

In the case of *Campbell* v *High,* 176 Ark. 222, 2 S. W. (2d.) 1101, it was contended 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 was 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; that the cost of said courthouse and jail, if paid for in cash, would not exceed the sum of $150,000. In passing on that question the court said:

"In *Stone* v. *Mayo,* 135 Ark. 130, 204 S. W. 751, 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 kind 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 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 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." *Campbell* v. *High,* 176 Ark. 222, 2 S. W. (2d.) 1101. See also *Kirk* v. *High,* 169 Ark. 152, 273 S. W. 389; *Ivy* v. *Edwards,* 174 Ark. 1167, 298 S. W. 1006; *Lake* v. *Tatum,* 175 Ark. 90, 1 S. W. (2d.) 55; *Norman* v. *Blair, ante* p. 649.

We think the cases cited above settle all the questions raised in this case, and a review of the authorities here would serve no useful purpose The evidence shows that the annual income or revenue is sufficient to meet the payments after paying the necessary expenses of the county. The authorities on all the questions involved in this case may be found reviewed in the cases above cited.

Under the authority of the recent decisions of this court, the decree of the chancellor is affirmed.

HOME FIRE INSURANCE COMPANY *v.* PARKER.

Opinion delivered June 18, 1928.

Wynne & Miller, for appellant.

Moore, Walker & Moore, for appellee.

McHANEY, J. Appellee held a policy of fire insurance in the Home Fire Insurance Company of New York, written by Hugh Mixon of Marianna, covering certain personal property, in the sum of $1,000. This company directed Mr. Mixon to cancel said policy, and on the 8th day of January, 1927, he canceled the policy, and issued another policy for appellant to appellee, covering the same risk and for the same amount. On said date Mr. Mixon wrote appellee the following letter:

"January 8, 1927.

"Mr. E. L. Parker,

"Lexa, Arkansas.

"Dear Mr. Parker: This insurance company in which I have your household goods policy is not being written by us any longer. We are today renewing your insurance in another company, and will run one year from date.

"Please return the policy you now have and we will give you credit for return premium and apply it on the new policy.

"If you decide to move to Marianna, the policy will not be affected except in a reduction in rate. I have a house I want you to look at when you arrive here.

"With very best regards,

"Yours very truly,

"Hugh Mixon Agency.

"Manager."

Appellant's policy, although issued on that date, was not countersigned and delivered to appellee until after the loss occurred on the 12th day of January, 1927. There is a clause in the policy of the Home Fire Insurance Company of New York, as in all standard fire insurance policies, to the effect that a policy remains in force five days after notice of cancellation is given, and the loss occurred within the five-day period. Appellee made proof of loss, and demanded payment of the full amount of his policy, the total loss being more than $1,800, which appellant refused to pay and this lawsuit followed, resulting in a verdict and judgment against appellant for the full amount sued for, plus 12 per cent. penalty and an attorney's fee of $150.

It is first insisted that the court committed error in refusing appellant's request for a peremptory instruction. This contention is based on the ground that the policy of the Home Fire Insurance Company of New York was still in effect on the date of the fire, by reason of the five-day cancellation clause heretofore mentioned, and that, under the concurrent insurance clause in its policy, same never became effective and binding on it, because of the prior insurance existing in the Home of New York. We do not agree with counsel in this contention, as the letter of Mr. Mixon to appellee shows clearly that he had canceled the policy of the Home of New York, and that he had renewed the risk in appellant company. The five-day clause referred to does not apply to a situation of this kind. It is for the benefit of the policyholder. While the company has the right to cancel it, it cannot do so until the expiration of five days, without the consent of the policyholder, which gives him

this time in which to secure additional insurance. Being for the benefit of the policyholder, it is a provision that can be waived by him, and was waived in this case by the acquiescence of appellee in the action of Mr. Mixon, who stated that he had canceled the policy in the Home of New York, and had re-written it in appellant company, to run one year from date, and it makes no difference that the policy was actually countersigned and delivered after the fire, because the appellee rested under the assurance of Mr. Mixon that his risk was covered. Mixon was the general agent for both companies, holding blank policies, with the power to execute and deliver and bind his companies immediately on fire insurance risks. *Milwaukee Mechanics' Ins. Co.* v. *Fuquay,* 120 Ark. 330, 179 S. W. 497.

In the case of *Phoenix Insurance Co.* v. *State,* 76 Ark. 180, 88 S. W. 917, 6 Ann. Cas. 440, this court held that an agent authorized to write policies of insurance may also act as the agent of the property owner, by agreement with the owner to keep his property covered with insurance, and to select the companies in which the policies shall be written. We think we may safely assume, in this case, that the agent of appellant had authority from appellee to keep his property insured. At least the agent assumed such authority by canceling the policy then held by appellee and reissuing it in appellant company. It cannot therefore be said that the action of the agent was without the authority of the assured, nor is there an attempted cancellation by substitution of the policy of another company. There was an actual cancellation and an actual issuance of another policy. Therefore the cases cited by appellant have no application to the facts in this case.

Appellant also complains of instruction No. 1 given by the court at appellee's request, as follows:

"You are instructed that, if you find from the evidence that Hugh Mixon was the agent of the defendant insurance company, and that he informed the plaintiff that he had canceled the policy issued by the Home Fire

Insurance Company of New York, and had placed a policy for a like amount in the Home Insurance Company of Fordyce, then you are instructed that the defendant would be bound by such statement, and you should find for the plaintiff."

It is said that this instruction is erroneous, because the agent had no such authority, but it will be seen from what we have already said that he did have this authority. And it is further said that it is in conflict with instruction No. 6, given at appellant's request. Instruction No. 6 simply was the converse of No. 1. It told the jury that, if they found the policy in the Home Insurance Company of New York had not been canceled at the time the fire occurred, the judgment should be for the defendant. The instructions are not in conflict, and were correct declarations of law.

We find no error, and the judgment is affirmed.

BRYAN *v.* AKERS.

Opinion delivered June 18, 1928.

C. P. Harnwell, for appellant.

Jay M. Rowland, for appellee.

McHANEY, J. On June 19, 1927, appellant's Essex automobile was stolen in Little Rock and, a few days later, the police department of Little Rock was notified by appellee, a private detective of Hot Springs, that he had located the car, and wanted to know if there was a

reward offered. He was advised that no reward was offered, and there was no theft insurance on the car. Akers found out that the car belonged to Bryan, and, on June 29, had the car hauled in from some distance out of Hot Springs and put in his back yard, in the city. On the night of June 29 he called up Bryan, and, according to Akers, told him he had found his car, that it was nine miles out in the country, and that Bryan told him to get the car and bring it in. According to Bryan, he did not ask him to get the car, but that Akers told him he already had the car, and that if he wanted it to come and get it. Bryan went to Hot Springs the next day, paid all telephone calls and the charges made by the Red Ball Garage for towing the car in, but refused to pay Akers anything for the recovery of the car. It appears that Akers was a deputy sheriff at the time. Akers refused to surrender the car until the bill was paid, and appellant instituted replevin in the municipal court, gave bond, and secured an order of delivery. Akers filed a cross-bond, and retained possession of the car. In the meantime Akers stored the car in the National Park Garage, C. Floyd Huff, Jr., proprietor, where it remained until the order of the circuit court releasing it, November 25, 1927. This replevin suit was dismissed by the municipal court on July 16, and an appeal taken to the circuit court, where judgment was rendered against appellant in favor of the National Park Garage and C. Floyd Huff, Jr., for storage on the car in the sum of $35, and to Akers $24.40 for expenses and services performed in securing the return of said automobile. Possession of the car was awarded to appellant by the circuit court upon the payment of the above sums. He deposited a cash bond in the sum of $200, and took his appeal to this court.

We think the circuit court erred in so far as it rendered judgment in favor of the National Park Garage or Akers. The National Park Garage is not a party to this action, did not intervene or file any claim asking judgment for storage, and the court therefore had no jurisdiction to render judgment against appellant in favor

of a person not claiming it; but, even if it had filed an intervention, appellant would not have been liable, as appellee had no right to retain possession of said car, demanding compensation for his services in securing the car. He testified himself that he was a deputy sheriff, a commissioned officer, and he therefore had no authority in law to make a charge for his personal services in securing the car. It is not disputed that appellant paid all charges, including telephone bills, which were rather extravagant, in connection with the car. He made no contract with appellee, and, under the circumstances, the law implies none. If there is any liability against any one for the storage of the car in the National Park Garage, it is the liability of appellee, as he gave the cross-bond in retaining possession of the car, and stored it on his own motion in the National Park Garage.

Appellant claimed damages in the sum of $100 for the wrongful detention of his car, but he made no proof of the amount of damages he was entitled to, or, if so, he did not abstract it.

The judgment of the circuit court will therefore be affirmed in so far as it awarded possession of the automobile to appellant, and will be reversed and dismissed in all other particulars.

A. J. CHESTNUT COMPANY *v.* HARGRAVE.

Opinion delivered June 25, 1928.

Wooldridge & Wooldridge, for appellant.

John T. Cheairs and *Williamson & Williamson,* for appellee.

HART, C. J., (after stating the facts). Counsel for the respective parties recognize the rule laid down in *Clark* v. *Wilson,* 171 Ark. 323, 284 S. W. 23, to the effect

that one who purchases lumber for a valuable consideration, in good faith, and without knowledge of liens existing thereon under the statute, is to be protected.

Counsel for appellant seek to reverse the judgment on the ground that there is no testimony in the record from which the circuit court might have found that appellant purchased the staves without any notice of the claims of appellees for liens. On the other hand, counsel for appellees seek to uphold the judgment on the ground that the evidence was sufficient to constitute notice to appellant. In making this contention, they rely upon the fact that Huggins was the general agent of appellant, or that at least he had apparent authority to act for appellant, and that knowledge to him was therefore knowledge to appellant. The rule in this State is that a principal is bound by all that is done by his agent within the apparent scope of his authority, and the authority given to and exercised by Huggins carried with it the apparent power to act for appellant in all matters connected with the operation of its lumber yards. In short, the general rule in this State is that the principal is bound by the acts of his agent which are within the real or apparent scope of his authority. *Security Life Ins. Co. of America* v. *Bates,* 144 Ark. 345, 222 S. W. 740; *Battle* v. *Draper,* 149 Ark. 55, 231 S. W. 869; *Bartlett* v. *Yochum,* 155 Ark. 626, 245 S. W. 27; *Ozark Mutual Life Association* v. *Dillard,* 169 Ark. 136, 273 S. W. 378; and *General Motors Acceptance Corporation* v. *Salter,* 172 Ark. 691, 290 S. W. 584.

Tested by this rule, we think that the circuit court might find that the appellant was not an innocent purchaser of the lumber. It is true that the evidence for appellant tended to show that the authority of Huggins was confined to inspecting lumber and shipping it upon orders given to him from the home office at Memphis. Be that as it may, the facts show that he at least had apparent authority in the premises. Appellant had three lumber yards in the same territory in the State of Arkansas. One of these was at Winchester, where the lum-

ber in question was received and inspected. Huggins had charge of all three of these lumber yards. He received and inspected all the lumber brought there. He attended to the shipping of all lumber from all of these yards. It is true that, according to the evidence for appellant, the lumber was shipped out upon order from the home office at Memphis, but all the shipping was done by Huggins, and all the lumber was received in each of these yards by him. In fact, he alone had charge of the yards. It is admitted that he had notice of the existence of the liens of appellees, and, under these circumstances, we think the circuit court was justified in finding as a fact that his notice was notice to appellant.

It follows that the judgment will be affirmed

NOWLIN *v.* NOTEWARE.

Opinion delivered June 25, 1928.

T. E. Helm and *A. W. Taylor,* for appellant.

F. L. Brown and *T. N. Robertson,* for appellee.

HART, C. J., (after stating the facts). Counsel for appellant seek to reverse the decree on the theory that the letters "O. K." before the signature of E. C. Nowlin render the contract ambiguous and let in oral proof of the contract between Noteware and Nowlin. In that contention we think counsel are correct.

In *Penn Tobacco Company* v. *Leman,* 109 Ga. 428, 34 S. E. 678, the Supreme Court of Georgia held, quoting syllabus: "A petition alleging that the letters 'O. K.' written on an order for goods, and followed by the signature of the person writing them, constituted a contract on the part of such person to pay for the goods in the event the persons sending the order failed or refused to pay at maturity, set forth a cause of action. These letters being ambiguous, their meaning may be explained by parol evidence." The court said that the letters "O. K." before the signature of the defendant rendered the contract ambiguous, and therefore parol evidence would be heard to explain the patent ambiguity appearing upon the paper. In that case it was alleged that the parties had agreed that payment of the account at maturity would be made by the defendant in case the purchaser failed to pay the same. In other words, it was held that parol evidence was admissible to show what the parties

had really agreed to, because all of the contract had not been expressed in writing. The letters "O. K." rendered the written contract ambiguous and let in parol proof as to what the parties meant by inserting these letters before the signature of the defendant.

It is true that the letters "O. K." have a very definite dictionary meaning, which is "all right; correct;" but the connection in which the letters are used must be taken into consideration. When this is done, we think that the letters "O. K." before the signature of Nowlin rendered the contract ambiguous, and that the significance of these letters should be interpreted in the light of the facts as they appear in the record, with the sole object in view of ascertaining the intention of the party or parties using them. If Nowlin had intended signing the contract as one of the builders, there would have been no sense in having the letters "O. K." before his signature. His assent was simply to the form of the contract, and no further. The contract being ambiguous by the use of the letters, it was competent for the parties by parol proof to show what the real contract between Nowlin and Noteware was. *Humphreys* v. *Sorrens,* 33 Wash. 563, 74 Pac. 690.

This brings us to a consideration of the case on its merits. Here we find the testimony of the parties in irreconcilable conflict as to what was the intention of Nowlin in signing the contract with the letters "O. K." before his signature. On the one hand, Noteware testified that Nowlin signed the contract for the purpose of guaranteeing that Veazey would execute it. On the other hand, both Nowlin and Veazey testified that Nowlin was not in any sense bound for the performance of the contract, and only signed it for the purpose of enabling Noteware to finance the building of the houses until they were partly completed and he could secure a loan upon them. The record shows that no loan could be secured until after the roof was on a house. Nowlin was a dealer in lumber and other building material, and, by financing the contract, had an opportunity to sell

his materials. This induced him to sign the contract with the letters "O. K." before his signature, and he was not in any sense bound by any of the terms of the contract of construction between Noteware and Veazey. In this view of the matter, the chancellor erred in dismissing the defendant's cross-complaint; for the evidence in his behalf shows that he filed a lien for materials furnished within the statutory period and that the materials were actually used in the construction of the houses.

Therefore the decree will be reversed, and the cause will be remanded with directions to the chancery court to enter a decree in favor of Nowlin for the amount of material furnished by him in constructing the houses, as shown by the record in this case, and for further proceedings in accordance with the principles of equity. It is so ordered.

ORDER OF RAILWAY CONDUCTORS OF AMERICA *v.* BANDY.

Opinion delivered June 25, 1928.

Block & Kirsch, for appellant.

Jeff Bratton and *Cooley, Adams & Fuhr,* for appellee.

HART, C. J., (after stating the facts). The office of the writ of prohibition is to restrain an inferior tribunal from proceeding in a matter not within its jurisdiction; but it is never granted unless the inferior tribunal has clearly exceeded its authority and the party applying for it has no other protection against the wrong that shall be done by such usurpation. *Russell* v. *Jacoway,* 33 Ark. 191; *Monette Road Improvement District* v. *Dudley,* 144 Ark. 169, 222 S. W. 59; and *Dist. No. 21 United Mine Workers of America* v. *Bourland,* 169 Ark. 796, 277 S. W. 546. The rule announced in these cases is that the writ of prohibition is an appropriate remedy to restrain the exercise of jurisdiction by an inferior court over a subject-matter when it has none and over parties where it can acquire none.

Where the court has jurisdiction over the subject-matter, and the question of its jurisdiction of the person turns upon some fact to be determined by the court, its decision that it has jurisdiction, if wrong, is an error, and prohibition is not the proper remedy. Works on Courts and Jurisdiction, page 634. But that condition is not the status here. The question of jurisdiction in the case at bar does not turn upon the sufficiency or insufficiency of the service of process, and the fact that

the circuit court held it to be sufficient does not avail. A different rule prevails where there is an entire want of service or where, upon the face of the record, it is shown that there was no service and that none could be acquired. In the case at bar the jurisdiction or lack of jurisdiction of the circuit court did not depend upon facts which are not made a matter of record in the proceedings in that court. It appears from the face of the record in the case in the circuit court that it was not authorized to proceed, and it affirmatively appears from the face of the record that no service of process was had upon the defendants and that they did not enter their appearance.

According to the allegations of the complaint of the plaintiff in the circuit court, the benefit certificate or policy sued on was issued, delivered and payment was required at the home office of the insurance company in the State of Iowa. There is no showing whatever that the insurance company did any business in the State of Arkansas or that it had any property here which could be impounded by the court in an action against it. Service was attempted to be had upon it by service of summons upon the Insurance Commissioner, under our statute authorizing such service. It is obvious, however, that such service could not be had upon nonresidents, whether persons or corporations, who did not do any business in this State. If such were the law, a person could make a contract of insurance with either a person or corporation in any State of the United States and then, by simply removing to this State, could acquire jurisdiction over such person or corporation, whether it had any property in this State or did any business in this State or not; and this would extend the jurisdiction of our courts beyond the territorial limits of the State, which every one would concede could not be done. In the very nature of the case, courts of the various States can only exercise jurisdiction over persons and property within the territorial limits of the State. Nonresidents can only be sued where they have entered the

State of Arkansas for the purpose of doing business here, or have acquired property in the State which may be impounded in a proper action. No such state of affairs exists in the present case. As we have already seen, the policy was issued, delivered and made payable at the office of the insurer in the State of Iowa, and there is nothing whatever in the record tending to show that it has any property or has attempted to do any business in the State of Arkansas.

If it had proceeded further in the matter, this court, upon appeal, would have quashed the service of summons; but such action on the part of the defendants would have entered their appearance to the action. In an unbroken line of decisions this court has held that a party appealing from an order denying a motion to quash service of summons will be treated as in court, although the service is held invalid. Moreover, the appearance is general, and the defendant, by appealing, becomes a party to the proceeding, and must follow the case to its conclusion or take the consequences. *Murphy* v. *Williams,* 1 Ark. 376; *Hodges* v. *Frazer,* 31 Ark. 58; *Benjamin* v. *Birmingham,* 50 Ark. 433, 8 S. W. 183; *Waggoner* v. *Fogleman,* 53 Ark. 181, 13 S. W. 729; *Southern B. & L. Assn.* v. *Hallum,* 59 Ark. 583, 28 S. W. 420; *Ark. Coal, etc. Co.* v. *Haley,* 62 Ark. 144, 34 S. W. 545; *Beal-Doyle Dry Goods Co.* v. *Odd Fellows Building Co.,* 109 Ark. 77, 158 S. W. 955; and *Duncan Lumber Co.* v. *Blalock,* 171 Ark. 397, 284 S. W. 15, and cases cited.

The theory of these cases is that the defendant recognizes the case as being in court, with jurisdiction over the parties, by appealing. The reason underlying the doctrine is that no appeal could be taken by a party unless the court acquired jurisdiction over his person, and he necessarily assumes the attitude that such jurisdiction had been acquired when he appeals, and, having taken that position, he is bound thereby and will not be heard afterwards to say otherwise. And, if the defendants had appealed from the order of the court refusing to quash the service of summons on them, they

would have become parties to the action, and must have followed the suit to the end.

In this view of the matter, it will be readily seen that the defendants had no adequate relief in the circuit court, and the face of the record in the circuit court shows that it was about to exercise judicial power over persons who had never been served with process and over whom no service of process could be had, and who absolutely refused to enter their appearance to the action. A case directly in point is *People* v. *Judge of the Wayne Circuit Court,* 26 Mich. 100. In that case there was a motion for prohibition. The record shows that a summons from the Wayne Circuit Court was issued against a nonresident of the State who was not found in the State. In a *per curiam* opinion it was said:

"The Wayne Circuit Court acquired no jurisdiction of the case. To give jurisdiction for the purpose of supporting the garnishee proceedings, it is necessary that some sort of service as to the principal defendant should be made within the county, either upon the person or upon the property or credits. Merely taking out a summons, which is never served, is not enough. The statute which authorizes the service of notice out of the State, presupposes that some sort of service has been made in the county, giving the court jurisdiction; and the notice is required for the purpose of fairness, and to preclude secret and collusive proceedings."

We are of the opinion that it appears from the face of the record that the circuit court was about to proceed in a case where it had no jurisdiction over the persons of the defendants, and could acquire none. The writ of prohibition asked for will be granted, and the clerk is directed to issue the writ restraining or prohibiting the circuit court from proceeding further in the case. It is so ordered.

FALLS *v.* DRIVER.

Opinion delivered May 14, 1928.

A. F. Barham and *J. F. Gautney,* for appellant.

J. T. Coston, for appellee.

MEHAFFY, J. Appellants filed in the chancery court of Mississippi County, Arkansas, Osceola District, a complaint seeking to foreclose a mortgage or deed of trust executed by William Walter Driver on April 12, 1921, to E. F. Falls and others, trustees for J. T. Fargason & Company and other creditors of William Walter Driver, and among other property included in the mortgage was an undivided one-seventh interest inherited by William Walter Driver from his mother, Mrs. S. L. Driver, in and to lands described in plaintiffs' complaint. Thereafter Abner Driver, administrator of the S. L. Driver estate, filed an intervention claiming lands described in plaintiff's complaint as the one-seventh interest in the S. L. Driver estate, stating that the total value of the estate would not exceed $126,000, and that W. W. Driver is entitled to an undivided one-seventh interest; that W. W. Driver is indebted to the said S. L. Driver estate in the sum of $42,140.71, which indebtedness was incurred prior to the execution of the trust agreement set out in plaintiff's complaint, and that the same is now due and unpaid; that the administrator of the S. L. Driver estate never became a party to nor agreed to the trust agreement, but has always refused to agree to said trust agree-

ment and refused to release any lien or claim against Driver that the estate might have on any part or share of said estate belonging to said W. W. Driver; that the indebtedness of W. W. Driver was incurred in the lifetime of Mrs. S. L. Driver, deceased, and is a prior claim upon defendant's one-seventh interest.

Appellants answered the intervention, and denied all the material allegations thereof, and pleaded the one-year and the two-year statutes of limitation, and that the claim was barred by laches.

The claim of the estate against W. W. Driver consisted largely of promissory notes, the first one being dated November 1, 1909; one was dated 1910; one 1911, and three in 1912, and of checks given W. W. Driver by S. L. Driver in her lifetime. A list of the debts, together with a list of payments on notes and accounts, were introduced in evidence and the testimony of witnesses then taken, the testimony on the part of the interveners tending to show that Driver owed the estate the amount claimed and that the administrator of the estate was present at some of the meetings when the giving of the deed of trust or mortgage sought to be foreclosed was discussed, and it was also shown in evidence that many of the credits claimed were not indorsed on the notes, and that some of the payments were made after the notes were barred by the statute of limitations. It is unnecessary to set out the testimony in detail.

Appellants' first contention is that the finding of the court as to the amount of the indebtedness is clearly against the weight of the evidence, and in fact without any substantial evidence to support it, and it is claimed that the testimony, instead of showing an indebtedness of $36,788.33, as found by the court, showed a balance due of only $15,894.14.

We think the testimony, if believed, justifies the finding of the chancellor. There was no testimony contradicting the statement of the witnesses, and W. W. Driver testified that he owed the amount claimed, and the auditor's report also showed the amount claimed, and

there was no testimony contradicting this. We therefore conclude that the findings of fact by the chancellor were not against the preponderance of the evidence, and, that being true, the findings of fact by the chancellor will not be disturbed.

It is next contended that the notes are barred by the statutes of limitation of one year and two years. No other statute of limitation is pleaded. Appellants do, however, plead that the claims are stale and should be disallowed on that account.

The evidence, without dispute, shows that these claims were made during the lifetime of Mrs. S. L. Driver and prior to the mortgage executed by W. W. Driver, and, under the evidence in this case, the claims were not barred by the statutes of limitation pleaded by the appellants. Driver himself did not plead the statute of limitation, and testified that he owed debts.

It is next contended that the interveners relied on the notes and checks being advancements to W. W. Driver, and appellants contend that, if they were not advancements, then the land descended to Driver free of any claim which the administrator of the estate of S. L. Driver may have had against W. W. Driver, and that the land is subject to the claims of the appellants, and that the sale under execution is good as against the administrator.

Appellants call attention to and rely on *Wheeler & Motter Mercantile Co.* v. *Knox,* 136 Ark. 95, 206 S. W. 46. That case quotes § 2636 of Kirby's Digest as follows: "When any person shall die, having title to any real estate of inheritance, or personal estate, not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed, in parcenary, to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following manner: First. To children, or their descendants, in equal parts. * * *." Attention was then called to the fact that the case of *Kelly's Heirs* v. *McGuire,* 15 Ark. 555, held that the ef-

fect of this section was to vest an absolute estate of inheritance in lands in the person who takes, subject to the indebtedness of the intestate and the rights of dower and homestead, and that this construction has been persistently followed in later cases.

We agree with this contention of the appellants. In the case of *Wheeler & Motter Mercantile Co.* v. *Knox, supra,* the court said: "Sections 2650, 2651 and 2652 of Kirby's Digest make advancements, as defined in those sections, a charge upon the heir's interest in the intestate's real estate. If the Legislature had intended to make an heir's ordinary debt to his intestate a charge upon the heir's interest in the real estate, it would have been easy to include such debts in the sections making advancements a charge. By the inclusion of one, the exclusion of the other is logically inferable. It is insisted by appellee that, notwithstanding the repeated declarations of this court that an absolute title to an intestate's real estate descends to the heir subject to the intestate's debts, dower, homestead rights and advancements, it descends subject also to the general indebtedness of the heir to the intestate. The case of *Wilson* v. *Slaughter,* 53 Ark. 137, 93 S. W. 515, is cited as decisive of their contention. The facts in that case are entirely different from the facts in the instant case. In that case, Edwin Jones mortgaged his lands to secure his brother John's indebtedness. * * * In the instant case, A. S. Knox was in no sense a mortgagor of his own undivided interest in the real estate. It was not pledged in the lifetime of the intestate to secure A. S. Knox's indebtedness. No part of the land was appropriated to the payment of A. S. Knox's debts prior to the procurement of appellant's judgment."

In the instant case there is no claim of advancement, but it is claimed that the ordinary debts of W. W. Driver to the estate of S. L. Driver was a charge on the real estate. In other words, that he took the real estate after deducting the amount of his indebtedness to the estate. This question is decided directly against appel-

lee in the case last mentioned. W. W. Driver could have mortgaged his interest in his mother's estate to secure the payment of his debts to the estate, or he could have conveyed it, but he could also mortgage it to secure his other debts, and this is what he did. He executed a mortgage on this property in 1921 to trustees for the benefit of his creditors, and in December, 1924, he conveyed his interest in the property to the other heirs. If his conveyance to the heirs had been prior to his mortgage, it would have been a valid conveyance, because, as this court has held, the land descended, upon the death of the owner, to the heir, free of any indebtedness from the heir to the owner, as stated in the case above referred to. "In this State it is firmly established that the real estate of the intestate descends directly to the heirs upon the death of the ancestor subject to the statutory exceptions. There is no statute incumbering an heir's interest in real estate with his indebtedness to his ancestor." It descended to W. W. Driver free of any charge or lien. He could therefore make any disposition of it that he wished to make.

It would be useless to prolong this opinion, because we hold that this case is controlled by the case of *Wheeler & Motter Mercantile Co.* v. *Knox, supra.*

It follows therefore that the decree on cross-appeal must be affirmed, and that the decree must be reversed on the appeal, and the cause remanded with directions for further proceedings not inconsistent with this opinion.

WATSON *v.* STATE.

Opinion delivered June 25, 1928.

[redacted]

W. H. Neal, I. S. Simmons, J. P. Clayton and *C. M. Wofford,* for appellant.

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

WOOD, J. C. J. Watson was indicted in the Crawford Circuit Court for the crime of murder in the first degree in the killing of one Jim Jackson. He was also indicted for the crime of murder in the first degree in the killing of one Henry Hamm. There was a change of venue to the Ozark District of Franklin County, where Watson was tried for killing Jim Jackson. He was convicted of murder in the second degree, and sentenced

by judgment of the court to imprisonment in the State Penitentiary for a period of twenty-one years, from which judgment is this appeal.

1. On the 26th day of November, 1927, appellant filed his petition for a change of venue, in which he set up, among other things, that the sheriff of Crawford County—who would have to summon the necessary panel of jurors to try appellant—and his deputies were prejudiced against the appellant, and that the minds of the inhabitants of Crawford County were so prejudiced against him that he could not obtain a fair and impartial trial in that county. He therefore prayed "that he be granted a change of venue to some other county of this circuit most convenient to all parties and where defendant can most nearly obtain a fair and impartial trial." On the day the petition was filed the court granted same, and ordered the cause transferred to the Ozark District of Franklin County, and set the same for trial on December 13, 1927. On the 28th of November, 1927, the appellant moved the court to quash the order granting the change of venue and transferring the cause to the Ozark District of Franklin County. He set up in this motion that he did not know, at the time of filing his motion for a change of venue, that there would be a special term of court in the Ozark District of Franklin County on December 13, 1927; that the shooting which resulted in the deaths of Henry Hamm and Jim Jackson and in the wounding of Bird Walker, deputy sheriff of Franklin County, occurred on the line between Crawford and Franklin counties; that the sheriff of Franklin County and Bird Walker, his deputy, were in the posse which captured the appellant, and they at the time shot at and tried to kill the appellant; that the sheriff of Franklin County and his deputy were material witnesses against the appellant; that the deceased parties were reared in Franklin County and had many near relatives and close friends in that county; that the killing had been widely discussed throughout that county, and appellant believed that the minds of the inhabitants

of that county were so prejudiced against him that it would be impossible for him to obtain a fair and impartial trial therein. He further set forth that the sheriff of that county and his deputies would have to summon the jurors necessary to try the appellant. Appellant alleged that he believed that the adjourned term of the Ozark District of Franklin County Circuit Court had been fixed in order that the appellant might be taken to the Ozark District of Franklin County for trial in case the venue was changed. Appellant therefore prayed the court to quash the order directing the change of venue to the Ozark District of Franklin County and set the cause for hearing in the Crawford Circuit Court.

The court overruled the motion of appellant to be allowed to withdraw his motion for a change of venue, and refused to annul its former order transferring the case to Franklin County. On the 13th day of December, 1927, the appellant filed his motion to dismiss the cause for want of jurisdiction in the Franklin Circuit Court. He attached to this motion the motion he had filed in the Crawford Circuit Court asking to be permitted to withdraw the motion for a change of venue and that the cause be tried in the Crawford Circuit Court. He therefore prayed that the cause be dismissed in the Franklin Circuit Court and transferred back to the Crawford Circuit Court for trial. The court overruled the motion. At that adjourned term of the court there was a mistrial of the cause, and the same was continued and set for trial February 23, 1928.

On February 23, 1928, the motion to dismiss for want of jurisdiction was renewed. In this motion the appellant again set up the former allegations to dismiss for want of jurisdiction, setting up that the order transferring the cause to the Ozark District of the Franklin Circuit Court was erroneous, and, under the circumstances, did not give that court jurisdiction, and appellant prayed that the cause, for the reasons before stated, be transferred to the Crawford Circuit Court. The motion to dismiss in the Franklin Circuit Court for

alleged want of jurisdiction in that court was signed by appellant's attorneys. The motion to dismiss the cause in the Ozark District of the Franklin Circuit Court and to transfer the same to the Crawford Circuit Court was overruled. The appellant duly objected and excepted to all the above rulings. Such rulings are assigned as error in appellant's motion for a new trial, and he contends that the judgment should be reversed on account of such rulings.

The petition of appellant for change of venue was made to the court in term time, and the order of the Crawford Circuit Court granting the prayer of the petition did not became a final order until the adjournment of the court. *Wells Fargo & Co.* v. *Baker,* 107 Ark. 415, 155 S. W. 122, and cases there cited; *Spivey* v. *Taylor,* 144 Ark. 301, 222 S. W. 57. This rule applies to orders directing the change of venue as well as to any other order of the court. In 15 R. C. L., 688, it is said:

"All courts of record have inherent power to vacate or set aside their judgments or orders during the term at which rendered. This is a power of daily exercise by the courts, and its existence, within proper limitation of time and propriety, cannot be questioned; it is based upon the substantial principles of right and wrong, to be exercised for the prevention of error and injury, and for the furtherance of justice."

Therefore the circuit court of Crawford County had not lost jurisdiction to entertain the appellant's motion to withdraw his petition for change of venue and to annul the order directing a transfer of the case to the Franklin Circuit Court. The petition for change of venue from the Crawford Circuit Court, alleging that the minds of the inhabitants of Crawford County were so prejudiced against the appellant that he could not obtain a fair and impartial trial therein, was duly verified by the appellant himself and was supported by the affidavit of two persons. The prayer of the petition was that the change be made to some other county of the circuit "most convenient to all parties and where defendant

could most nearly obtain a fair and impartial trial." The petition for change of venue set up that certain articles exceedingly derogatory to the appellant had been published by the press of Van Buren, a newspaper at Mulberry, in Crawford County, in Fort Smith papers, and the Arkansas Gazette, which were calculated to poison the minds of the inhabitants of Crawford County against the appellant. Some of these articles were attached to and made a part of the petition.

The record shows that the court, after hearing the argument of counsel and being well and sufficiently advised, sustained the motion for change of venue, and transferred the cause to the Ozark District of Franklin County, which was doubtless known by the court to be most convenient to all the parties, as set up in the prayer of the petition. Two days thereafter the appellant and his counsel changed their minds, and, after they discovered that there was an adjourned term of the Ozark District of Franklin Circuit Court to meet on December 13, 1927, they asked to withdraw the petition for change of venue and to have annulled the former order transferring the cause, and that the cause be tried by the Crawford Circuit Court. This written motion, signed by counsel for the appellant and verified by him, was not supported by the affidavit of any one else. Nor were the motions of appellant in the Franklin Circuit Court to dismiss the cause in that court and transfer the same back to the Crawford Circuit Court supported by the affidavit of two credible persons, as the statute in change of venue cases requires.

Now it occurs to us that the court did not err in its rulings. The court, at the instance of the appellant, had granted his solemn petition for change of venue, duly verified by himself and supported by the affidavit of two credible witnesses, as required by statute. Two days thereafter the court was requested by the appellant to annul this solemn judgment and let the cause be tried in the Crawford Circuit, where it originated. The affidavit of the two affiants and the newspaper publications and

other circumstances that convinced the court that a fair and impartial trial could not be had in Crawford County were not changed or withdrawn. The court was justified in finding that there were no sufficient grounds stated and proved to justify the court in annulling its former order changing the venue. Changes of venue are exceedingly important orders. Petitions for same should not be presented except in the utmost good faith on the part of the defendant and counsel representing him. The court has the right to assume that the accused and his counsel have made all the necessary investigation of the circumstances as to the terms of court in other counties and as to the prejudice of the minds of the inhabitants in the county where the cause originates and as to all conditions making a change of venue necessary, before a petition for such change is presented. Defendants can not play fast and loose with the court in the matter of petitioning for change of venue. "Statutes authorizing changes in venue are not intended to give a defendant the right to shift the venue back and forth at will, with incidental delays in trying him. Statutes authorizing change of venue are undoubtedly enacted in order to promote the ends of justice, and, unless abused, are reasonably calculated to secure that aim. A tendency has been displayed, however, to make use of the privilege of change to obstruct and delay the progress of litigation, and consequently the courts have felt impelled to lay down certain rules as to the appropriate time for seeking the removal of a cause." 27 R. C. L., page 820, §§ 39 and 40.

If the minds of the inhabitants of Crawford County were so prejudiced against the appellant that he could not obtain a fair and impartial trial in that county, as his petition, duly verified by himself and his supporting witnesses, set forth, and as the court found to be the fact, there was nothing in the motion of appellant, filed two days after the petition was granted, to show that there had been any change in the condition of the minds of the inhabitants of Crawford County in that respect... After

the cause was transferred to the Ozark District of Franklin County the appellant did not petition for a change of venue from that county to a county in the district other than Franklin and Crawford. Appellant's motion to dismiss the cause for want of jurisdiction in the Franklin Circuit Court was, in effect, tantamount to another motion for a change of venue from Franklin County, but the motion did not comply with the statute requiring petitions for change of venue to be supported by the affidavit of two credible persons. Section 3088, C. & M. Digest. It set forth that the persons whom the appellant killed were reared in the Ozark District of Franklin County, and had many relatives there, and also that appellant was indicted for an assault upon Bird Walker, a deputy sheriff of the Ozark District of Franklin County. But none of these were grounds for a change of venue. Nor was it a ground for change of venue that the sheriff of Franklin County and his deputy were prejudiced against the appellant, if that were a fact. For the statute makes ample provision for designating other officers or persons to summon jurors where a reason exists for designating other officers or persons. Section 3147, C. & M. Digest. There was no error in the rulings of the trial court in the matter of change of venue.

2. Appellant was on trial for the killing of Jim Jackson and Henry Hamm. Henry Hamm was the city marshal of the town of Mulberry, in Crawford County, and Jackson was assisting him at the time they were killed in attempting to arrest the appellant. Appellant, in company with his wife, had run his truck against a truck of one Jim Wood, on a bridge about a mile west of Mulberry; he had cursed Wood and shot through the front of his car. Wood reported the matter to Bruce Jackson, a deputy sheriff, and he and Bruce Jackson, without procuring a warrant, went out to arrest the appellant. They met appellant on his way into Mulberry in his truck. Appellant was armed. He stopped Wood and Jackson, and cursed Wood. They went away and left him, and appellant went on to town. When appel-

lant drove into Mulberry, he stopped his truck within a few feet of the curb, and Henry Hamm stepped up to the car and said something to him. Appellant pointed his pistol at Hamm, and commanded him to hold up his hands, and took Hamm's revolver from him, and advised him not to follow him when he left town going back toward Mulberry Creek, where appellant was camped. After appellant took Hamm's pistol, Hamm procured a double-barrel shotgun, and he and Jim Jackson followed appellant out to the bridge, where the killing occurred. Hamm and Jackson did not procure a warrant for appellant's arrest. When they overtook the appellant he turned and met them. They told him to give up, but, instead of doing so, he engaged in battle by firing at the officers, and they in turn fired at him, resulting in the killing of Hamm and Jackson.

Without setting out in detail the testimony, the above is substantially the testimony of witnesses for the State to the shooting. The appellant testified, in substance, that the testimony of the witnesses for the State was all false, and that he killed Hamm and Jackson in self-defense, after they had first attacked him without attempting to arrest him. The above sufficiently sets forth the testimony upon which the court instructed the jury, at the instance of the appellant, in instructions numbered A, B and F, and on its own motion F 2, as follows:

"A. You are instructed that it is the duty of an officer in making an arrest to inform the person about to be arrested of the intention to arrest him, the offense charged against him for which he is arrested, and, if acting under a warrant of arrest, to give information thereof, and, if required, to show the warrant. No unnecessary force or violence shall be used in making an arrest.

"B. You are instructed that a peace officer can only make an arrest for a misdemeanor without a warrant where the offense is committed in his presence. If the offense is not committed in his presence, it is neces-

sary that a warrant be procured before the arrest is legal.

"F. You are instructed that in this case, if you find that the officer, Henry Hamm, assisted by Jim Jackson, went out to Little Mulberry Bridge, near Mulberry, for the purpose of arresting the defendant, C. J. Watson, on an alleged misdemeanor only, and that they attempted to make this arrest without a warrant, and if you find from the evidence that the defendant committed a misdemeanor in the presence of the officer, Henry Hamm, on the streets of Mulberry, then he had the right as an officer to pursue the defendant immediately and arrest him for said misdemeanor, but in doing so he could not shoot him or inflict any great bodily injury upon the defendant, unless it were necessary in his own self-defense.

"F 2. You are instructed that if Jim Jackson and Henry Hamm were not, at the time of the killing, acting in the capacity of officers of the law, with the right so to act, no account should be taken of the fact that they were officers, if you find they were, and that is not a circumstance to be considered by the jury, unless the officers, if they were such, had the right to act in that capacity and were so acting at the time."

The appellant contends that the court erred in not giving his prayers for instructions numbered C, D, E, G, H, and I on the subject of arrest. We will not unduly extend this opinion by setting out these prayers for instructions because, after a careful consideration of same, we are convinced that such of them as were correct declarations of law were fully covered by prayers for instructions asked by the appellant, above set forth, which the court granted, and other instructions on self-defense given on the court's own motion. The appellant contends that the jury were not told in any of these instructions that the appellant had the right to resist an illegal arrest or that the officers had no right to shoot him or to do any great bodily injury in attempting to arrest him, whether with or without a warrant. But when instruction F 2, given by the court on its own

motion, is considered in connection with the instructions given by the court on self-defense, which were correct, it is impossible for any prejudice to have resulted to the appellant in the ruling of the court of which he complains. The instructions given on the subject of arrest correctly declared the law as it has often been announced by this court. *Roberson* v. *State,* 53 Ark. 516, 14 S. W. 902; *Johnson* v. *State,* 100 Ark. 139, 139 S. W. 1117; see also *Adams* v. *State,* 176 Ark. 916, 5 S. W. (2d.) 946. The court ruled correctly in not repeating instructions on the same subject. *Griffin* v. *State,* 160 Ark. 166, 254 S. W. 469.

3. In addition to self-defense, the appellant also defended on the ground that, at the time of the killing, he was insane. The testimony adduced by the appellant on this issue was sufficient to warrant the court in submitting the issue to the jury. The appellant requested the court to grant certain prayers for instructions on this issue, which we deem it unnecessary to set forth, because the court fully and correctly instructed the jury on the issue of insanity, declaring the law on this subject in conformity with the opinion of this court in *Bell* v. *State,* 120 Ark. 530, 180 S. W. 186, and as supplemented by the opinion in *Hankins* v. *State,* 133 Ark. 38, 201 S. W. 832, L. R. A. 1918B, 784.

The instructions on the issue of insanity followed closely the law applicable to such issue as declared by this court in *Bell* v. *State, supra.* It could serve no useful purpose to reiterate the law announced in that case and in *Hankins* v. *State, supra.* The appellant objected generally to the instruction given by the court, and specifically to that part of the instruction relating to emotional and moral insanity. The appellant contends that there was no definition of emotional or moral insanity. But on examination of the instruction we find that the court in the instruction told the jury that "the fact that one's reason is temporarily dethroned by anger, jealousy or any other passion, or the fact that he has become suddenly depraved to such an extent that his conscience

ceases to control or influence his actions, is not a defense to criminal charge. In other words, what is commonly known as emotional or moral insanity is not a defense under the law of this State for one charged with crime.'' The instruction on the proposition of emotional and moral insanity thus conformed to the law as declared by the court in *Bell* v. *State, supra,* and was a sufficiently explicit definition of emotional and moral insanity.

There are no reversible errors in the rulings of the trial court. The judgment therefore must be affirmed.

DUNAWAY *v.* RAGSDALE.

Opinion delivered June 25, 1928.

Gustave Jones and *J. H. Wharton*, for appellant.

Pickens & Ridley, for appellee.

WOOD, J. This is an action by J. G. Ragsdale, administrator of the estate of Roy B. Johnson, against W. N. Dunaway and the New York Life Insurance Company.

The plaintiff set up, in substance, that Roy B. Johnson died in Jackson County on April 19, 1927; that the plaintiff was duly appointed administrator of his estate; that Johnson, at the time of his death, had a life insurance policy in the New York Life Insurance Company, made payable to Johnson's estate, in the sum of $2,000; that, under the terms of the policy, if death resulted from natural causes the company was to pay the estate of Johnson the sum of $2,000, and, in case of accidental death, the sum of $4,000; that Johnson's death was by drowning; that, before his death, Johnson had assigned the policy to the defendant, Dunaway, as collateral security for a debt which Johnson owed Dunaway, the amount of such debt, as plaintiff was informed, being approximately $300; that, without any authority so to do, Dunaway received and the insurance company paid the sum of $2,000 on the policy. The plaintiff prayed that the insurance company be required to file a true copy of the policy and that Dunaway be required to file and prove the amount of the indebtedness of Johnson to him, and that the plaintiff have judgment against the insurance company in the sum of $4,000 and judgment against Dunaway in the sum of $2,000, less the amount of indebtedness due from Johnson to Dunaway, and judgment for penalty and attorney's fee as allowed by law.

Dunaway moved to dismiss on account of misjoinder of cause of action, whereupon the plaintiff dismissed the action as to the New York Life Insurance Company. Dunaway then answered, and denied that the policy had been assigned to him as collateral security, but alleged that the policy was assigned to him absolutely; that the assured, Johnson, agreed with the defendant that, in the event of the death of Johnson, all of the proceeds of the

policy should be paid to Dunaway, because Johnson, at the time the policy was issued, was largely indebted to the defendant.

The cause, by agreement, was submitted to the court sitting as a jury. The plaintiff proved by the defendant that the latter collected the proceeds of the policy in the sum of $1,930. Plaintiff himself testified that, after the death of Johnson, he was appointed administrator of his estate, and had a conversation with the defendant concerning the indebtedness of Johnson to him, in which conversation the defendant stated that he did not know exactly the amount of the indebtedness, but thought that same was between two and three hundred dollars. He stated to the plaintiff that, when he ascertained the amount and collected the insurance, he would pay the difference. Witness called on him two or three times for the amount, but he refused to pay. The reason witness did not take steps to prevent Dunaway from collecting the amount of the policy was because Dunaway promised, when he collected the amount of the policy, to pay witness the difference between the amount of the policy and the indebtedness of Johnson to Dunaway.

Plaintiff, over the objection of the defendant, was permitted to introduce a letter received by the plaintiff from the insurance company, in which it was stated that the administrator of the insured did not have any claim on the policy, as it was made to Mrs. Johnson as beneficiary, and later assigned to the defendant, Dunaway, and that settlement had been made on the policy to the defendant, Dunaway. Also, over the objection of the defendant, the witness was allowed to testify that the deceased, Johnson, told witness that he (Johnson) had borrowed some money from the defendant, Dunaway, to pay the expenses of a trip to Massachusetts, and that he had put up the policy with Dunaway for that money; that he gave Dunaway an assignment of the policy as collateral security. No one was present when Johnson made the statement to the witness in regard to the

assignment of the policy. The defendant duly excepted to the ruling of the court in admitting this testimony.

Alvis Jackson, a witness for the plaintiff, testified that he was the agent of the New York Life Insurance Company, and, as such, wrote the policy on the life of Roy Buck Johnson. Witness did not have a copy of the policy. Witness had a conversation with the defendant, Dunaway, relative to the assignment of the policy. Witness asked Dunaway about the payment of the premium. That was before Mrs. Johnson, the beneficiary in the policy, died. Dunaway stated there would be plenty of money left to pay the premium on the policy after he (Dunaway) got his money. He stated that he had an assignment of the policy for the money that Johnson owed him, and, over the objection of the appellant, the witness stated that Johnson, prior to his death, had told witness the same thing. The witness stated that Johnson had told him that he had made an assignment of the policy to Dunaway for money to go East.

Dunaway testified, in his own behalf, that Johnson and his wife wanted to go back to Massachusetts, and needed some money. Witness had advanced Johnson money to keep his insurance in force, and, when Johnson went back East, he said that he would assign the policies to witness, as witness had done more for him than any of his kinfolks; that, if anything happened to him, the proceeds of the policies were to go to witness. Witness kept the policies in force. When Johnson returned from the East, he could not pay the premiums, and stated that he would just let the insurance go unless witness would keep it up, and told witness if he would keep the premiums paid, witness could have it all. Witness had a complete assignment of the policy on Johnson's life and of the policy on the life of his wife. Johnson owed witness advances on the insurance policy in the sum of $172.50 and a furnishing account in the sum of $637.64. Johnson paid witness something like $600 and he owed witness over $1,200. Witness had a conversation with Ragsdale, after Johnson's death, and did not remember

that he had told Ragsdale that the policy was put up as collateral and that witness would pay him the balance after the indebtedness of Johnson to witness was paid out of it. Witness told Ragsdale that he had an assignment of the policy. He did not think that the question ever came up as to whether it was collateral or not.

The court found that there was a balance due the plaintiff, Ragsdale, as administrator of the estate of Johnson, from the defendant Dunaway, in the sum of $1,087.51, and rendered a judgment in favor of plaintiff in that sum, from which judgment is this appeal.

The appellant, in his answer, alleged that the policy "was assigned absolutely" to appellant. So there was no issue as to the fact of the assignment of the policy to the appellant. The only issue was whether the policy was assigned to the appellant absolutely or merely as collateral security for the indebtedness of Roy B. Johnson to the appellant. The appellant contends that the court erred in allowing appellee to prove by oral testimony that the policy was assigned to appellant as collateral security. But appellee alleged and proved that the policy was in the hands of the insurance company, and that it had been assigned to the appellant. Appellee alleged that he did not have copy of the policy, and asked that copy of the policy be exhibited so that it might be used in evidence. The testimony shows that appellee could not obtain the policy or a copy thereof, but that the appellant could. This is shown by the letter of the insurance company to appellee. Under these circumstances the court did not err in allowing appellee to prove by oral testimony that the policy was assigned to appellant as collateral security.

Appellant contends that the court erred in allowing appellee to prove that Johnson told appellee that he, Johnson, assigned the policy to appellant for money "to go back to Massachusetts on." The above testimony was not competent. Const. Sched. § 2. See also *Lincoln Life Ins. Co.* v. *Smith,* 134 Ark. 245, 203 S. W. 698; *Strickland* v. *Strickland,* 103 Ark. 183, 146 S. W. 501; *Jef-*

ferson v. *Souter,* 150 Ark. 55, 233 S. W. 804; *Parker* v. *Twist,* 150 Ark. 448, 234 S. W. 624. But, since this was a trial before the court, we must assume that the court considered only the competent and relevant evidence. Such is the presumption. *Johnson* v. *Spangler,* 176 Ark. 328, 2 S. W. (2d.) 1089, and cases there cited. The appellant did not ask the court to state in writing the conclusions of fact and law separately. Appellant did not ask the court to make any special findings or conclusions of fact, nor to state any conclusions of law. C. & M. Dig., § 1309. Therefore appellant is not in an attitude to insist here that the trial court's conclusions of fact and law are erroneous, since there is competent and relevant testimony in the record to justify the findings of the court. The court announced in ruling upon appellant's objection to incompetent testimony that "the court will only consider such testimony as is competent." We must presume, as before stated, that the court did that. The record presents no error. Let the judgment be affirmed.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* FULKERSON.

Opinion delivered June 25, 1928.

Wooldridge & Wooldridge, Chas. S. Jacobson, J. R. Turney and *A. H. Kiskaddon,* for appellant.

Coleman & Riddick, for appellee.

SMITH, J. Appellant railway company has the record title to a right-of-way through the plantation owned by appellees, which plantation they inherited from their father, George F. Baucum. This right-of-way is 100 feet wide, 50 feet on each side of the center of the main track, but, for a distance of 1,600 feet opposite the depot at Baucum, the right-of-way south of the center of the track is 100 feet wide, making the total width of the right-of-way for this distance 150 feet. The right-of-way was acquired through two deeds from George F. Baucum, the last of which was executed in October, 1889.

The ordinary width of the right-of-way is 100 feet, and for a number of years the railway company maintained fences on each side of the track on the boundary lines of its right-of-way, and the fence through the Baucum land was a straight line, so that the strip of land here in controversy (50 by 1,600 feet) was inclosed as a part of the Baucum field and excluded from the remainder of the right-of-way. Baucum cultivated this strip as a part of his farm, and continued to do so until his death, which occurred twenty-five years before the institution of this suit, and since his death the strip of land has been cultivated by his heirs as a part of their field, and they testified that they did not know that the railway company claimed this land prior to the institution of this suit, and that they did at all times claim it.

Officers of the railway company testified that the railway company had at all times claimed this strip of land, and that all the maps and plats of their right-of-way showed their claim thereto, and that it was included in the railroad's real estate holdings as certified to the Interstate Commerce Commission for valuation of its property.

In 1903 the following contract was signed by an assistant engineer for the railway company and Mr. Baucum:

"Whereas, the St. Louis Southwestern Railway Company contemplates fencing such portions of its railway, where the danger to travel and loss to the residents and to the company on account of the killing of stock renders it advisable and necessary to do so, it is therefore agreed by and between the St. Louis Southwestern Railway Company, party of the first part, and G. F. Baucum, party of the second part, that, for and in consideration of the mutual advantages to be derived and received by both parties hereto, and one dollar in hand paid by the party of the first part to the party of the second part, the receipt whereof is hereby acknowledged, that the party of the first part will construct such private gates, road crossings or cattle guards upon the land occupied by the party of the second part as are shown by the diagram below; which arrangement is hereby agreed to by both parties, and will be followed and accepted strictly as a final settlement for their mutual advantage."

Attached to this agreement, as a part of it, was a plat of the railroad through Baucum's land, showing the location of the gates, road crossings and cattle guards on the Baucum farm, and this plat shows the right-of-way to be wider opposite the depot than it is elsewhere through the farm, although the plat does not indicate its width at any place.

Officers of the railway company testified that they assumed, without inquiry, that appellees were occupying the strip of land in subordination to the deed of their ancestor, and that no objection was made to its use for the reason that the railway company did not require the use of this land for railroad purposes. A no-fence district was organized, at a date not given, when all fences in the district were removed, and since that time no fences had been maintained along the right-of-way therein. On April 1, 1925, the railway company exe-

cuted a lease to a part of this strip to one Kohler, and when appellees asked Kohler to pay them the rent, the railway company inclosed with a fence, as a part of its right-of-way, the land in question, and when appellees removed the fence this suit was brought.

Appellees testified that they did not know that their father had ever conveyed the strip in question to the railway company, and that their father had at all times cultivated it as a part of his field, and that they had done so since his death under a continuous claim of ownership.

Upon this testimony the court below decreed that appellees were the owners of the land in question, and dismissed the complaint, and this appeal is from that decree.

As appears from the facts stated, the question presented is one of fact, that fact being whether appellees have acquired title by adverse possession to land which their ancestor had conveyed.

The law of the case appears to be well settled. In the case of *Graham* v. *St. Louis, I. M. & Sou. Ry. Co.*, 69 Ark. 562, 65 S. W. 1048, which is somewhat similar under the facts, Mr. Justice RIDDICK said:

"Though the continued possession of the land by the vendor after conveyance executed is not, of itself, sufficient to show a holding adverse to the vendee, yet there is nothing in their relations which will prevent the vendor from acquiring a title by adverse possession. But, before the vendor or those claiming under him can acquire title in that way against the vendee, the intention to hold adversely must be manifested by some unequivocal act of hostility, such as to give notice to the vendee of the intention of the vendor to deny his right and hold adversely to him. Until this is shown, the statute does not commence to run. 1 Am. & Eng. Enc. Law (2d ed.), 818, 819; *Connor* v. *Bell,* 152 Pa. St. 444 (25 Atl. 802); *Paldi* v. *Paldi,* 84 Mich. 346 (47 N. W. 5); *Sherman* v. *Kane,* 86 N. Y. 68. The distinction between a vendor and a stranger in such a case relates to the character of evidence necessary to show that the posses-

sion was adverse. If the parties are strangers in title, possession and the exercise of acts of ownership are, in themselves, in the absence of explanatory evidence, proof that the holding is adverse; whereas if the vendor, after having executed deed, continues to remain in possession, the natural and reasonable inference, in the absence of evidence to the contrary, would be that he holds in recognition of the rights of the person to whom he has conveyed; it not being supposed, from mere acts of possession and ownership not inconsistent with the rights of the vendee, that the vendor intends to deny the title he has conveyed."

While there is a presumption that the grantor who remains in possession after the execution of his deed does so in subordination to the title which he has conveyed, this is not a continuing, enduring presumption. On the contrary, the probative value of this presumption diminishes with the lapse of time, and may, if the possession of the grantor be long enough continued, cease to exist. In the case of *Pullen* v. *Cowan,* 163 Ark. 507, 260 S. W. 401, it was held (to quote a syllabus) that "retention of possession of land by a grantor, after conveyance thereof, is presumed to be for the grantee, but such presumption will not extend over an unreasonable length of time." See also *American Bldg. & Loan Assn.* v. *Warren,* 101 Ark. 163, 141 S. W. 765.

We are of the opinion that the court below was warranted in finding the fact to be that appellees' possession had been of such a character as to rebut the presumption that they were occupying the land in subordination to the grant of their ancestor, and that the railway company was charged with notice of that fact.

Appellees and their ancestor held continuous possession of the land for thirty-nine years, during all of which time they continuously cultivated it as a part of their field, and during most of this time the railway company had itself, by building its fence, included the land in the farm and had excluded it from its right-of-way. It is true that, fourteen years after the execution of the deed

conveying the land to the railway company, Baucum signed an agreement to which a plat was attached showing that the right-of-way through the farm was not of a uniform width, but was wider opposite the depot, but this plat did not purport to show the width of the right-of-way at any place, and was not executed for that purpose. The purpose of its execution was to locate crossings, cattle guards and gates, and all of these were within the hundred-foot right-of-way, and the gates were in a fence fifty feet from the center of the right-of-way. Moreover, Baucum had been dead twenty-five years after the execution of this agreement before the institution of this suit, and during all this time appellees were in possession of the land, cultivating it as a part of their farm.

Under these facts we think the possession of appellees had ripened into title to the disputed strip of land, and the decree of the court below must be affirmed, and it is so ordered.

KIRBY, J., not participating.

INDIAN BAYOU DRAINAGE DISTRICT *v.* DICKIE.

Opinion delivered June 25, 1928.

Chas. A. Walls, for appellant.

Trimble & Trimble, for appellee.

SMITH, J. Appellee is a landowner and taxpayer in the Indian Bayou Drainage District of Lonoke County, and he brought this suit to restrain the commissioners of the district from issuing additional bonds. In his complaint, appellee alleged the organization of the district under act 279 of the Acts of 1909, which act appears as §§ 3607 *et seq.,* C. & M. Digest.

The assessed betterments in the district amounted to $463,428, and against this assessment bonds were issued in the sum of $147,000 from the proceeds of the sale of which the construction cost of the improvement, in accordance with the plans upon which the betterments had been assessed, was paid.

During the year 1927 the commissioners of the district instructed the engineer of the district to formulate plans and estimates for widening, deepening and straightening the channel of the main ditch in said district, and to provide for improving the outlet thereof, to provide for clearing out the laterals in said district, and for extending and otherwise improving the system of drainage in said district.

The estimated cost of the proposed work is $130,000, and there is outstanding and unpaid $64,000 of the original bond issue, and the commissioners of the district are proposing to refund the outstanding bonds and to issue new bonds to pay the cost of the new work, a single bond

issue to cover both items. Certain other facts are alleged in the complaint, which are reflected in the decree of the court.

The court found: (1) That the district is not authorized to do the additional construction work until a reassessment of benefits had been made in said district, and until a petition signed by a majority in number, acreage or value of the owners of land in the district authorizing that action had been filed, as provided by act 203 of the Acts of 1927 (Acts 1927, page 680). (2) That the commissioners of the district are authorized to refund the outstanding bonds of the district and reissue them in a bond issue to embrace both the outstanding bonds and a new issue floated for obtaining money with which to widen, deepen, straighten or otherwise improve the system of drainage in the district. (3) That act 203 of the Acts of 1927 requires a majority in number, acreage or value of the landowners of the district, and not a majority in number, acreage and value of such landowners, before being authorized to proceed under that act.

The commissioners of the district proposed to refund the bonded indebtedness of the district under the authority of act 16 of the Acts of 1927 (Acts 1927, page 43), which act confers that authority. They propose also to issue bonds to pay the cost of additional work, and, if allowed to do so, have a single bond issue to cover both items.

The refunding act (act 16, Acts 1927) empowers drainage districts "to issue refunding bonds for the purpose of paying any bonds and interest upon any bonds, certificates of indebtedness, or unsatisfied judgments of such district outstanding" (§ 1, act 16, Acts 1927, page 43), and, where a district may also issue bonds to provide funds for additional work, we perceive no reason why a single bond issue should not be made for both purposes. If separate bond issues may be authorized for each purpose, a single issue would suffice for both purposes.

The decision of the two remaining questions passed upon by the court below requires a consideration of act 203 of the Acts of 1927.

Section 1 of this act provides that the commissioners of any district organized under the provisions of §§ 3607 *et seq.*, C. & M. Digest, shall have power, either before or after the completion of the plans for the work therein, to deepen or widen the drains in such district, and to build additional laterals for the better drainage of its lands, and to borrow money by the issue of negotiable bonds for the purpose of securing the funds with which to complete the work of improvement in such district and of widening or deepening ditches, adding laterals, and for maintenance of the ditches and levees, and to secure the payment of such bonds by a pledge and a mortgage of the assessment of benefits in such district and of all reassessments thereof.

Section 2 of the act authorizes the commissioners to make a reassessment of the benefits not oftener than once a year, with the right on the part of the landowners to object to such assessments and to appeal therefrom.

Section 3 of the act provides that "if the commissioners shall have filed plans for additional work in the district, no proceeding shall be taken looking to a confirmation of the assessment of benefits based thereon until a petition has been filed with the county court, signed by a majority in numbers, acreage *and* value of the owners of land within the district, praying that the work as provided for in said plans shall proceed," etc.

We think there is nothing in this act which deprives the commissioners of the power conferred by § 3630, C. & M. Digest, of preserving the improvement by keeping the ditches clear from obstructions, etc. *Hopson* v. *Oliver,* 174 Ark. 666, 298 S. W. 489. But the act does provide that, "if the commissioners shall have filed plans for additional work in the district," no proceeding shall be taken to that end until the landowners have filed a petition requesting that action. In other words, the commissioners may preserve the improvement without

a petition from the landowners so to do, provided the necessary funds are available; but, if it is proposed to do additional work, that is, work not contemplated by the original plans upon which the assessment of benefits was based, a petition by the landowners is required. The court below so held, and we affirm that holding.

The third and last question presented by this appeal is whether the petition must be signed by a majority in number, acreage *and* value, or will a petition signed by a a majority in number, acreage *or* value suffice?

Section 3 of the act, from which we have quoted, provides that the petition shall be signed by a majority in number, acreage *and* value of the landowners, and if the act contained only this provision we would be compelled to hold that the language was unambiguous, and nothing was left for construction or interpretation, and that the commissioners could not proceed with the "additional work" unless authorized by a petition of a majority in number, acreage *and* value of the landowners. But in the same section provision is made for a hearing before the county court to determine whether the necessary majority has been obtained, and it is provided that "on the day named in said notice, it shall be the duty of the county court to meet and to hear all persons who wish to be heard, and first to determine whether a majority in numbers, acreage *or* value of the landowners have petitioned for the doing of the work under the revised plans, and, if it finds that such majority have signed the petition," the court shall then hear the complaints against assessments based upon the revised plans.

It is obvious that these provisions appearing in the same section are conflicting, and both cannot be given effect. One provision requires that a majority in number, acreage *and* value of the landowners shall be obtained, while the other directs the court to proceed if the petition so to do contains a majority in number, acreage *or* value of the landowners. Which provision shall be followed?

In deciding this question we have in mind the settled rule of construction that a statute must be read as a whole to ascertain its meaning, and courts must give effect to the meaning of the statute as thus ascertained, and in the discharge of this duty courts are frequently required to eliminate or to substitute words for those employed by the Legislature. *Clark* v. *State,* 155 Ark. 16, 243 S. W. 865; *Williams* v. *State,* 99 Ark. 149, 137 S. W. 927, Ann. Cas. 1913A, 1056; *McDaniel* v. *Ashworth,* 137 Ark. 280, 209 S. W. 646; *Ferguson* v. *Montgomery,* 148 Ark. 95, 229 S. W. 30.

Another rule of construction equally as well established is that all new legislation must be construed with reference to existing legislation on the same subject. *McIntosh* v. *Little Rock,* 159 Ark. 607, 252 S. W. 605; *Stewart-McGehee Construction Co.* v. *Brewster, etc., Co.,* 171 Ark. 199, 200, 284 S. W. 53.

In the construction of this legislation we cannot be unmindful of the practical difficulty—if not the utter impossibility—of securing a majority in number, acreage *and* value of the landowners for the construction of any public improvement, and no other legislation has ever imposed a requirement so difficult to discharge.

On the contrary, § 2 of the act of 1909, *supra,* which appears as §§ 3608 *et seq.,* C. & M. Digest, under which the district was organized, provides that: "If, upon the hearing provided for in the foregoing section (for the formation of the district), the petition is presented to the county court, signed by a majority, either in numbers or in acreage or in value of the holders of real property within the proposed district, praying that the improvement be made, it shall be the duty of the county court to make the order establishing the district without further inquiry," etc.

It is therefore our opinion that it is not only more probable, but more reasonable, to conclude that the Legislature did not intend to require a majority in number, acreage *and* value, but intended to require only that the

petition contain a majority in number, acreage *or* value, and the statute will be so construed.

The decree of the court below accords with the views here expressed on all three of the questions presented for decision, and from this decree both the district and the landowners have appealed; but, as the decree appears to be correct, it is in all respects affirmed.

SCHOOL DISTRICTS NOS. 14, 15, 44 *v.* COUNTY BOARD OF EDUCATION.

Opinion delivered June 25, 1928.

Robert Bailey, for appellant.

Ward & Caudle, for appellee.

HUMPHREYS, J. Eighty-five electors in School Districts Nos. 15 and 44, in Pope County, signed and filed a petition, on the 18th day of June, 1926, with the county board of education, which reads as follows:

"To the county board of education of Pope County, Arkansas: Petition. Being desirous of further benefiting our children in public school advantages, wanting better buildings, better equipment, longer school terms and better prepared teachers; and knowing that these various needs cannot be had except by consolidating and increased financial resources, therefore we, the under-

signed electors residing in School Districts Nos. 15 and 44, hereby petition the county board of education of Pope County, Arkansas, to abolish School Districts Nos. 15 and 44 and consolidate said territory now embraced in the said districts into one consolidated school district, as the law directs. Building for said consolidated district to be located about or near the Judge Bullock Farm, accessible to the pike road, said building to be a modern four-room structure, built on an economic plan."

Notice was given, in accordance with the law, that the petition would be presented to the county board of education for action on the 23d day of July, 1927. In the interim a petition remonstrating against the consolidation of the two districts was signed by thirty-three electors in District No. 44, and same was filed with the county board of education and presented, along with the original petition, on the date fixed for the consideration of same in the notice. On the hearing it was shown and found by the board of education that the majority of electors residing in the two districts to be affected had signed the original petition, and, based upon such finding, made an order attaching the territory of District No. 44 to District 15 and designated the consolidated district No. 15 of Pope County; and also found and ordered that it was for the best interest of the pupils residing in sections 32, 33 and west half and the northwest quarter of the southeast quarter of section 34, all in township 8 north, range 20 west, to be detached from Consolidated District No. 15 and attached to and made a part of Russellville Special School District No. 14. An appeal was taken from the order to the circuit court, where, on trial *de novo,* a judgment was rendered consolidating Districts Nos. 15 and 44 and detaching from Consolidated District No. 15 the particular territory detached therefrom by the board of education, and attaching same to Russellville Special School District No. 14, from which is this appeal.

Appellant contends for a reversal of the judgment on two grounds; the first being that act No. 156 of the

Acts of the General Assembly of 1927, under which the petition was filed, required a majority of the electors in each district affected to sign the petition before the districts could be consolidated; and the second being that the board and circuit court were without authority under said act to detach territory from the districts affected and attach same to a district not embraced in the petition.

Said statute under which the proceeding was instituted was recently interpreted by this court in the case of *Manley* v. *Moon, ante* p. 260, to mean that a majority of the electors in the districts to be affected, and not a majority of the electors in each district to be affected, was necessary in order to warrant the consolidation of the districts embraced in a petition. The trial court correctly construed the statute to mean that a majority of the electors in the districts embraced in the petition were necessary to obtain an order consolidating same, but, in applying the statute as construed, erred in detaching certain territory from the consolidated district and attaching same to a district which was not embraced in the petition. Russellville Special School District No. 14 was not embraced in the petition and its territory was not in any wise affected by the petition to consolidate Districts Nos. 15 and 44, and, upon the petition being presented, neither the board nor the circuit court had authority to detach territory in said Districts 15 and 44 after being consolidated and designated as District No. 15 and to attach same to Russellville Special School District No. 14. The county board of education is authorized by said act to form new school districts and to change the boundary lines between any school districts theretofore formed, when a majority of the qualified electors in the territory to be affected sign and present a petition to the board for that purpose. In the petition presented to the board in the instant case the only territory described was that embraced in Districts Nos. 15 and 44. Neither Russellville Special School District No. 14 nor any territory embraced therein was mentioned in the petition, and therefore it was beyond

the jurisdiction of the board or court, under the petition presented, to detach territory in the districts mentioned and attach same to Russellville Special School District No. 14. It may be that neither the board of education nor the circuit court would have consolidated Districts Nos. 15 and 44 without detaching a part of the territory and attaching same to Russellville Special School District No. 14. Only one judgment was rendered. It cannot be said that one judgment was rendered on the petition and another rendered without authority. The whole judgment must be treated as one, and is erroneous for the reasons given above.

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

Mr. Justice KIRBY dissents.

SHELBY *v.* UNION LIFE INSURANCE COMPANY.

Opinion delivered June 25, 1928.

Limus A. Williams, for appellant.

Duty & Duty, for appellee.

HUMPHREYS, J. Upon a trial of this cause in the circuit court of Franklin County a verdict was returned in favor of appellee, and a consequent judgment was rendered dismissing the complaint of appellants, from which is this appeal.

The suit was brought by the administrator of the estate of R. W. Shelby, deceased, and his widow and heirs at law against appellee to recover $10,000 on two life insurance policies issued to R. W. Shelby on his life, by which it was agreed to pay said amount "to the People's Bank of Ozark (creditor), as its interest may appear, and the balance, if any, to the insured's executors, administrators and assigns, immediately upon receipt of due proofs of the fact and cause of death of the insured during the continuance of this contract, and the surrender of this policy."

On the 11th day of March, 1925, R. W. Shelby died, and on the 17th day of March following the People's Bank of Ozark, through its president and cashier, filed with appellee the following affidavit of his death and of his indebtedness to it at the time:

"State of Arkansas, County of Franklin—ss. We, L. L. Ford and Finis E. Stockton, president and cashier of the People's Bank of Ozark, Arkansas, do hereby make oath as follows:

"We state that Robert W. Shelby of Mulberry, Arkansas, died on the 11th day of March, 1925; that he was the holder of policy No. 740, dated April 17, 1922, and policy No. 2491, dated May 16, 1924, issued by the Union Life Insurance Company of Rogers, Arkansas, in the sum of $5,000 each; and that the People's Bank of Ozark was and is now a creditor of the said Robert W. Shelby, and was named beneficiary in said policies of insurance as its interest may appear.

"We further state that, at the death of the said Robert W. Shelby, he was indebted to this bank in the sum of $10,000 or more, or the full face value of said

policies of insurance, and that said bank is justly and legally entitled to the proceeds of said policies of insurance, and that said indebtedness was and is valid and subsisting and a *bona fide* indebtedness against the said Robert W. Shelby, said indebtedness being evidenced by the following promissory notes, described as follows, to-wit:

"One note date 12-31-24, $1,694; one note date 3-31-22, $4,000; one note date 12-28-23, $860; one note date 12-1-21, $4,000; total $10,554.

"Witness our hands this 17th day of March, 1925. L. L. Ford, president People's Bank of Ozark. Finis E Stockton, cashier People's Bank of Ozark."

"Acknowledgment—State of Arkansas, County of Franklin—ss. On this the 17th day of March, 1925, personally appeared before me, the undersigned, a duly commissioned and acting notary public for and in the State and county aforesaid, L. L. Ford and Finis E. Stockton, respectively, and, after being sworn by me, state that the facts set forth in the above and foregoing affidavit are true and correct. (Seal).

"Witness my hand and seal the day and year above written. My commission expires December 31, 1926. Vint Addy, clerk circuit court."

Based upon this proof of death and indebtedness, appellee paid $10,000, the amount of the policies, to the People's Bank of Ozark, and received a beneficiary receipt from the bank for said amount.

The grounds upon which the recovery was sought were set out in the fourth and fifth allegations of the amended complaint, which are as follows:

"Fourth: That Finis E. Stockton, cashier of said bank, and L. L. Ford, president of said bank, induced said insurance company to pay said policies to said bank by false and fraudulent representations, by filing a false affidavit with the insurance company, representing to said company that, at the time of the death of the said R. W. Shelby, he was indebted to said bank in the sum of $10,554.80.

"Fifth: That in truth and in fact said R. W. Shelby was not indebted to said bank in any sum."

Appellee filed an answer, denying the fourth and fifth allegations in the complaint, and admitting that it paid the face of the policies to the bank upon proof of the death of R. W. Shelby and his indebtedness to the bank shown by the affidavit filed by its president and cashier, heretofore set out in full.

At the conclusion of the evidence the court instructed the jury relative to the burden of proof as follows, over the objection and exception of appellants:

"Gentlemen of the jury, I instructed you awhile ago that the burden of proof is on the defendant, Union Life Insurance Company, to prove the indebtedness of R. W. Shelby to the People's Bank at the time of his death, but I have changed my mind, so I am now instructing you that the burden of proof is on the plaintiff (appellant) to establish this."

The controlling question involved on this appeal is whether the court properly instructed the jury with reference to the burden of proof. There is no ambiguity in the clause designating the beneficiaries in the policies. The People's Bank of Ozark was primarily made the beneficiary in case R. W. Shelby was indebted to it at the time of his death, to the extent of such indebtedness, and the executors, administrators or assigns of R. W. Shelby were made the beneficiaries of any surplus remaining after paying said indebtedness. It was clearly the duty of the insurance company to pay such indebtedness as existed out of the insurance money to the People's Bank of Ozark first. The clause designating the beneficiaries made no particular requirement as to the character of proof that should be made of the death of the insured and the existence of his indebtedness to the bank. We think the affidavit of the death and indebtedness was sufficient showing to warrant the appellee in making the payment. There is no testimony in the record tending to show that it made the payment in bad faith. It is alleged in the fourth and fifth paragraphs of the com-

plaint, upon which a recovery was sought, that the payment was made in bad faith, and that R. W. Shelby owed the bank nothing at the time of his death. It was necessary, in order to recover, to sustain the allegations by weight or preponderance of the evidence. The record fails to reflect any evidence tending to establish either of the allegations. Appellants contend and argue that the burden rested upon appellee to show that R. W. Shelby owed it the amount of $10,000 at the time of his death. In other words, appellants treated the answer of appellee as an acknowledgment of the debt and a plea of payment. The real issues, according to the pleadings, were the allegations contained in the complaint, to the effect that no debt existed, and that payment was made by appellee to the bank in bad faith. If no proof had been taken, necessarily, under the pleadings, the appellee would have prevailed. Section 4113 of Crawford & Moses' Digest provides:

"The burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side."

This court ruled in the case of *Looney* v. *Potts,* 163 Ark. 310, 260 S. W. 23 (quoting syllabus):

"A suit to recover a sum alleged to have been obtained fraudulently by procuring plaintiff, who could not read, to sign a check for more than the intended amount, was not a suit on the check, but for deceit, and the burden of proof was on the plaintiff, under Crawford & Moses' Digest, § 4113, placing the burden of proof on the party who would be defeated if no evidence was given on either side."

The court correctly instructed the jury, in the instant case, that the burden of proof rested upon appellants.

No error appearing, the judgment is affirmed.

FERRELL *v.* STATE.

Opinion delivered June 25, 1928.

Sellers & Eddy and *E. A. Williams,* for appellant.

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

HUMPHREYS, J. Two indictments were returned against appellant on the 6th day of March, 1928, by the grand jury of Conway County, one charging him with unlawfully and feloniously running over and injuring Tom Hunter, within the corporate limits of the city of Morrilton, and the other charging him with unlawfully and feloniously running over and injuring Mrs. Tom Hunter, within the corporate limits of said city. By agreement the cases were submitted and tried together, resulting in a conviction and sentence in each case to serve two and one-half years in the State Penitentiary, from which is this appeal.

Before the trial, appellant filed a motion for a continuance in each case, which was heard by the court on testimony introduced by appellant and the State. Appellant requested that the witnesses be excluded from the

room while the motion was being heard. The court refused to grant the request, over appellant's objection and exception. After hearing the testimony the court overruled the motion, to which ruling appellant objected and excepted.

The record reflects that on the 13th day of November, 1927, at about 8:30 or 9 o'clock P. M., some one in a Ford coupe ran over Mr. and Mrs. Tom Hunter, who were walking along the shoulder of a hard surface road, within the corporate limits of the city of Morrilton, and in doing so caught the feet of Mrs. Hunter under the car in some way and dragged her down the road two or three blocks, to where it turns at a little grocery store toward the north in the direction of the compress; that the car continued to drag her until the driver reached the southeast end of the compress, where he turned into an alleyway, at which time her feet came loose from the car; that the car was being driven so rapidly its number could not be obtained by the children of Mr. and Mrs. Hunter, who were in front of them at the time they were run down, or by those who were attracted to the scene by the screams of Mrs. Hunter; that Mrs. Hunter was skinned and bruised all over, some of her ribs broken, and her limbs so badly injured that she could not walk for some time; that, as a result of the injury, Mr. Hunter's mind was so badly affected he could not remember anything about the occurrence; that he labored under the delusion that a cyclone had injured them; that the driver did not stop the car at the time he struck the Hunters nor when Mrs. Hunter's feet became extricated therefrom; that, a few minutes after a witness by the name of Bob Cross heard Mrs. Hunter scream, he met a Ford coupe with a First State Bank's sign on the side thereof coming from the direction where the parties were injured; that, the next morning, the Ford coupe was in a damaged condition at the Tri-Service Station; that, about 7:15 P. M., in the neighborhood of about one hour before the injury occurred, appellant was seen driving a Ford coupe with the First State Bank's sign thereon; that, at about

that time he stopped at Charlie Baker's restaurant and ate a lunch, after which he asked Charlie if he ever drank beer, and, when informed that he did, told him that they could get some about a mile or a mile and a half out on the road; that Charlie joined him, and went to the place and got some beer; that a number of witnesses were introduced who testified to circumstances tending to connect appellant with the commission of the offense. As no contention is made that the evidence is insufficient to sustain the verdicts and consequent judgments, the circumstances thus detailed by the several witnesses will not be set out.

Appellant objected and excepted to the introduction of the testimony of Charlie Baker concerning his visit to his restaurant and their trip in search of beer. Appellant also objected and excepted to the following statement made by Mr. Ramsey, the deputy prosecuting attorney:

"Now, gentlemen, we just want to be fair. If I knew Frank Ferrell was innocent in this crime I would say it, but the circumstances, gentlemen of the jury, that we have introduced here before you have not been denied."

Appellant also objected and excepted to the following statement made by Mr. Ragsdale, the prosecuting attorney, in his closing argument:

"I ask you if, in the argument by any one of the three distinguished gentlemen on the other side of the house, if anywhere in their argument they showed you an avenue, if they gave you one iota of reason, anything that would lead you out to arrive at any other verdict than a verdict of guilty in this case?"

Appellant first assigns as reversible error the refusal of the court to exclude the State's witnesses from the room before hearing the motion for a continuance. Nothing is reflected by the record indicating that the court abused its discretion in refusing to grant appellant's request. The matter of putting witnesses under the rule when requested is within the sound discretion

of the trial court. Unless some abuse in the exercise of the discretion is shown, the judgment will not be reversed on appeal. *Marshall* v. *State,* 101 Ark. 155, 141 S. W. 755; *Oakes* v. *State,* 135 Ark. 221, 205 S. W. 305; *Harris* v. *State,* 171 Ark. 658, 285 S. W. 367.

Appellant next assigns as reversible error the admission of Charlie Baker's testimony to the effect that, at about 7 or 7:15 P. M., before the injury occurred, he went with appellant about a mile or a mile and a half on the pike road and got some beer, and that he was driving a Ford coupe advertising the First State Bank. We think this testimony admissible as a circumstance tending to identify appellant as the driver of the car that struck Mr. and Mrs. Hunter.

Appellant next assigns as reversible error the statement made by the deputy prosecuting attorney to the jury in the opening argument. The contention is that the effect of this statement was to comment upon the failure of appellant to testify in the case. This court ruled, in the case of *Markham* v. *State,* 149 Ark. 507, 233 S. W. 676, that a statement of a prosecuting attorney to the effect that the testimony introduced by the State was undenied and uncontradicted was not tantamount to a comment upon the failure of an accused to testify.

Lastly, appellant assigns as reversible error the statement heretofore set out, made by Mr. Ragsdale, the prosecuting attorney, in his closing argument. There is nothing objectionable in the statement. It was a legitimate argument.

No error appearing, the judgment is affirmed.

STONE *v.* MORRIS.

Opinion delivered June 25, 1928.

Eugene Cypert, for appellant.

Morris & Barron, for appellee.

MEHAFFY, J. The appellee, G. W. Morris, brought suit in the White Chancery Court against Sam Wexman for $1,000 and interest at the rate of 10 per cent. per annum, and alleged that, as collateral security, Wexman had deposited with him a note of Mr. and Mrs. T. L. Tyson for $2,800, with interest at 8 per cent. per annum, which was secured by a second mortgage on the land in controversy, and the plaintiff alleged that defendants, W. A. Stone and Ethel Stone, his wife, were in possession of the land without right, and that said land was not of sufficient value to pay the indebtedness, and asked for a receiver to take charge of the same. Appellee also alleged that Tyson was a nonresident, and asked that Wexman, Tyson and wife and Stone be made parties defendant.

Sam Wexman filed answer, admitting the indebtedness mentioned, and asking the foreclosure of the mortgage originally executed to him, and joined appellee in prayer for receiver, and judgment was asked in the original suit in the name of G. W. Morris.

W. A. Stone and Ethel Stone filed their answer, claiming title to the land by virtue of a deed of trust executed by the defendants, Mr. and Mrs. T. L. Tyson, to C. B. Tucker as trustee, to secure indebtedness due to W. N. Harlan. This deed of trust was executed on the second day of December, 1921, prior to the mortgage executed to Wexman. The property described in the deed of trust given to Tucker to secure the indebtedness to Harlan was sold under the power in the mortgage, and Harlan became the purchaser. Harlan then sold to

Mrs. T. L. Tyson, and Mrs. Tyson sold to the defendant, W. A. Stone.

Appellee filed an amendment to his complaint, alleging fraud and collusion on the part of Harlan and Stone and wife, and alleged that Harlan had sold to Mrs. T. L. Tyson, and that the mortgage to Wexman became a prior lien on the land in controversy. He also denied that Stone was an innocent purchaser.

Sam Wexman's mortgage, which was given to Morris as collateral security, was a second mortgage, W. N. Harlan having a first mortgage amounting to $1,500, and the note made by Wexman included not only the amount that he borrowed from Wexman, but the $1,500 that he owed Harlan, and Wexman agreed to pay this $1,500. He did not pay it, however, because Harlan did not want him to do so. But, after he had offered to pay it, Harlan, through the trustee in his mortgage, without notice either to Wexman or Morris, had the land sold under the terms of the first deed of trust, and purchased the property at the sale. After the time for redemption had expired, Harlan resold the land to Mrs. T. L. Tyson. The deed from Harlan to Tyson does not appear in evidence, but the record shows a joint deed of trust given by Mr. and Mrs. T. L. Tyson to secure an indebtedness of $675 to W. N. Harlan. This deed of trust is dated February 24, 1926.

Stone alleged in his answer that in February, 1926, he received a deed from Mr. and Mrs. Tyson to the lands involved in the suit. The deeds were not introduced in evidence. There is no evidence as to the consideration.

The chancellor found from the exhibits, pleadings and testimony taken orally that Mr. and Mrs. T. L. Tyson, as joint mortgagors, conveyed by mortgage the lands in controversy to Sam Wexman for the purpose of securing an indebtedness of $1,300.45, with interest at the rate of 8 per cent. per annum until paid, and that this mortgage was subject to a prior lien by Harlan. That Harlan foreclosed his lien, purchased the property himself, and, a year thereafter, resold it to Mrs. Tyson,

retaining a lien thereon to secure $675; that, by reason of the covenant of warranty contained in the mortgage given to Sam Wexman, his mortgage became a valid lien upon the real property when it was repurchased by Mrs. T. L. Tyson, subject to a lien in favor of Harlan in the sum of $675. That appellee, G. W. Morris, has a lien on said lands, prior and paramount to all claims of the defendants, in the sum of $1,458.33. Also that cross-complainant, Sam Wexman, has a lien on said land, subject to appellee's lien and the lien in favor of W. N. Harlan, in the sum of $360.44.

The court decreed that, if said lien be not paid off within ten days from the date of the decree, the commissioner should advertise and sell said real property.

There is very little of the testimony abstracted by the appellant, and from the testimony abstracted it very clearly appears that the Tysons had mortgaged the land to Harlan and afterwards to Wexman. That Harlan's mortgage was a prior lien. They transferred the note and mortgage from the Tysons to the appellee, Morris, as collateral security for Wexman's indebtedness to Morris. Wexman took a note and mortgage and, it appears from the abstract, agreed to pay Harlan. It also appears that he offered to pay Harlan, and Harlan did not want the money. But afterwards, without notice to Morris or Wexman, Harlan caused the land to be sold by the trustee under the power of sale in the mortgage, and became the purchaser, kept it for about a year, until the time for redemption had expired, and then conveyed the land to Mrs. Tyson.

Section 1498 of Crawford & Moses' Digest provides: "If any person shall convey any real estate by deed, purporting to convey the same in fee simple absolute, or any less estate, and shall not, at the time of such conveyance, have the legal estate in such lands, but shall afterwards acquire the same, the legal or equitable estate afterwards acquired shall immediately pass to the grantee, and such conveyance shall be as valid as if such legal or equitable estate had been in the grantor at the time of the conveyance."

The Tysons conveyed this land to Wexman, permitted it to be sold under the prior mortgage, purchased by Harlan, and then Harlan reconveyed to Mrs. Tyson.

In construing the above statute, which was § 734 of Kirby's Digest, this court said: "In this case the appellant's defense was that they purchased the land from the Broadways, who conveyed the land to them on the 4th day of September, 1895. They previously, on the 2d day of December, 1894, conveyed the land by mortgage to Sidway. The statute in such cases provides." Then the court copies the statute, which is above copied as § 1498 of Crawford & Moses' Digest, and continues:

"In this case the estate acquired by purchase from the Broadways vested in Sidway by virtue of the mortgage." *Broadway* v. *Sidway,* 84 Ark. 527, 107 S. W. 63.

Chief Justice Cockrill, speaking for the court, in passing on this statute, said:

"We have no reported case in which the statute has been held to apply to a mortgage, but, as the mortgage is with us, as at common law, the conveyance of a conditional estate, and the statute by its terms applies to any conveyance purporting to convey a fee simple or any less estate, the provisions must be held to apply to mortgages equally as to conveyances absolute in form." *Kline* v. *Ragland,* 47 Ark. 111, 14 S. W. 474.

Continuing, the court in the above case said:

"The prevailing doctrine of the after-acquired title inuring to strengthen the mortgage lien, in the absence of a statutory provision, is that, in order to have that effect, the conveyance must contain a covenant of warranty or something nearly akin to it. The usual covenant of warranty is not found in the mortgage in this case, but in the *habendum* clause it is recited that the land shall be held by the mortgagees, their heirs and assigns, 'against the lawful claims and demands of all persons whomsoever.' * * * Without the aid of the statute referred to, which, as we have heretofore held, modified the rule as to the character of deed required to enable the grantee to take the after-acquired title, this convey-

ance appears to be sufficient to have that effect, but under the statute there can be no doubt of it."

Under this and other decisions of this court, this statute applies to mortgages as well as to conveyances absolute in form. If the Tysons had made a deed to Wexman without having a title, and afterwards acquired title, no one would contend that the after-acquired title would not pass to the grantee, in this case to the mortgagee. See also *Grayson-McLeod Lumber Co.* v. *Duke,* 160 Ark. 76, 254 S. W. 350; *Wyman* v. *Johnson,* 68 Ark. 369, 59 S. W. 250; and *Turman* v. *Sanford,* 69 Ark. 95, 61 S. W. 167.

In the last case the court said:

"The statute in reference to the grantor's after-acquired title was enacted to prevent fraud and effect justice, but, under the circumstances here, it would be neither right nor just to compel Turman to pay his mortgage debt a second time to one who had given him no notice of his claim until after the payment of the debt. For these reasons we think the plaintiff, under the facts stated in the record, cannot recover."

In the instant case there is no question of the Tysons paying their debt twice. They had never paid Wexman. They did not claim to have paid him, but permitted Harlan to sell the property under his mortgage, purchase it himself, and then deed it to Mrs. Tyson, without paying or offering to pay Wexman. If this statute was enacted to effect justice, as this court has held, it would certainly be unjust and inequitable and a violation of the spirit of this statute to permit one to acquire title from a mortgagee who had bought under a prior mortgage, and then defeat the payment or hold that the land was not subject to the lien of the second mortgage.

It is contended, however, by appellant, that Mrs. Tyson sold to the defendant, Stone, and that Stone holds the title to the land both in law and equity, and that Wexman is estopped. The purchasers from Mrs. Tyson purchased with notice of Wexman's mortgage. There can be no doubt about their actual knowledge of Wexman's

mortgage, and they are in no better position than the Tysons.

It is contended also by the appellant that the defendant, Stone, holds under the foreclosure of the Harlan mortgage. As a matter of fact, he holds under a conveyance from Mrs. Tyson, one of the original mortgagors, who acquired the title after the execution of the mortgage to Wexman and with notice of Wexman's mortgage.

It would be unjust and inequitable to permit the sale under the power of the mortgage, a purchase by Harlan, the mortgagee, and a conveyance to Mrs. Tyson, and thereby defeat or prevent Wexman from resorting to the land to collect his debt. We think the statute was enacted for the purpose of preventing injustice of this sort.

Appellant, however, contends that Wexman knew of the prior mortgage, and turned down the check or draft when the deed was tendered to him, and that Wexman therefore is estopped. But the testimony abstracted by both appellant and appellee shows that Wexman agreed to take up the first mortgage of $1,500, but that he did not take up the note held by Harlan because Harlan did not want his money; that he never refused to pay Harlan. That he did not refuse to pay any draft for the amount of the first mortgage, but he testified the reason he did not take up the mortgage was that there was no release deed. If there is any testimony anywhere in the record that there was a release deed sent to Wexman, or that he refused to pay Harlan, it is not abstracted.

There is not much conflict in the testimony, and it cannot be said that the finding of the chancellor is against the preponderance of the evidence.

The decree of the chancellor is correct, and is affirmed.

MILLER COUNTY *v.* MAGEE.

Opinion delivered June 25, 1928.

Shaver, Shaver & Williams, for appellant.

John N. Cook and *Pratt P. Bacon,* for appellee.

MEHAFFY, J. F. F. Magee, as sheriff of Miller County, filed two claims in the county court, each for fees charged and services rendered by himself and deputies in felony cases in the municipal court at Texarkana, Arkansas. Both claims were disallowed, and from the order of disallowance Magee appealed to the circuit court, where the claims were allowed and judgment entered in favor of appellee. The facts are undisputed.

The appellant first contends that there is no law authorizing any fee for serving a warrant of arrest by the sheriff of Miller County. It is contended that § 4587 of Crawford & Moses' Digest and amendments thereto, enumerating sheriffs' fees, do not specify any fee for

serving a warrant of arrest. And appellant further contends in this connection that § 2034 of Crawford & Moses' Digest expressly prohibits the county court from allowing constructive fees to be paid officers by any county in this State. Appellant alleges that its main contention involves the construction of act 138 of 1917, at page 734, creating the municipal court of Texarkana, Arkansas.

If appellant is correct in his contention that there is no law authorizing any fee for serving a warrant of arrest by the sheriff of Miller County, the sheriff would not be entitled to any fees for serving a warrant. The right of a sheriff to charge fees is derived from and dependent upon statute, and he is not entitled to any compensation except such as is given him by law, and he can recover no compensation or fees where the law provides none. 35 Cyc. 1547.

This court, speaking through Chief Justice COCKRILL, said: "Observance of a few general rules deducible from the statutes and decisions will serve to simplify the questions. Three things must be found to concur before the county court is authorized to allow a claim against a county in favor of an officer for fees: (1) There must be specific statutory authority to the officer to make a charge for the service rendered; (2) he must be required by the statute, or by the rules of practice or order of the court, to perform the service; (3) the statute must indicate expressly or by fair intendment the intention to permit the fee allowed by the statute for the service to be charged against the county." *Logan County* v. *Trimm*, 57 Ark. 487, 22 S. W. 164; *McHenry* v. *Hot Spring County*, 57 Ark. 565, 22 S. W. 175; *Hempstead County* v. *Jones*, 62 Ark. 272, 35 S. W. 230.

In all these cases the court held that the sheriff was not entitled to fees as against the counties, unless there was specific statutory authority to the officer to make a charge for the services rendered. It is therefore settled by the decisions of this court that no claim for fees can be allowed against a county unless authorized by statute.

Appellant's contention is that there is no authority in the statute for charging a fee for serving a warrant, because it states that § 4587 of Crawford & Moses' Digest enumerates the fees allowed sheriffs, and that no fee for serving a warrant of arrest is specified therein. It is then insisted that the several amendments do not apply to Miller County, and that act No. 35 of the session of 1923 amends the act, and does not except Miller County, but contends that it does not specify any fee for serving a warrant of arrest.

Act No. 35 of the special session of 1923 provides for sheriff's fees, and is an amendment of act No. 386 of the Acts of 1923, and, while it is admitted that it does not except Miller County, it is contended that it does not specify any fee for serving a warrant of arrest. The title of the act itself makes it applicable to Miller County and provides for serving every capias, summons, *scire facias* or attachment for each defendant and garnishee, 75 cents.

Act 220 of the 1925 Legislature is an act to regulate fees for sheriffs of Arkansas, and provides, for serving every warrant of arrest, $1. This act, however, excepts Miller County, or rather provides that this act shall not apply to a number of counties, including Miller County.

Act 100 of the Acts of 1927 is an act to amend § 3 of act 220 of the Acts of the General Assembly of 1925. Section 3 is the section which contains the proviso that the act shall not apply to Miller County. This act, 100, provides also that its provisions shall not apply to Miller County, and that would leave act No. 35 of the special session of 1923 in force as to Miller County. It is true that the acts other than act 220 of 1925 did not specifically mention by name "warrants of arrest" and fix a fee for serving same, but it does provide for a fee for serving every capias.

Capias is defined in Corpus Juris as a writ directing the sheriff to take the person of defendant into custody. And the note in Corpus Juris, taken from Bouvier's Law Dictionary, among other things says, after describing its

origin: "It came to denote the whole class of writs by which defendant's person was to be arrested." 9 C. J. 1276. The object of the writ is to arrest the defendant, or, as stated in the text, "a writ directing the sheriff to take the person of the defendant into custody."

The Kentucky court has said: "But the court had made no order of this sort, and there was no sentence of imprisonment. They had a right at any time to pay or replevy the fine and costs. It is equally clear that they were not held under a capias or mittimus, for the word 'capias' here is used in a broad sense, and includes a writ for the holding of the person. No writ of any kind had issued." *Saylor* v. *Commonwealth,* 122 Ky. 776, 93 S. W. 48.

Byrnes' Law Dictionary defines capias as follows: "Capias (that you take) is the generic name for several writs directing the person to whom they are addressed to arrest the person therein named. They are, or were, usually directed to the sheriff, and are, or were, of the kinds mentioned in the seven titles next following."

Cyclopedic Law Dictionary is as follows: "A writ directing the sheriff to take the person of the defendant into custody. It is a judicial writ, and issued originally only to enforce compliance with the summons of an original writ, or with some judgment or decree of the court. It was originally issuable as a part of the original process in a suit only in case of injuries committed by force or with fraud, but was much extended by statutes. Being the first word of distinctive significance in the writ, when writs were framed in Latin, it came to denote the whole class of writs by which a defendant's person was to be arrested. It was issuable either by the court of common pleas or King's bench, and bore the seal of the court."

We therefore think the word capias in the statute is broad enough to include, and does include, warrant of arrest.

Appellant, however, says that its main contention is that act 138 of 1927 was intended to and did provide that

all the work and service for which the appellee has charged in this case should be done by the constable of Garland Township, who received a salary of $1,200 a year. There is nothing in this act that justifies the conclusion that the sheriff should not thereafter make arrests in felony cases or that, if he did make them, he should have no pay for it.

Section 46 of art. 7 of the Constitution provides that the qualified electors of each county shall elect one sheriff, who shall be ex-officio collector of taxes, unless otherwise provided by law. Section 9147 of Crawford & Moses' Digest provides for the election of a sheriff for a term of two years, with such duties as are now or may be prescribed by law.

Section 9156 of Crawford & Moses' Digest provides: "Every sheriff shall be a conservator of the peace of his county, and shall cause all offenders against the laws of this State, in his view or hearing, to enter into recognizance to keep the peace and appear at the next term of the circuit court of the county; and, on failure of the offender to enter into recognizance, to commit him to jail."

Section 9160 provides that the sheriff shall execute all process directed to him by legal authority.

And we think it perfectly clear that it was not the intention of the Legislature to prohibit the sheriff from serving warrants of arrest in Garland Township or elsewhere in Miller County, but that he is not only authorized to serve them, but, if issued and directed to him, he is bound under the statute to serve them, and is entitled to fees provided by statute.

Appellant insists that it was not contemplated by the Legislature that double costs should be charged against the county. We think that is correct, but that paying the sheriff for services performed does not amount to charging the county with double costs. It was evidently the intention of the Legislature in passing the act to provide as nearly as it could for a proper and equitable distribution of the costs between the city and the county.

And the fact that the act makes it the duty of the constable to serve the court's process does not of itself prohibit the sheriff from serving warrants when called upon to do so. If, under the provisions of the act, the county is called upon to pay more than it should, this is a matter that can be corrected and regulated by the Legislature, but not by the courts.

The judgment of the circuit court is affirmed.

COCA-COLA BOTTLING COMPANY *v.* SHIPP.

Opinion delivered June 25, 1928.

R. R. Lynn, June P. Wooten, Lee & Moore and *Robinson, House & Moses*, for appellant.

Bogle & Sharp, Sam T. Poe, Tom Poe and *McDonald Poe*, for appellee.

McHANEY, J. This is the second appeal of this case. On the former appeal the judgment was reversed and dismissed on the ground that appellee was guilty of contributory negligence as a matter of law, which prohibited a recovery. On rehearing, the cause was reversed and remanded for a new trial for the error of the court in permitting the city ordinance of North Little Rock, relative to lights on automobiles, to be introduced, and for

giving instructions 1 and 5 referring thereto. In the opinion on rehearing, the former judgment of this court, holding appellee guilty of contributory negligence as a matter of law, was set aside, the final judgment being that the question of contributory negligence was one for the jury, in that such negligence was a question about which fair-minded men might honestly differ as to the conclusion to be drawn from the facts in the case. The former opinion will be found reported in 174 Ark. 130, 297 S. W. 856.

As to the question of the negligence of the appellant, both the original opinion and that on rehearing conceded that the facts were sufficient to take that question to the jury, and were sufficient to justify a finding by the jury that appellant was guilty of negligence, and, as heretofore stated, the opinion on rehearing held that the question of the contributory negligence of the appellee was one for the jury. The facts in the case now before us are substantially the same as those on the former appeal, both with reference to the negligence of appellant and the contributory negligence of appellee, and we will not repeat them here. The opinion of the court on the former appeal, both as to the negligence of appellant and the contributory negligence of appellee, including the question of the proximate cause of the injury, constitute the law of the case so far as this appeal is concerned. It is now urged on this appeal that the proximate cause of the injury was the bright lights of the approaching automobile, which caused appellee to turn his car to the right, thereby striking the parked truck of appellant, but this matter was necessarily concluded against appellant on the former appeal. We there said:

"In the case at bar the question of the contributory negligence of the plaintiff, as well as the question of the negligence of the defendant, was a question that should have been submitted to the jury under proper instructions, because his contributory negligence was a matter about which fair-minded men might honestly differ."

Again, in the same case it is said:

"This court therefore recognizes that it is a question for the jury to determine whether the injured party was in the exercise of due care; whether he was guilty of contributory negligence. And certainly it will not be contended that any person would intentionally run into a truck where injury would certainly follow. But the disposition of every rational person, as said by the California court, is to avoid injury. And whether he exercised ordinary care is a question of fact."

Therefore, in determining and holding that the question of contributory negligence of appellee was a question to be submitted to the jury, on proper instructions from the court, necessarily carried with it the question of the proximate cause of the injury. For if this court, on the facts then before it, which are the same in this regard as the facts in the case at bar, had decided that the bright lights of the approaching car were the proximate cause of the injury, there could have been no question of contributory negligence to submit to the jury. Hence this point has already been decided against appellant, and is the law of the case on this appeal.

In *St. Louis, I. M. & S. Ry. Co.* v. *York,* 92 Ark. 554, 123 S. W. 376, this court said:

"The matters which were adjudicated by this court upon the former appeal cannot be retried in the circuit court, nor can they be reviewed upon this second appeal by this court. The questions of law there determined became the law of this case on this subsequent trial and appeal, whether we may now believe them to be right or wrong. The finding of the facts upon the former appeal cannot be binding as to the finding of the facts in this second trial, because the testimony on the second trial might be different from or additional to that given on the first trial. But the principles of law determined and announced upon the former appeal are binding, and must stand as the law of this case; and if the testimony upon this second trial is substantially the same as on the first trial, then the former decision of this court upon all questions of law involved in this case must be followed on this appeal" (Citing cases).

The only question in this case that has given us much concern is the alleged excessiveness of the judgment and verdict. . On the first trial of this case appellee was awarded a verdict of $7,500, and on the second trial he was awarded a verdict and judgment of $17,500. Appellee, on the former appeal, earnestly urged an affirmance of this judgment, and apparently felt satisfied with the amount of the recovery. Immediately after the injury he was taken to the hospital, where he remained ten days, then went home for ten days, and back to the hospital for another ten days. The second trip to the hospital was for an operation for hemorrhoids. He lost only thirty days then from his work, and was paid half time for that. His injuries were severe and painful. He received a cut in the right thigh or hip, and an injury to his right side. He received a blow on the forehead from which there is a slight scar and a slight bony protuberance, which may be removed by an operation. Some of his teeth were knocked out, from which he is wearing a bridge. He testified that he now has a tired feeling, is nervous to a certain extent, is easily exhausted; that he doesn't sleep well without taking aspirin, is almost completely deaf in his right ear, and that he has a deafness in his left ear; has to wear ear-drums; and that he is troubled with dizziness to a certain extent; that his memory has been impaired, and that he is irritable. At the time of his injury he was working for the Texas Company as a salesman, and his earnings averaged approximately $145 per month, including salary and commissions on sales. Mr. Paul, his superior officer in the Texas Company, testified that at the time of the accident he was drawing a salary of $100 per month and commissions, which would probably average $35 per month, and that he continued to work for the Texas Company until December 15, 1926, but that his commissions on sales didn't average quite as high after the accident as they did before. He was promoted from salesman to local agent after the accident. Immediately after leaving the Texas Company, appellee worked for another oil company at a salary of

$110 per month with a car furnished. Appellee is now in the employ of the Transcontinental Oil Company at a salary of $150 per month, without commissions, and is allowed $2.50 per day for his car. Mr. Peak, manager of the Transcontinental, testified that appellee had been working for his company since June 1, 1927, in a position requiring experience and intelligence, as agent for Little Rock and North Little Rock; that he saw appellee every few days, and that no complaint had been made to him about his physical condition. Neither did Mr. McCoy, who was the agent for the Texas Company, and appellee's immediate superior, know anything about any physical ailments, or any deafness of appellee, and he noticed nothing about appellee that showed him to be unfit for his work; that after his injury appellee was able to drive a truck 100 miles a day. Dr. N. E. Murphey, a reputable physician of Monroe County, was appointed by the judge of the court to make a physical examination of appellee. He testified that he was physically all right, and that he was not suffering from deafness. He testified that the bump on appellee's forehead could be removed by a simple surgical operation. Appellee admitted that he was able to drive his automobile, and had driven it from Little Rock to Clarendon with his family to attend court.

It therefore appears from the undisputed evidence that appellee's earning capacity is as great or greater now than it was at the time of the accident; that he is occupying a more responsible position with his employers, and drawing a larger salary, although his total compensation is only slightly higher than it was at the time of the accident. We are therefore of the opinion that the verdict is excessive, and that it should be reduced to $10,000. If the appellee will, within fifteen days from this date, enter a remittitur of $7,500, the judgment will be affirmed for $10,000; otherwise the cause will be reversed and remanded for a new trial.

HOLT *v.* RING.

Opinion delivered June 25, 1928.

Sam M. Wassell, for appellant.

Wallace Townsend, for appellee.

MEHAFFY, J. Suit was brought in the Pulaski Chancery Court by appellants, owners of real estate within the boundaries of Street Improvement District No. 465 of Little Rock. The suit is an attack on the proceedings in the city council and also an attack on the validity of the district.

The complaint, as abstracted, shows that appellants contend that there was no proper and legal certification, as provided by law, covering the value of real estate within the district. (2) That there is no legal certification from the county clerk's office that a majority in value signed said petition. (3) That the city council and the street improvement district committee, to which the city referred the matter, refused to consider any protests that property was included which should be excluded, and contended that the council would only consider whether the lump amount certified to by the Little Rock Abstract and Guaranty Company of $1,315,490 was more than 50 per cent of $2,161,465, and refused to consider any other fact. (4) That there has been no examination of protests whatever. That the inclusion of certain property in the petition is arbitrary, and should be excluded, and that the committee of the city council, and the city council itself, refused to hear proof on said contention; that for the purpose of ascertaining the value of the property signed for in the district, certain property

should be excluded. (5) That said petition does not contain a majority in value of legal signers within the district. (6) That certain property values within the district have not been considered in determining the total values. (7) That the bounds of said district are improperly stated, and petitioners are unable to determine what property is in the district and what property will be taxed.

The appellees filed answer, denying all the allegations of the complaint.

Appellant's first contention is that the city council should have heard the proof which was offered to show that certain property included in the district should be excluded, and that certain property excluded should be included, and that the city council was wrong in deciding that it would go into nothing except the question whether the majority favored the district.

It is earnestly insisted that the ordinance should have denied the establishment of the district instead of granting it. The petition of the property owners is not abstracted, but it is not contended that the first petition did not comply with the law. The first petition was presented to the city council on March 7, and on the same day the city council passed the ordinance establishing the district. There were no protests against the property included in the district or the purpose for which the district was created, and it is therefore contended by the appellee that, since the petition was in proper form and properly presented and signed by more than ten property owners, it became the duty of the city council to lay off the portion of the city included in the petition into the improvement district.

Section 5649 of Crawford & Moses' Digest provides that, when any ten owners of real property shall petition the city or town council to take steps toward making any such local improvements, it shall be the duty of the council to at once lay off the portion of the city or town into an improvement district, designating the boundaries of

such district so that it may be easily distinguished. And it provides that the district shall be designated by number.

It therefore appears from the above section that the Legislature has prescribed the manner in which the improvement district may be organized, and has made it the duty of the city council to at once lay off the district. The foundation of the improvement is the petition of the owners of real property situated in the proposed district. There must be ten owners of real property. It is the duty of the city council to pass an ordinance in substantial compliance with the terms of the petition upon which it is based.

This court has said: "Special limited jurisdiction is conferred upon the city council to lay off the district as designated by the property owners in the first petition. And the council must conform strictly to the authority conferred upon it." *Smith* v. *Improvement District No. 14,* 108 Ark. 141, 156 S. W. 455, 44 L. R. A. (N. S.) 696.

Appellant quotes from and relies on the case of *Lipscomb* v. *Lenon,* 169 Ark. 610, 276 S. W. 367. That case construes an act which was passed by the Legislature of 1923, authorizing the formation of improvement districts for the building of auditoriums for public meetings. And the court there held that the building of an auditorium would be for the benefit of the whole community who may be served by it individually and collectively, and that it cannot and does not confer any peculiar or special benefit upon the real estate assessed and taxed for its construction and maintenance. The court also held that, if it could be said that such an improvement is essential to the progress and prosperity of the city and suburban communities, the contribution which an auditorium makes to such prosperity is general to the entire community, and not peculiar and special to the real property in the city and outlying contiguous territory. In that case the court said:

"But, unless the land embraced in a local improvement district is peculiarly and especially benefited by the

improvement contemplated, there is no justification, under our Constitution and laws, for the creation of such districts, whether the lands constituting the district be entirely rural or urban territory, or both. No better definition has ever been given of a local improvement than that by Judge RIDDICK, speaking for the court, in *Crane* v. *Siloam Springs,* 67 Ark. 30, at page 37, 55 S. W. 956, where he said: 'If we look for the technical or legal meaning of the phrase "local improvement," we find it to be a public improvement, which, although it may incidentally benefit the public at large, is made primarily for the accommodation and convenience of the inhabitants of a particular locality, and which is of such a nature as to confer a special benefit upon the real property adjoining or near the locality of the improvement.' "

The improvement must be public, and at the same time the property taxed must be peculiarly and especially benefited. Unless there is peculiar and special benefit to the property embraced within the district, it cannot be taxed. The whole theory of taxing real estate for making improvements is that the property taxed is benefited especially, and the benefits must equal or exceed the tax. No tax can be collected on property in an improvement district for the purpose of making the improvements unless the property taxed is benefited at least as much as the tax.

Appellant does not contend that, after the filing of the first petition and passing of the ordinance, notice was not given, as required by law, advising the property owners within the district that, on a day named, the council would hear the petition and determine whether those signing the same constitute a majority in value of the owners of real property.

The statute provides: "At the meeting named in the notice, the owners of real property within such district shall be heard before the council, which shall determine whether the signers of the said petition constitute a majority in value, and the finding of the council shall be conclusive, unless, within 30 days thereafter, suit be

brought to review its action in the chancery court in the county where such city or town lies. In determining whether those signing the petition constitute a majority in value of the owners of real property within the district, the council and the chancery court shall be guided by the record of deeds in the office of the recorder of the county, and shall not consider any unrecorded instruments."

It was the duty of the council, in determining whether or not a majority in value had signed the petition, to be guided by the record of deeds in the office of the recorder of the county. It might be, in the formation of an improvement district, that persons own considerable property but their deeds had not been recorded. And, of course, this property, if within the district, would add to the value. And if the owners of the property signed the petition, it would add to the real value of the property owned by the petitioner. But the Legislature has seen proper to provide the method by which the council and the chancery court must determine whether or not a majority in value have signed the petition. This method must be followed both by the city council and the chancery court. And it would not be competent to introduce unrecorded deeds or show the value of property in any other way except that provided by law.

The appellant offered to show in the chancery court that he had offered testimony before the city council; that he had offered to prove certain facts. He offered to prove by several witnesses that they attended the first meeting of the special improvement district committee, and offered to show that certain property was arbitrarily included within the bounds of Street Improvement District No. 465; that said property was in no wise benefited, and should be excluded; and offered to show that the chairman of the street improvement district committee stated that they were to go by the abstracter's certificate alone to see whether a majority had petitioned for the improvement, and, if so, they must recommend to the council that the district be established.

The suggestion that this proof was offered in the city council is not equivalent to offering it in the chancery court. But the city council, as well as the chancery court, was required to be guided by the record of deeds in the office of the recorder of the county in determining whether those signing the petition constituted a majority in value. And the evidence offered was not competent in determining whether or not the petition was signed by a majority.

It may be that appellants are correct, that there should be some method of procedure where the conclusions of the city council should be based on some fact. But the method is provided by law, and neither the city council nor the court can change the law. And the law is that they must be guided by the record of deeds in the office of the recorder of the county.

When the first petition is presented to a city council for an improvement district, the statute says it shall be the duty of the council to at once lay off the district. And the law makes it the duty of the city clerk of the city or town, within 20 days after the designation of such district, to publish the ordinance establishing the district. And thereafter, within the time limited by law, the persons claiming to be a majority in value must present their petition, and, when that is done, the law provides that the city council shall determine whether or not there is a majority, in the manner above mentioned.

It is next contended by appellant that the district is void because it divides lots. Certainly, in the formation of an improvement district, the property owners forming the district can fix the boundaries, and it has been decided by this court that the boundary line may divide lots. If a lot is divided, a portion of it being within the district and another portion without, this does not invalidate the district. But, in determining whether the petitioners have a majority in value, the value of a lot so divided cannot be considered. And the reason it cannot be considered is that the council and the court must be guided, in arriving at the value, by the deeds in

the office of the recorder of the county, and cannot take other and additional evidence to determine the value. It might be better if the law authorized the taking of testimony showing the value of the portion of the lot included within the district. But such is not the law, and this court has held that the value of such lots cannot be considered, and the chancery court did not consider them in this case.

It is also contended that, where improvement or a building is situated on two lots and only one of them is in the district and the other one without the boundaries of the district, this makes the district void. This does not affect the validity of the district. If one lot was benefited and the other was not, it would be entirely proper to include the lot which was benefited, although a building might cover it and the one that was excluded. It would be practically impossible to form an improvement district that did not in some measure benefit a great deal of property outside of the district. But this benefit is the benefit received by the lands generally and not a special and peculiar benefit. To justify an assessment of benefits for any local improvement, it is necessary that the improvement be public and at the same time specially and peculiarly benefit the property taxed.

It is next contended by appellant that certain mortgaged property cannot be included because the mortgagor has parted with the legal title. This court has held that the mortgagor was the owner in the meaning of the law when he had conveyed his property by mortgage, if he was still allowed to redeem. There is no property mentioned in this suit where the owner has mortgaged it and does not have the right to redeem, so this case is settled outright by former decisions of this court. And the same may be said about leased property. However, the complaint made about property that is leased would be unavailing anyway, because both the lessor and lessee signed the petition. See *Ahern* v. *Board of Improvement Dist. No. 3, Texarkana,* 69 Ark. 68, 61 S. W. 575.

As to the property where one lot is included and another not included and the building or improvement is on both lots, it appears that the assessment record carries separate assessments for the separate lots.

The appellant also complains about the manner of proving the value, and insists that the clerk himself would have to make the proof. We do not agree with appellant in this. While the value is fixed according to the deeds in the office of the recorder of the county, it does not necessarily follow that the clerk is the only person who can testify to those. They are public records, and any person who examines them might testify. To be sure, the appellant could introduce the clerk if he wished to do so, if there was any dispute about the correctness of the testimony.

The court did not exclude any testimony or refuse to permit any competent testimony offered to be introduced in the trial in the chancery court. The chancery court, of course, did not determine whether the council heard proper evidence or not, but it did determine from evidence introduced in the court whether the district was valid or not.

Practically all of the questions involved here have been settled by numerous decisions of this court, and it would serve no useful purpose to review them here or comment on them at length. And the finding of the chancellor on questions of fact we think are sustained by a preponderance of evidence, and the decree is affirmed.

JOHNSON *v.* GUARANTY BANK & TRUST COMPANY.

Opinion delivered July 2, 1928.

Scott & Cooper, for appellant.
Robert S. Keebler, for appellee.

HART, C. J., (after stating the facts). A stipulation in a mortgage that, if the mortgagor shall fail to pay any note or installment of interest, or neglect to pay taxes or special assessments, the entire indebtedness shall become due and payable, or that the mortgagee may, at his option, declare it to be due and payable, is a legal and valid provision. *Hume* v. *Indiana Nat. Life Ins. Co.,* 155 Ark. 466, 245 S. W. 19; *Markle* v. *Fallin,* 161 Ark. 504, 256 S. W. 841; and *McCormick* v. *Daggett,* 162 Ark. 16, 257 S. W. 858. In the case last cited it was held that an acceleration clause in a deed of trust which matures the debt matures it for all purposes. In the case at bar, the mortgagee exercised its option to declare the mortgage debt due for failure of the mortgagors to pay the taxes and the past due purchase money note and the accrued interest, by filing a complaint to foreclose the mortgage for the whole indebtedness. In other words, the mortgagee in its complaint declared the whole debt due, and asked for a foreclosure for the whole of the mortgage indebtedness.

The stipulation for accelerating the time of payment of the whole debt may be waived by the mortgagee, especially when it is made to depend upon his option. A court of equity will also relieve against the effect of such provision, where the default of the debtor is the result of accident or mistake, or when it is procured by the fraud or other inequitable conduct of the creditor himself. Pomeroy's Equity Jurisprudence, 4 ed. vol. 1, § 439.

Under our decisions, the stipulation in a mortgage for the whole debt to mature upon default of a part of the debt is not treated as a forfeiture clause, but rather as a stipulation for a period of credit on condition. A breach of the clause can only be relieved against when some one of the equitable grounds above stated are established. It was not shown that the failure of the mortgagors to make the payments as stipulated in the mortgage was attributable to the plaintiff or its officers. No excuse was offered for the nonpayment of the levee taxes except that the defendants were short of money,

and this not sufficient. It is claimed that the failure to pay the purchase money note and the accrued interest on January 1, 1927, was due to the fault of the mortgagee, and an effort was made to place the blame upon its officers who represented it in the transaction, but in this the chancery court was justified in finding that the defendants have failed.

On this point T. P. Johnson testified that he was led to believe, from a conversation had with the vice president of the plaintiff, in December, 1926, that a reasonable extension of time would be given them after note due January 1, 1927, became due, to pay it, and that no effort was made by plaintiff to foreclose until after the Legislature of 1927 had passed an act relieving the lands of Crittenden County from road taxes, which had the effect to greatly enhance them in value.

Dickey said that Johnson reported to him that an extension of time had been granted them to meet the payment of the note due January 1, 1927, and the accrued interest. Otherwise he said that he would have paid the note. On the other hand, the vice president of the plaintiff bank and his assistant denied in positive terms that any extension of time of payment was granted. On the contrary, they asserted that payment was at all times demanded, and that an extension of the time of payment was specifically refused.

It was the duty of the defendants to pay the installments as they fell due, and they could not rely on any confusion that resulted from a misunderstanding on their part, which was not the result of any inequitable conduct of the plaintiff or its officers, and which was not caused by any misrepresentations made by them. The chancery court made an express finding that plaintiff did no act amounting to a waiver by it of its rights under the acceleration clause, and, under our familiar rules of practice, the finding of facts by a chancellor must be upheld upon appeal, unless clearly against the preponderance of the evidence. Such is not the case here.

Neither are we able to afford relief to the defendants because the Legislature passed an act which had

the effect to relieve the lands in connection with other lands from the payment of road taxes. So far as the record discloses, plaintiff had nothing to do with the passage of this act, and did not make any promises to defendants based upon it. Nothing whatever was said or done by the parties in reliance on the passage of such an act. Defendants only claim that they were misled by promises made by the officers of the plaintiff bank, but the promises relied upon in the testimony of T. P. Johnson, even if true, are too vague and indefinite to be made the subject of a waiver of the acceleration clause, and to amount to such inequitable conduct as to relieve defendants from the enforcement of the accelerating clause.

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

SNODDY *v.* PAVING IMPROVEMENT DISTRICT NO. 4 OF MONTICELLO.

Opinion delivered July 2, 1928.

[redacted]

P. Henry, for appellant.

Williamson & Williamson, for appellee.

HART, C. J., (after stating the facts). The first ground upon which it is sought to reverse the decree is that the ordinance creating the district embraces more than one improvement. In making this contention, counsel point to the fact that it embraces four separate areas of land disconnected, except that the areas are connected or joined together by streets which have already been paved by the commissioners of Paving District No. 2 of Monticello. Under our former decisions the determination of the city council as to the singleness and unity of the proposed improvement, as well as the selection of the property to be benefited thereby, is conclusive, except for fraud or demonstrable mistake. *Little Rock* v. *Katzenstein*, 52 Ark. 107, 12 S. W. 198; *Cooper* v. *Hogan*, 163 Ark. 312, 260 S. W. 25; and *Paving Districts Nos. 2 and 3 of Blytheville* v. *Baker*, 171 Ark. 692, 286 S. W. 945. Under the holding of these cases, it cannot be said that the action of the city council in grouping together into a single district the improvement of the streets named in the petition for the organization of the district is invalid. In other words, lack of unity in the proposed improvement is not so apparent from the map and the face of the other record in the case as to show a demonstrable mistake, such as to make the organization of the district void. In this connection it may also be stated, while this is a direct attack on the organization of the district, no proof was introduced to show that this is true in point of fact.

While streets and parts of streets which are not immediately and directly connected with each other are embraced in one improvement, yet they are connected together through other paved streets, and this, under the decisions above cited, constitutes them the same improvement. The streets are to be improved with the

same material. The similarity of the improvement proposed to be made and the situation of the property with respect to each street or part of street to be improved make as satisfactory a test as to whether they might all be embraced in one improvement as their actual physical connection with one another. To the same effect see *Fry* v. *Poe*, 175 Ark. 375, 1 S. W. (2d.) 29, and *Portis* v. *Ballard*, 175 Ark. 834, 1 S. W. (2d.) 1; *Brown* v. *Board of Commissioners of Paving Dist. No. 3*, 165 Ark. 585, 265 S. W. 81.

It is next urged that the assessment of benefits is illegal because made in an arbitrary manner. It is alleged that they were made upon a front foot basis. In their answer the defendants "deny that said assessment has been made entirely on a front foot basis, but alleged that, in assessing said benefits, the assessors of said district took into consideration the value, superficial area, frontage, location, improvements on the property, and the relation to business and other centers, and every other factor entering into the benefits to be received by each and every parcel of land in the district, and adopted the system for assessment of all such benefits which they believed to fairly and equitably estimate the benefits to be actually received by each and every lot, block and parcel of land in the district by reason of all the improvements to be made therein."

The plaintiffs demurred to the answer, and, upon their demurrer being overruled, elected to stand upon it, and, in addition, expressly conceded the truth of the allegations of the answer in this respect. In *Lewellyn* v. *Street Improvement Dist.*, 172 Ark. 496, it was said that the fact that the assessment of benefits was made on a front foot basis did not necessarily condemn the assessment, even on a direct attack, for such a basis of assessment might coincide with the actual benefits. In a direct attack the court said that it becomes a question of proof whether or not the assessments are correct, but in a collateral attack the court must indulge the presumption that the assessors considered all the elements

of enhancement of value or detriment which might result from the improvement. The same rule has been expressly declared and followed in the following cases: *Moore* v. *Paving Imp. Dist. 20,* 122 Ark. 326, 183 S. W. 766, 1 Ann. Cas. 1917B, 599; *Ford* v. *Plum Bayou Road Imp. Dist.,* 162 Ark. 475, 258 S. W. 613.

It follows that the decree was correct, and it will be affirmed.

JOHNSON *v.* BARRETT.

Opinion delivered June 25, 1928.

R. W. Wilson, for appellant.

A. F. Triplett, for appellee.

McHANEY, J. Appellants in each case were tenants on the farm of Mrs. J. B. Pierce, in the year 1926, Jefferson County, Arkansas. Appellee agreed to furnish them certain supplies for that year, and on the 18th day of February, 1926, took from each a note for advances already made and to be made, which notes were secured by a mortgage on certain personal property, which were filed in the recorder's office at Pine Bluff. On the 18th day of March, 1926, appellee assigned the notes and mortgages to the Bank of Sherrill as collateral security for indebtedness owed by him to the bank. Part of this indebtedness was paid in the fall of 1926, and the remainder in the spring of 1927, when the notes were

turned over to the makers by the bank, and it later reassigned the mortgage to appellee.

Each of the mortgages, in addition to reciting the indebtedness for which the note was executed, for which the mortgage was security, contained this further provision: "And also the further sum of $....., more or less, for goods, merchandise or supplies, live stock, advances or acceptances furnished and which may be furnished by the second party or parties to the first party or parties, the exact amount to be determined by the books of the second party or parties, and due and payable on the 15th day of October, 1926." Other provisions in the mortgage contemplate that the appellee might furnish additional supplies, or make additional advances, and that the mortgage given should be security therefor. Appellee made advances in addition to that represented by said notes, and, these advances not having been paid, he brought suit in the justice court to replevin the property covered by such mortgage. Appellants did not deny the indebtedness, but contended that the mortgages were not security for these supplemental debts. A judgment was rendered against appellants in the justice court, and an appeal was taken to the circuit court, where like judgments were rendered. The case is here on appeal.

The only question necessary for us to determine is stated by appellants as follows: "Could Mr. Barrett transfer the notes and mortgages on the personal property involved in this suit and yet retain a lien on the same property for the money, goods, wares and merchandise furnished after the transfer?" It is appellant's contention that the mortgage is not divisible; that appellee could not transfer same and yet retain a lien on it; that by transferring the mortgage and notes to the Bank of Sherrill, appellee had no further security for whatever advances he made thereafter under the mortgage. We cannot agree with appellant in this contention. While it is true that each mortgage was an indivisible instrument, the debts it secured were divisible. In other words, the mortgage secured a definite, certain sum, rep-

resented by the notes, and by its own language, heretofore set out, it secured, in addition, any advances thereafter to be made in addition to the sum mentioned in the note. As stated in 19 R. C. L. 389: "The indivisibility of a mortgage does not render indivisible the obligation secured, and the divisibility of a debt does not necessarily import the divisibility of the mortgage securing it."

The assignment of the mortgage and notes in these cases was not an absolute one, but was collateral security for the appellee's debt to the bank.

In the case of *Hughes* v. *Johnson,* 38 Ark. 285, quoting the first syllabus, it is said: "A mortgagee does not lose his interest in the mortgage by assigning it to his creditor as collateral security for his own debt, though he stipulates in the assignment to forfeit all interest in the mortgage if he fail to pay his debt by a specified day, and fails to pay it. The agreement for forfeiture amounts to nothing in a court of equity." *Ford* v. *Black,* 50 Ark. 256, 7 S. W. 131; *Penzel* v. *Brookmeyer*, 51 Ark. 105, 10 S. W. 15, 14 A. S. R. 15.

When appellants paid their notes at the bank which the mortgage secured, this operated as a redemption from the pledge of the mortgage to the bank made by appellee. On the mortgage being re-assigned to appellee by the bank, he was in the same situation as if no assignment had been made, and appellants are in no position to complain. They do not dispute the indebtedness, but only claim that the mortgage did not secure same. We find no error, and the judgments are affirmed.

McDonald *v.* Roberts.

Opinion delivered June 25, 1928.

Miles & Taylor, for appellant.

Carmichael & Hendricks, for appellee.

McHaney, J. Appellant and appellee, Fannie Roberts, are the owners of the east half of Spanish grant or survey No. 497, appellant being the owner of the east half of the east half, and appellee, Fannie Roberts, the owner of the west half of the east half thereof. Both parties claim title from a common source, Leon Lefevre, who executed deeds to appellant's immediate predecessor and to Fannie Roberts on the same day, February 3, 1887. Since that date appellee, C. G. Roberts, has been in the actual possession of the entire east half of this property through his wife, and under a continuous lease from appellant and her predecessor. Both tracts front on the north bank of the Arkansas River.

This suit was brought by appellant to determine the boundary line between the tracts, the prayer being "that a commission issue to fix the boundary line between the respective lands of the parties hereto, to preserve such line from confusion, and to mark off definitely the lines of plaintiff's land," and for quieting title to her land in her.

A plat of the tract in the transcript shows that the St. Louis Southwestern Railway runs across the tracts east and west approximately 2.35 chains from the river and parallel therewith. This plat also shows appellant's property to be 16½ chains wide, and appellee's 18 chains wide. The river runs in a southeasterly direction, making the appellant's tract longer than that of appellee.

The undisputed evidence in the record tends to show that, at the time Leon Lefevre conveyed the land to appellant's grantor and to appellee, Fannie Roberts, a rail fence divided the two tracts, and that all parties regarded

the fence as the line between the two tracts as long as it remained there. The fence rotted down, and was removed in the year 1906, and has never been rebuilt, but the undisputed evidence shows that this old fence line is still susceptible of location by stones in the line, and at least one stump near the line. The testimony tends to show, and is undisputed, that at the time Leon Lefevre conveyed these separate tracts he did so with reference to this fence, not in so many words, but that he had so placed the fence as to divide the land into two equal parts as to acreage, the east half of the east half being the longer tract, he so placed the fence as to make it the narrower of the two tracts. This accounts for the difference in their width, appellant's tract being 16½ chains wide, and the Roberts tract 18 chains wide, but, at the time of the conveyance, they had the same number of acres in them. The testimony further shows that the river bank has been caving during high water, and that appellant's tract has sloughed off into the river until perhaps it does not have as many acres in it now as the tract belonging to appellee.

The chancellor found that the old fence row was the true line between the parties at the time the deeds were made, and that appellee, Fannie Roberts, has always claimed all the land on the west side of and up to the fence; and that said line can be traced at this time, and is subject to identification. The court entered a decree quieting the title to the east half of the east half of private survey No. 497, as established by said line, in appellant, and the west half of the east half thereof, as established by said line, in appellee, Fannie Roberts.

We think the court correctly found the facts, and correctly established the line between them to be the line of the old fence row, and that it is now capable of identification. However, appellant does not seem satisfied, and we are in doubt as to whether persons unskilled in the establishment of lines could definitely locate the line as established by the court's order. Therefore, while the court's order definitely fixes the line in accordance with

all the evidence, still it has not actually been established and fixed on the land itself so that the parties themselves may go and locate it and know exactly where the line is. If the parties themselves cannot agree upon the definite and actual location of line from the decree of the court, as apparently they cannot do, appellant would be entitled to have the court appoint a surveyor to locate and establish the line on the land, with fixed monuments, in accordance with the decree of the court. In this regard the decree of the court is modified, and in all other respects it is affirmed, each party to pay his own costs in this court.

NO FENCE DISTRICT NO. 1 OF LINCOLN COUNTY *v.* GRUMBLES.

Opinion delivered June 25, 1928.

A. J. Johnson and *Henry W. Smith*, for appellant.

Mike Danaher and *Palmer Danaher*, for appellee.

MCHANEY, J. This case was tried upon the following agreed statement of facts: "No-Fence District No. 1 of Lincoln County, Arkansas, is a corporation organized by special act No. 233 of the Acts of the General Assembly of Arkansas for 1923, approved February 27, 1923. That it was incorporated for the purpose of build-

ing a fence in Lincoln County, Arkansas, on the boundary of what was designated as No-Fence District No. 1. That the district did build and construct the fence in 1923, and the board of directors, in order to pay for said improvement, levied an annual tax based on the assessed benefits against the lands within the district. That the tax levied for the year 1923 remained unpaid on the 10th day of April, 1924, and a certified copy of the delinquent list was furnished by the collector to the clerk of the chancery court of Lincoln County, and same was filed and recorded on the 7th day of June, 1924; that the taxes for 1924 remained unpaid on April 10, 1925, was also certified to the Lincoln Chancery Court, and filed and recorded on the 8th day of June, 1925, and the taxes remaining unpaid on April 10, 1926, were likewise certified to the clerk of the Lincoln Chancery Court and filed and recorded on the 12th day of June, 1926.

"That F. E. Grumbles was the duly qualified and acting clerk of the chancery court of Lincoln County from January 1, 1923, until December 31, 1926; that he was succeeded in office on January 1, 1927, by O. F. Myers, who is now and has been since that date the duly qualified and acting clerk of the Lincoln Chancery Court. That the board of commissioners in No-Fence District No. 1, for the purpose of foreclosing the lien in favor of the district for delinquent taxes, filed their petition in the Lincoln Chancery Court with copy of the delinquent tax list for years 1923, 1924 and 1925, attached on the 26th day of August, 1926; that the complaint and list of delinquent taxes are attached as part of the statement of facts. That a decree in favor of the district for the amount of the taxes, interest, penalty and cost was rendered in favor of the district on October 18, 1926, and on said date the clerk of the Lincoln County Court was appointed a commissioner and directed, if said taxes were not paid in ten days, to sell said land at public sale, after giving notice for the payment of said judgment. That the notice given by the clerk as commissioner is hereto attached. That the commissioner's report of sale

was filed with the court on December 14, 1926; that the report of sale was approved by the court on the 14th day of December, 1926. No part of the lands included in the decree has ever been redeemed. That a large number of the tracts of land returned delinquent by the collector in 1924 for the delinquent taxes of 1923 also became delinquent for the taxes of 1924 and 1925, and were returned delinquent by the collector for each of these years.

"The clerk, F. E. Grumbles, is asking the court for judgment as cost in suit to foreclose the delinquent tax of $1 per tract for filing and recording the delinquent list for each year said tract was returned delinquent. This request is for $1 per tract for 416 tracts appearing on the delinquent list for one year; $2 per tract for 53 tracts on the delinquent list for two years; $3 per tract on 64 tracts on delinquent list for three years, making a total of $714 for filing and recording. The district refuses to pay.

"F. E. Grumbles is asking also the court for judgment against the lands for the amount of $1 per tract on a total of 533 tracts as commissioner's fee for making sale. The deeds conveying the lands as sold by the commissioner to the district have not been executed nor approved. The district has refused to pay this item, for the reason that it contends that it is incumbent upon the present clerk, O. F. Myers, to execute the deeds.

"All pleadings, exhibits, notices, motion and answer thereto considered in evidence.

"The present clerk, O. F. Myers, who succeeded F. E. Grumbles as clerk in January, 1927, is charging and collecting from all persons who wish to redeem any of said lands one dollar per tract for the redemption certificate, and one dollar for deeds executed.

"We agree that the above statement may be taken and considered by the court as facts relevant to the above case without any proof thereof, at the trial of said cause."

Based on these facts, the court found that appellee was entitled to a fee of $1 for each tract of land returned delinquent for filing and recording the delinquent list for each year that such tracts were returned delinquent; that there were 416 tracts returned delinquent for one year, 53 tracts returned delinquent for two years, and 64 tracts returned delinquent for three years, which entitled appellee to the sum of $714. The court further found that the commissioner, appellee, had advertised and sold 533 tracts of said delinquent lands, all of which were purchased by appellant, for which he was entitled to a fee of $1 for each tract so sold, or $533, making a total of $1,247, for which amount a decree was entered in his favor against the district.

It is first contended that appellee is not entitled to collect the $1 per tract for filing and recording the delinquent lists for the years mentioned, for the reason that he did not issue any certificates of redemption. This contention is based on § 3 of act 534 of the Acts of 1921, p. 573, the pertinent parts of which are as follows: "For his services in filing, recording and issuing certificate of redemption the said clerk shall be entitled to the sum of $1 per tract, which shall be added to the same at the time of recording said list and shall be charged as costs against said tract."

Section 4 of said act provides that if the board desires to bring suit for the collection of such delinquent taxes, they shall obtain a certified copy of the delinquent list from the chancery clerk and file same with the complaint, which shall be taken as a part thereof, and the clerk for making the certified copy is entitled to ten cents per tract, to be taxed as costs in said suit. This procedure was followed. The delinquent lists were returned to the chancery clerk as provided in said act, which he filed and recorded, and at the time entered up the charge of $1 as costs for filing, recording and issuing certificates of redemption, provided any property owner desired to redeem. No redemptions were made, however, and when the certified list of delinquents was made to the board

and suit was filed thereon, this $1 per tract was included in the costs, plus the ten cents per tract for the certified copy, and the land was sold for the tax, penalty, interest and costs, including this $1.10. If the land had been sold to an individual instead of to the district, there could be no question whatever that the clerk would be entitled to his costs of $1 per tract for filing and recording, as that amount would necessarily have been paid by the purchaser of the tract. Since the district became the purchaser of all this delinquent land, and since it is provided in § 22 of the act creating the district, act 233, Acts of 1923, p. 447, "that in any case where the lands, lots, railroads and tramroads are offered for sale by the commissioner, as provided for in this act, the sum of tax due, together with the interest, costs and penalty is not bid for the same, the said commissioners shall bid the same off in the name of the said district, bidding therefor the whole amount due as aforesaid; and the commissioner shall execute his deed therefor, as in other cases under this act, conveying such land to such board," etc. It is therefore plain to be seen that the clerk's costs of $1 per tract for filing and recording such lists have been included in the amount for which suit was brought, and for which sale was made, was included in the amount bid by the district for such land, and we know of no reason why the district should not pay the clerk his fees for this work. The mere fact that § 3 of the act 534, Acts 1921, provides that this fee of $1 shall be for filing, recording and issuing certificate of redemption, when no redemptions have been made by the property owners, cannot disentitle him to the fee which he was required to enter up at the time of filing and recording, and which has been certified to the board, and for which the land has been sold to the district.

We therefore hold that the clerk was entitled to this item of fees as allowed him by the chancellor.

It is finally insisted that the appellee is not entitled to the $1 per tract allowed him by the court as commissioner's fee for making the sale. The decree of fore-

closure under which the sale was had was made and entered October 18, 1926, from which there has been no appeal, and in this decree the commissioner was ordered, in making the sale, "to add a fee of $1 for acreage property and $1 for town lots as his fee, and the sum of $1 as attorney fee against each and every separate tract of land." This was the commissioner's fee for making the sale.

As heretofore stated, he has made the sale in pursuance of said decree and reported same to the court, which has been approved, but no deed has been made to the district conveying the lands to it. In fact, no deed could have been made until the expiration of one year from the date of the sale and its confirmation by the court, as the act under which the district is organized, act 233 of the Acts of 1923, provides, in § 21, "that the owner of any such property may redeem the same by paying to the clerk of the proper chancery court the amount of taxes, penalty, interest and costs within one year after the sale of said lands or other property, and saving to minors and insane persons the right to redeem within one year after such disability shall have been removed."

For this service of issuing redemption certificates after sale, the act fails to provide any fee for the clerk. The above provision of the act creating the district clearly refers to redemptions after the sale, whereas § 3 of the act of 1921 refers to redemptions before sale. Until the period of redemption, as above set out, expired, the commissioner would not be authorized to make a deed to the district, but, at the expiration of that time, on the demand of the board, it would be his duty to execute such deed. That duty would not devolve upon the present clerk, as the former clerk, appellee, was the commissioner making the sale, and the act creating the district makes it the duty of the commissioner making the sale to execute the deed. The commissioner might or might not be the clerk, as the act creating the district provides that the court "shall appoint a commissioner,

who should be directed to sell the lands," etc. It will be a very simple matter for the commissioner, appellee, to make a deed to the district for the lands remaining unredeemed from the sale, and on doing so he would be entitled to his fee as fixed by the court for making the sale.

The decree is therefore affirmed.

SMITH *v.* HALTOM.

Opinion delivered July 2, 1928.

[redacted]

[redacted]

Haynie, Parks & Westfall, for appellant.

McRae & Tompkins, for appellee.

HART, C. J., (after stating the facts). At the outset it may be stated that we have carefully read and considered the record, and if the defendant, W. Scott Haltom, had appealed we could have reached no other conclusion than that the chancery court properly granted the plaintiff, Lois B. Haltom, a divorce from her husband, W. Scott Haltom, and awarded her the custody of their infant son. The court also was right in setting apart to the plaintiff one-third of all the real estate described in the complaint as belonging to her husband.

The case of *Allen* v. *Allen,* 126 Ark. 164, 189 S. W. 841, was a case where constructive service was had upon the husband, and the wife in her complaint described real estate belonging to her husband, and asked that one-third of it be set apart to her for her natural life. There was a decree granting her a divorce and awarding her one-third of the lands of her husband for her life. The court held (quoting from syllabus): "The statute authorizes the court to set apart to the plaintiff in a divorce case one-third of all the husband's real estate, and the filing of a complaint describing the property gives the court jurisdiction over it for the purposes of making an award in accordance with the terms of the statute; no attachment or other method of sequestration is necessary in order for the court to acquire jurisdiction."

Again, in *Hegwood* v. *Hegwood,* 133 Ark. 160, 202 S. W. 35, the court held (quoting from syllabus): "The division of the property is a mere incident to the divorce, and it is not essential to the jurisdiction of the court that the pleadings should set forth the property. The decree for divorce draws to the court the power to ascertain the description of the property owned by the husband, for the purpose of awarding to the divorced wife her share thereof."

From the contract of marriage springs a relation or status in which the State and the public are interested

and which has always been deemed subject to the control of the Legislature by laws which, amongst other things, prescribe the effect of the relation upon property rights of the contracting parties. *Closson* v. *Closson,* 30 Wyoming 1, 215 Pac. 485, 29 A. L. R. 1371; *Maynard* v. *Hill,* 125 U. S. 190, 8 S. Ct. 723.

In *Forrester* v. *Forrester,* 155 Ga. 722, 118 S. E. 373, 29 A. L. R. 1363, it was held that the property of a nonresident husband which may be found in the State of Georgia may be seized and appropriated to the support of his wife by proper proceedings *quasi in rem,* in a court of equity which has jurisdiction of the subject-matter of the suit and possession of a *res* which may be subjected.

In a case-note to 29 A. L. R., 1381, the principle is recognized and the rule is stated as follows:

"While it has been held in many cases that a purely personal decree or judgment for alimony, rendered against a nonresident, who is notified constructively by publication or actual service out of the State, and who does not appear, is void, not only in the State in which it is rendered but in other jurisdictions as well, yet a different rule prevails as to property of the nonresident so served which is within the jurisdiction of the court. Assuming that the nature and *situs* of the property are such as to support a proceeding *in rem* or *quasi in rem,* the rule is that constructive service of process or personal service outside of the State, even in the case of a nonresident, will give jurisdiction to render a decree for alimony or maintenance, which is binding upon property belonging to him which is within the jurisdiction of the court and which has been specifically proceeded against;" and among the cases cited are *Pennington* v. *Fourth Nat. Bank,* 243 U. S. 269, 37 S. Ct. 282, L. R. A. 1917F, 1159, and *Allen* v. *Allen,* 126 Ark. 164, 189 S. W. 841.

In the application of the rule in *Walker* v. *Walker,* 147 Ark. 376, 227 S. W. 762, in an action for divorce against a nonresident on constructive service of process, it was held that a personal judgment could only be ren-

dered upon personal service of process, and that in such a case a personal decree for alimony and attorney's fee against the husband was void on its face.

In the case at bar the court specifically refused to allow attorney's fees, and also refused to make a personal decree for alimony. The decree provided that the alimony was to be paid out of the portion of the estate of J. F. Haltom, deceased, which had been ordered distributed to W. Scott Haltom and which had been impounded for that purpose in the hands of the administrator as a part of the personal estate of the decedent ready to be distributed to his heirs-in-law.

The chancery court, at the commencement of the suit, was asked to impound only that part of the personal estate of J. F. Haltom, deceased, which had been specifically ordered to be distributed to W. Scott Haltom. This constituted an equitable garnishment of the funds, and brings the case squarely within the rule announced in *Pennington* v. *Fourth Nat. Bank,* 243 U. S. 269, 37 S. Ct. 282, where it was held that the alimony obligation of a nonresident husband, served only by publication, though inchoate at the commencement of the divorce suit, may, consistently with the due process of law guaranteed by the 14th Amendment of the United States Constitution, be enforced out of a bank deposit in a local bank, where, upon the filing of the suit, the court entered a preliminary order enjoining the bank from paying out any part of the deposit, such an order being as effective a seizure as the customary garnishment or taking by trustee process. In discussing the question the court said:

"The power of the State to proceed against the property of an absent defendant is the same whether the obligation sought to be enforced is an admitted indebtedness or a contested claim. It is the same whether the claim is liquidated or is unliquidated, like a claim for damages in contract or in tort. It is likewise immaterial that the claim is, at the commencement of the suit, inchoate, to be perfected only by time or the action of the court. The only essentials to the exercise of the State's power are

presence of the *res* within its borders, its seizure at the commencement of proceedings, and the opportunity of the owner to be heard. Where these essentials exist, a decree for alimony against an absent defendant will be valid under the same circumstances and to the same extent as if the judgment were on a debt; that is, it will be valid not *in personam*, but as a charge to be satisfied out of the property seized."

This rule applies here. The defendant, J. B. Smith, as administrator of the estate of J. F. Haltom, deceased, was made an equitable garnishee when the divorce complaint was filed. His answer admits that he has in his hands as such administrator a sum of money which the probate court has already ordered to be paid by him to W. Scott Haltom as his distributive share of the estate. The administration was closed, so far as the sum garnisheed was concerned; nothing remained to be done except to pay out the amount to W. Scott Haltom as his distributive share of the personal estate. Hence equitable garnishment of the same could in no way affect the jurisdiction of the probate court over the administration of the estate of J. F. Haltom, deceased. The answer of the defendant, J. B. Smith, as such administrator, made him a party to the proceeding, and, as a result, he was required to follow the suit to its end or stand the consequences. Hence he had the right to appeal to this court, and, indeed, it was his duty to do so if he thought the decision of the chancery court was wrong. But, as we have already determined, the decree of the chancery court was correct as far as he is concerned.

For the reasons above given, the application of the defendant, W. Scott Haltom, for a writ of certiorari to quash the decree of the chancery court in the divorce case must be denied. No appeal has been taken from the decree for divorce, and, for that reason, the motion of the attorneys of Lois B. Haltom for attorney's fees pending the appeal in this court must be denied. The appeal of J. B. Smith, as administrator of the estate of J. F. Haltom, deceased, does not give us jurisdiction to

grant attorney's fees in the divorce case, which was not appealed. Nor can the cross-appeal of Lois B. Haltom have that effect, because it does not affect her rights as to the equitable garnishment against J. B. Smith, administrator of the estate of J. F. Haltom, deceased.

The result of our views is that the decree of the chancery court will be affirmed, and the application of the defendant, W. Scott Haltom, for a writ of certiorari to quash the decree of the chancery court will be denied. It is so ordered.

VAN NORMAN *v.* REYNOLDS.

Opinion delivered July 2, 1928.

E. A. Williams and *Dean, Moore & Brazil,* for appellant.

Strait & Strait, for appellee.

WOOD, J. This is an action by certain citizens, residents and taxpayers of Conway County, Arkansas, against the county judge of that county and the commissioner appointed by the county court to superintend the erection of the courthouse, and the contractor, with whom a contract was entered into for the building of the courthouse, to restrain them from performing their contract.

The plaintiffs alleged seventeen reasons why the courthouse should not be built, all of which have been abandoned here except the following:

(1) Because the county is unable to build a courthouse on the plan outlined and leave sufficient revenue to meet the county's necessary expenses of government, which would be contrary to provisions of act No. 11. (2) That the attempted appropriation for the building of the courthouse was illegal and void, as all of the 5-mill levy that could be appropriated under the statutes was appropriated before the attempted appropriation of 1½ mill for the purpose of building the courthouse. (3) That the matter of building a courthouse was not properly presented to the quorum court, and no sane and reasonable estimate of the county's necessary running expenses was attempted to be made by the quorum court. (4) That the contract entered into by the county judge and the building commissioner with the contractor is illegal and void, because it is in violation of the statute and Constitution forbidding the payment of interest by counties.

Issue was joined by the defendants on the above alleged grounds.

The cause was heard by the chancery court upon the pleadings and the depositions of witnesses, together with certificates of officers and certified copies of record attached to the depositions of witnesses, and the court made a general finding in favor of the defendants. The court entered its decree dismissing the complaint for want of equity, from which is this appeal. We will con-

sider the alleged grounds for injunction in the order in which they are stated by appellant's counsel.

1. In the recent case of *Tatum* v. *Tatum,* 175 Ark. 90-95, 1 S. W. (2d.) 554, we said: "It is incumbent upon the county court to ascertain from the budget of past years of the quorum court and from estimates of the future condition of the county if there will be annually a margin left to meet the annual payments for construction of a courthouse after the indispensable governmental expenses of running the county are deducted from the total amount of the county general revenue to be annually levied and collected." In this view of the matter, the burden of proof was upon the defendants to show that this state of facts existed.

It appears from the records of the county and quorum courts of Conway County that the courthouse in that county was destroyed in January, 1927. The judge of the county court, who presided over the quorum court during its deliberations, testified, among other things, as follows:

"I have ascertained from the record the amount of income of Conway County per annum for the last two or three years, and am in possession of the facts showing the income. The amount of the general revenue of the county for general purposes for the year 1927 from all sources was $38,833.33. My estimated total income for the county general purposes for the year 1928 is $42,-678.78. I am familiar with the current general expenses of operating the business and affairs of the county per annum. There will, from the amount of income, be a surplus over and above the necessary and economical administration of the affairs of the county, amounting to approximately a little more than $8,000. There will be sufficient each year, under present valuation and method of assessment, to operate and conduct the business affairs of the county and meet its expenses and have sufficient to pay the annual installments under the contract for the construction of the courthouse $6,000 each year. The assessed values are increasing in Conway County. The

county itself and the wealth of the county is increasing in value. The letting of this contract and the payment of the contract price in installments of $6,000 a year will not depreciate the value of county scrip. Scrip is on a par basis at this time. The county's income will be sufficient to pay its current expenses and to pay these installments each year in cash as they become due."

On being recalled, the judge further testified that the estimate of the net income for 1928 will be $29,372.26. The net income for 1927 was $29,060.98. He had been county judge a little over five years. The net income for the years 1927 and 1928 is about an average of the county's annual income. The witness then went into detail in explaining the annual revenues and expenses of the county.

It would unduly extend this opinion, and is wholly impractical, to set out and discuss in detail the figures given by the witness in making his estimate of the amount which the county could expend in the building of a courthouse over and above the necessary expenses of county government. The witness was examined at great length, both in his direct and cross-examination, and, after setting forth the sources of income and the necessary expenditures, he stated that the county would have "funds enough to carry on an economical administration of the county's affairs, after paying $6,000 per annum as per contract for the construction of the courthouse."

Two of the members of the quorum court were called as witnesses. They testified that no committee was appointed by the quorum court to make a survey of the accounts to determine whether the court could levy 1½ mills for the purpose of building a courthouse and have enough left to pay the necessary expenses of county government. They relied on the statement of the county judge as to the condition of the county finances, believing he ought to know, as he had been county judge for four years. One of these witnesses stated that he attended all sessions of the court, heard all reports that were made. "The regular order for county clerk to make a detailed

statement of the county finances was made, and seemed to be in regular form. The court adopted it, and that was used as a basis for the action of the court in making the appropriation—that is, we relied on the judge's statement of the county's finances in making the appropriation."

The county treasurer was called, and the record of the county treasurer for several years back was introduced and statements and certificates by the treasurer, showing the amounts of revenues received from various sources and the amounts paid out by him, and the condition of the treasury, which tended to show that there was left to the credit of the general county fund on January 1, 1928, only the sum of 50 cents. It was agreed that all certificates of the county clerk and the report of all the officers of the county pertaining to the general revenue for the year 1927 and many years prior thereto should be introduced and considered as evidence in the cause, and there were many certificates and reports introduced and considered.

M. H. Dean was a witness. He had been circuit clerk of the county from 1902 till 1908 inclusive, and county treasurer from 1909-1912 inclusive, and then again circuit clerk from 1913-1916 inclusive, and county judge from 1918-1922 inclusive. He testified at considerable length. Among other things he said: "The county's indebtedness had greatly increased through all the years he had been in office up to the present time, and was now $96,900 in debt." As to the increase, says the witness, "the only way I can account for it, there is not enough revenue derived to meet the county's expenses; in other words, the assessed valuation and revenue does not provide enough to meet the expenses of the county. It just won't do it. * * * I have examined the records closely for the last ten years, from 1918-1927, and the assessed valuation of the county for the years 1923, '24, '25, '26, and '27—that is, the highest valuation for these years—is lower than the five years preceding."

After a careful examination of this voluminous record we are unable to say that the finding of the chancellor on this issue of fact is clearly against the preponderance of the evidence.

In *Ivy* v. *Edwards,* 174 Ark. 1167, 298 S. W. 1006, we said: "It would be impossible to build a courthouse if speculation and conjecture merely should be allowed to enter in the making the estimates as to the amounts necessary to pay the necessary government expenses. In other words, a mere suggestion that it might take all the revenue in any current year to pay the necessary government expenses should not preclude the quorum court from authorizing the construction of the courthouse if a sane and a reasonable estimate disclosed that there would be sufficient to build the courthouse on the installment plan, after paying the necessary expenses for government." Judge M. H. Dean, because of his connection with the financial affairs of Conway County as clerk, treasurer and county judge for twenty years, to be sure, was exceedingly conversant with the finances of the county. According to his testimony, there was not enough revenue to meet the county's expenses. He had seen the county's debt pile up through all these years until it was now $96,900. But, during the time Judge Dean was connected with the financial affairs of the county in the various offices mentioned, there was no constitutional provision, such as is now contained in Amendment No. 11, prohibiting the making of any contracts or allowances, for any purpose whatever, in excess of the revenue for the fiscal year in which the contract or allowance is made and attaching severe penalties by way of fine and removal from office of any officers who had violated the provision of the Constitution. No doubt Judge Dean was a faithful and efficient county judge, and he did all in his power, as the testimony shows, to meet the expenses of the county government with the revenue as it came in. But it is a matter of common knowledge that, with no restriction upon the power of county courts to incur indebtedness, many of the counties of the State had incurred a

large indebtedness, Conway County among them. But, under the new regime inaugurated by the adoption of Amendment No. 11 to the Constitution, it is now impossible for county judges to involve their counties in debt without incurring heavy penalties. Therefore the viewpoints from which Judge Dean on the one hand and Judge Reynolds on the other viewed the fiscal affairs of their county were entirely different. Judge Dean was out of office, and no longer charged with the responsibility of managing the affairs of the county. Judge Reynolds, who is the present incumbent of the office and has had the responsibility of managing the finances of the county since the adoption of Amendment No. 11, explained before the quorum court the condition of the finances of the county at the time that court made the appropriation for the building of the courthouse. The testimony shows that the indebtedness of the county had been paid, under the provisions of Amendment No. 11, and that the court had before it a detailed statement of the county's finances made by the county clerk; so it was determined by the quorum court and the county court, before it entered into the contract, that the revenue would be sufficient to meet all other expenses of the county government and to provide the necessary funds for the building of the courthouse.

In *Lake* v. *Tatum,* 175 Ark. 90-93, 1 S. W. (2d.) 554, we said: "Where the county court, in good faith, finds, upon an investigation of the fiscal affairs of the county, that there will be a margin left, if it be spread over a series of years sufficient to meet the annual payments for the construction of a courthouse, such contract for the construction of a courthouse will be a valid and enforceable contract, and the annual payments will be considered allocated or appropriated to the construction of the courthouse."

Without pursuing the matter further, we are convinced that the county court of Conway County acted in good faith in finding that the general revenue of the county would be sufficient to enable the county to pay the

necessary expenses of county government and at the same time make the annual payments required by the contract for the building of the courthouse. At least we are unable to say that the evidence does not preponderate in favor of such finding of fact by the trial court.

2. Learned counsel contend, in their second proposition for reversal, that the attempted appropriation for the building of the courthouse was illegal and void, as all the five-mill levy that could be appropriated under the statutes was appropriated before the attempted appropriation of 1½ mills for the purpose of building the courthouse. The record shows that the quorum court, at its regular November term, 1927, levied a 5-mill tax for general county purposes, and then appropriated 1½ mills of this tax for the construction of a courthouse. Later, at a special term, the quorum court was regularly convened December 23, 1927, at which term the court passed the following resolution:

"Whereas, it has been calculated that the amount of money necessary to pay said warrants as they mature in twenty installments of $7,000 each will be realized by levying a tax of 1½ mills, be it ordered, adjudged and decreed by the quorum court of Conway County, Arkansas, that a tax of 1½ mills on the dollar of the assessed value of all the taxable property within said county is hereby levied to pay the installments of said warrants of not exceeding the amount of $140,000, maturing serially $7,000 per year for twenty years, beginning in the year 1929. That during each of the years, while any of said warrants are outstanding and unpaid thereon, there shall be calculated the amount of money necessary during each of said years to pay the current installment maturing during said years, and that a tax at a rate sufficient to raise said money shall be levied by the quorum court and collected during each of said years, and is hereby ordered levied."

This procedure followed closely that which was adopted by the quorum court of Benton County in making the levy and appropriation for the building of a court-

house, which was held valid by this court in the case of *Ivy* v. *Edwards, supra.* No useful purpose can be served by repeating what was there said. According to the doctrine of that case, appellants' second ground for reversal cannot be sustained.

3. The appellants' third proposition for reversal is that the matter of building a courthouse was not properly presented to the quorum court and no sane and reasonable estimate of the county's necessary running expenses was attempted to be made by the quorum court. This involves a question of fact which we have already determined in disposing of appellants' first proposition for reversal. It follows, from what we there said and our conclusion with reference to that, that the third ground urged by appellants for reversal cannot be sustained.

4. The last ground urged by appellants as set forth above is: "The contract entered into by the county judge and the building commissioner with the contractor is illegal and void because it is in violation of the statute and Constitution forbidding the payment of interest by counties." This is purely a question of law, which has already been decided by this court against the contention of appellants in several cases, some of them quite recent, and it would be purely supererogation to reiterate what has been said in former opinions, to all of which we adhere. See *Norman* v. *Blair, ante* p. 649; *Kleiner* v. *Parker, ante* p. 671, and cases there cited. While there is an allegation in the pleadings of the appellants to the effect that the manner of letting the contract is an illegal and fraudulent attempt upon the part of the appellees to conceal their purpose and intent to violate § 1, art. 16, of the Constitution of the State, there is no proof whatever to sustain such contention, according to the doctrine announced in the cases above cited.

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

FIELDS *v.* FREEMAN.

Opinion delivered July 2, 1928.

C. H. Herndon, for appellant.

Jerry Witt, for appellee.

SMITH, J. Appellant, W. A. Fields, brought suit for himself and on behalf of two of his minor children to recover damages to his automobile and to compensate injuries sustained by his children as the result of a collision between his automobile in which he and his children were riding and one driven by appellee. The cases were consolidated and tried together, and from a verdict and judgment in favor of appellee is this appeal.

Appellant was driving through the town of Mount Ida, on a street which is a part of State Highway No. 27, and one of the two children was on the front seat of the car and the other on the rear seat. Appellee was driving out of an alley into this highway when the collision occurred. As is usual in such cases, each driver excused himself and blamed the other.

The testimony on the part of the appellee was that he drove out of the alley in low gear and at a low speed, and, after he had driven about twenty-five feet down the

street from the point of intersection of the street and alley, he saw appellant approaching at a speed of about twenty miles per hour and on the left-hand side of the street, which was forty-two feet in width. Appellant was driving south, and there were cars parked on the right, or west side of the street, and he was driving ten feet east of the center of the street.

Appellee testified that, after turning into the street, driving north, he saw appellant's car approaching rapidly, and he observed that appellant was not keeping a lookout, and was on the wrong side of the street, so he applied his brakes and yelled at appellant to attract his attention, as he did not have time to blow his horn after observing that appellant was not looking ahead. Immediately after the impact, appellant stated that he did not know whether he placed his foot on the brake or on the accelerator.

We do not state appellant's version of the collision, as we must assume, in testing the sufficiency of the evidence, that the jury accepted as true the testimony which tends to support the verdict returned.

The court submitted the case to the jury under correct instructions, which told the jury that, if appellee was negligent and appellant was not, all the plaintiffs were entitled to recover, but, if the negligence of each contributed to the injury, appellant could not recover. The court further instructed the jury that the negligence of appellant, if he was found to be negligent, could not be imputed to his children, and that they were entitled to recover if the negligence of appellee contributed to their injury. As a verdict was returned against all the plaintiffs, we must assume that the jury found that appellee was not guilty of any negligence contributing to the injury of the infant plaintiffs. We think the testimony is legally sufficient to support that finding.

The court charged the jury, under § 19 of act 223 of 1927 (Acts 1927, page 721), an act entitled, "A uniform act regulating the operation of vehicles on highways," that appellant had the right-of-way over appellee, who

was driving into a public highway from a private alley, but refused to charge the jury that appellee was guilty of negligence as a matter of law if he failed to comply with certain other provisions of this act and with § 7426, C. & M. Digest, in regard to the speed of an automobile in rounding a corner, but left the jury to say whether the conduct of appellee was that of a prudent man under the circumstances. There was no error in this, as it was recently held, in the case of *Pollock* v. *Hamm, ante* p. 348, that the violation of the State traffic statutes is merely evidentiary of negligence and is not conclusive of that issue.

The case appears to have been properly submitted to the jury, and the testimony on appellee's behalf is sufficient to support the finding that appellee was guilty of no negligent act causing or contributing to the injury, and the judgment in all three cases must therefore be affirmed, and it is so orderd.

PINE BLUFF *v.* MEAD.

Opinion delivered July 2, 1928.

L. DeWoody Lyle and *Jones & Hooker,* for appellant.

E. W. Brockman, for appellee.

SMITH, J. Upon a proper petition and after due notice and a majority vote of the electors, the county court of Jefferson County made an order annexing about three square miles of outlying and contiguous territory to the city of Pine Bluff. Certain owners of property in the territory affected, who made themselves parties to the proceeding, appealed to the circuit court, and, after the appeal had been perfected, several changes were made in the petition so as to exclude various portions of the proposed addition. It was permissible to do this, and the jurisdiction of the circuit court on the appeal was not affected thereby. *Vestal* v. *Little Rock,* 54 Ark. 328, 15 S. W. 891, 11 L. R. A. 778.

Conflicting testimony was heard upon the adaptability of the property included in the petition after the last of the amendments had been made, and the court made a finding of fact that a preponderance of the evidence showed that the city does not need the territory sought to be annexed; that there is much vacant property in the present city limits, and that much of that attempted to be taken in is unplatted and vacant, and that many acres of it are in woods, with no improvements.

The leading case in this State, and one frequently cited by the courts of other States on the conditions under which it is proper for the boundaries of a city or town to be extended to take in outlying and contiguous territory, is that of *Vestal* v. *Little Rock, supra.* Judge HEMINGWAY, for the court, there stated the correct rule to guide the courts in determining whether an application for annexation should be granted. He said:

"That city limits may reasonably and properly be extended so as to take in contiguous lands: (1) when they are platted and held for sale or use as town lots; (2) whether platted or not, if they are held to be brought on the market and sold as town property when they reach a value corresponding with the views of the owner; (3) when they furnish the abode for a densely-settled commu-

nity, or represent the actual growth of the town beyond its legal boundary; (4) when they are needed for any proper town purpose, as for the extension of its streets, or sewer, gas or water system, or to supply places for the abode or business of its residents, or for the extension of needed police regulation; and (5) when they are valuable by reason of their adaptability for prospective town uses; but the mere fact that their value is enhanced by reason of their nearness to the corporation would not give ground for their annexation, if it did not appear that such value was enhanced on account of their adaptability to town use."

After stating affirmatively when the contiguous territory should be annexed, he further said:

"We conclude further that city limits should not be so extended as to take in contiguous lands: (1) when they are used only for purposes of agriculture or horticulture, and are valuable on account of such use; (2) when they are vacant and do not derive special value from their adaptability for city uses" (citing authorities).

We think it unnecessary to set out or to review the testimony offered in support of and in opposition to the prayer of the petition for annexation. We are of the opinion that by far the greater part of the territory involved is shown, under the tests announced by Judge HEMINGWAY, by the great preponderance of the evidence, and much of it by the undisputed evidence, to be territory which should be annexed to the city. But, before we could reverse the finding and judgment of the circuit court, we would have to say that all of the land included in the petition was adapted to urban uses.

We do not interpret the court's finding as meaning that none of the land embraced in the petition was adapted to urban uses, but only that lands were included in the petition which should not have been, and, if that finding is supported by substantial testimony, we must affirm the judgment of the circuit court, which denied the prayer of the petition. *Brown* v. *Peach Orchard,* 162 Ark. 175, 257 S. W. 732.

There was testimony that a forty-acre tract of land owned by W. M. Simpson is unplatted and is used exclusively for agricultural purposes, and its present value is due to that use and is not attributable to its adaptability for urban purposes. Similar testimony was offered as to certain other tracts of land.

This testimony was not undisputed. On the contrary, the testimony on the part of the petitioners was to the effect that all this land was adapted to urban uses and derived its principal value from that fact. But we are required to affirm the judgment of the court below if it is supported by substantial testimony, and it is so supported.

In the Vestal case, *supra,* this court on the appeal held that most of the territory embraced in the annexation petition should properly have been annexed, including a forty-acre tract of land which was said to be vacant, low, flat, wet, and covered with timber, but the judgment of the circuit court which had affirmed the order of the county court annexing the unincorporated town of Argenta to the city of Little Rock, was reversed because another forty-acre tract of land was embraced in the annexation petition, and the court found that the owner of this land had no need of local government and the city had no need of his land.

A similar finding was made by the court below as to certain agricultural land included in the petition, and, as there is substantial testimony to support that finding, the judgment must be affirmed, and it is so ordered.

KING *v.* STATE.

Opinion delivered July 2, 1928.

Earl Wiseman and *Coleman & Reeder*, for appellant.

H. W. Applegate, Attorney General, and *Walter L. Pope,* Assistant, for appellee.

SMITH, J. This is an appeal from a conviction of the crime of murder in the second degree, with an assessed punishment of fifteen years in the penitentiary imposed upon appellant.

For the reversal of the judgment it is first insisted that the court abused its discretion in permitting the prosecuting attorney to unduly cross-examine appellant as to what appellant meant by saying that he had killed the deceased partly by accident and partly in self-defense. We think there was error in this cross-examination, but, as the alleged error is not likely to again occur, we do not further discuss that feature of the case.

Another error assigned for the reversal of the judgment is that the court erred in refusing to grant appellant's motion for a continuance. This motion was in proper form, and, from the testimony offered upon the hearing of this motion, the following facts were disclosed: Only five persons saw any part of the difficulty, appellant and deceased being two of these. The others were an employee of deceased, named James Neal, and a son and young daughter of appellant. The daughter came upon the scene just as or just after the fatal shot was fired, and did not hear or see any part of the beginning of the difficulty. Appellant's son was present, and saw and heard everything that happened.

It was shown that appellant's son was sick at appellant's home when the case was called for trial, and in support of that fact the following statement from two repu-

table practicing physicians of the county was read in evidence:

"This is to certify that we have visited the home of Noah King and have examined his son, Hamp King, and find him affected in left lung, and other trouble that follows flu. We can truthfully say that in our opinion it would be doing the boy a gross injustice to advise his going to court."

The absent witness, if present, would have testified that deceased struck appellant with a pitchfork, and started to leave the wagon in which he was standing, when appellant drew his pistol, which he changed into his left hand, using his right hand to protect himself with a club held in that hand from the assault being made upon him with the pitchfork, when deceased threw the pitchfork at appellant, striking him on the shoulder and exploding the pistol, which appellant was holding in his left hand to deter deceased from advancing upon him.

Appellant made an application for bail, which was granted after his arrest, and when the court convened he was indicted on Monday, and his case set for trial on the following Thursday.

A subpoena was issued for appellant's son, and the officer was on his way to serve it, but, before reaching appellant's home, the officer met appellant, who told him he would accept service for his son, who was sick, and the subpoena was not otherwise served.

Neither of the physicians who signed the certificate set out above had attended the absent witness for about three weeks before the day of trial, but both physicians examined him the day before the case was called for trial. Neither of the physicians testified upon the hearing of the motion for a continuance.

When the court indicated that the motion for a continuance would be overruled, appellant's counsel then asked a postponement for one week to obtain the attendance of the absent witness, but this request as well as the motion for a continuance was overruled, and appellant was placed upon trial over his objection.

It has been many times said that motions for continuances are so far under the discretion of the trial courts that the action of a court in overruling a motion for a continuance will not be reviewed or reversed unless there has been an abuse of this discretion. The majority of the court are of the opinion, however, that there was an abuse of discretion, under the facts of this case, in refusing the continuance or the request to postpone for a week. The discretion which the court has is a judicial discretion, and not a discretion which can be exercised arbitrarily. The witness was within the jurisdiction of the court, was in fact a resident of the county, and his illness was not of a kind likely to be long continued or fatal, and the certificate of the doctors was to the effect that it would be a gross injustice to the witness to require his attendance at court. His testimony was highly material, as it would have corroborated that of his father, and was in direct and sharp conflict with that of the only other witness who saw and heard all that was said and done preceding and at the instant of the shooting.

It is therefore the opinion of the majority—in which the CHIEF JUSTICE and Justice HUMPHREYS and the writer do not concur—that the motion for a continuance or for a postponement of the case should have been granted, and, for the error in denying this request, the judgment will be reversed, and the cause remanded for a new trial.

SHREVE *v.* CARTER.

Opinion delivered July 2, 1928.

Joiner & Stevens, for appellant.

Mahony, Yocum & Saye, for appellee.

SMITH, J. Appellant filed a complaint which contained, in substance, the following allegations.

That on April 8, 1926, she purchased from defendants, J. W. Carter and Mayme, his wife, a strip of land eight by one hundred and fifty feet off of a lot in the city of El Dorado; "that the defendants on that day executed and acknowledged to her their warranty deed, and deposited the same in the National Bank of Commerce, and on the same day this plaintiff deposited the consideration of $120 in said bank for these defendants; that, under the contract plaintiff had with defendants, title was to pass on that day, and did pass at that time; that it was agreed that plaintiff's title was to be free from any and all liens, and was to be in fee simple." That, four days later, defendants executed a deed of trust to the First National Bank covering the strip conveyed to plaintiff and other lands to secure a loan of $4,280, which deed of trust, dated April 12, 1926, was filed for record April 13, 1926; that defendants inserted in their deed to plaintiff a clause which read that the deed was made subject to the deed of trust to the bank; that said clause was written in said deed after the consideration had been paid and the title passed, and without the knowledge or consent of this plaintiff, and is a cloud upon the title of this plaintiff. As soon as the plaintiff discovered this alteration of the deed, she went to the defendants and asked that they make another deed in accordance with their contract. That defendant Carter undertook to destroy the deed, but she would not permit him to do so, as it was the only written evidence of the contract. That defendant Carter and his wife refused to make another deed or to remove this cloud from her title, although the owner of the deed of trust agreed to release the strip of land here in question from the deed of trust if the defendants would request that action, but that they declined to make the request. That on the 24th day of June, 1926, in a further effort to cloud the title of this plaintiff, the defendant J. W. Carter executed a warranty deed to his wife, conveying this strip of land, which deed is alleged to be void, but a cloud on plaintiff's title, which defendants have refused to remove after

request so to do, and the defendant Mayme Carter claims to own said land under said deed. That the plaintiff is in possession of said property, and has been all the time."

Upon these allegations plaintiff prayed "that the defendants be required to perform their contract by delivering to her a good and fee simple title to this land, free from liens, and that her title be quieted and confirmed as against them, and, if they do not remove the lien on said land, that she have judgment in damages in the sum of $1,500, and for all other legal and equitable relief."

A demurrer to this complaint was filed and sustained, and, as plaintiff stood on her complaint, the same was dismissed as being without equity, and from that decree is this appeal.

It obviously appears that the complaint is very loosely drawn, but this affords no ground of demurrer if a cause of action is stated, however defectively, and in determining whether a cause of action has been stated, every allegation made therein, together with every inference which is reasonably deducible therefrom, must be considered. *Brown* v. *Ark. Central Power Co.*, 174 Ark. 177, 294 S. W. 709, and cases there cited.

A motion to make the complaint more definite and certain was not filed, but, had the demurrer been treated as a motion to that effect, the motion should have been sustained in the particulars indicated herein.

It is insisted that the demurrer was properly sustained for several reasons.

(1). That the complaint shows on its face that plaintiff accepted a deed which was made subject to the deed of trust, that exception having been incorporated in the deed before its delivery to plaintiff.

The allegations of the complaint do not necessarily imply that plaintiff accepted a deed made subject to the deed of trust. It is argued that the deed was placed in escrow with the bank, and, while so in escrow, the alteration was made, and that this alteration appeared in the face of the deed, and that plaintiff accepted the deed as

altered, and thereafter paid the consideration recited therein. But it was not alleged that the deed was in escrow and was altered while it was. On the contrary, the allegation of the complaint is that the deed was delivered to the bank for plaintiff, and that she paid to the bank for defendants the agreed consideration for the deed, and that the title passed when these events occurred. There are no allegations that there were any conditions to be performed by either the plaintiff or the defendants after the deed and its consideration had been placed in the hands of the bank. A motion to require a specific allegation of the conditions under which the deed was placed in the possession of the bank would have been proper and appropriate.

If the bank was constituted the agent for each of these parties, with no duty to perform except to deliver the deed as originally executed and without the alteration, upon receipt of the purchase money, and while so holding the deed the bank received for defendants the purchase money, there was a delivery of the deed, and the title to the land there described passed upon that delivery, although the bank may not have actually turned the deed over to plaintiff until a later date and at a time when defendants had altered it.

In the case of *Russell* v. *May,* 77 Ark. 89, 90 S. W. 617, Mr. Justice Battle, for the court, said:

"A delivery of a deed is essential to its validity. It cannot take effect without delivery, and what is a delivery depends upon the intention of the grantor. Any disposal of a deed, accompanied by acts, words, or circumstances which clearly indicate that the grantor intends that it shall take effect as a conveyance, is a sufficient delivery."

A full recital of the conditions upon which the deed had been delivered to the bank should have been required had a motion to that effect been made, and such a recital might show that the alteration of the deed had been made before a delivery to plaintiff had been effected, in which event the plaintiff would have had the option to refuse

to accept the deed and to demand the return of her money by the bank, or to have demanded the specific performance of the contract to convey an unincumbered title, and, if it had become impossible to grant that relief, to ask damages for the breach of the contract. If, on the other hand, as defendants argue (but not as the complaint alleges), plaintiff accepted a conveyance made subject to the deed of trust, she must be content with her purchase, and cannot ask the court to decree her something she did not buy, to-wit, an unincumbered title. *Geren* v. *Caldarera*, 99 Ark. 260, 138 S. W. 335.

(2). It is argued that the demurrer was properly sustained because it was not alleged that the alteration of the deed was the result of a mutual mistake. A mutual mistake affords ground for the equitable relief of reformation, but it is not the only ground upon which that relief will be awarded. As we have said, the complaint is susceptible of the construction, in its existing form, of alleging that the deed was altered after its delivery to plaintiff and after the payment of the consideration, and without plaintiff's knowledge or permission. If true, this is a fraud which equity would correct by reformation, if there were no intervening rights of innocent third parties which prevented the granting of that relief. *Craig* v. *Simpson*, 170 Ark. 214, 279 S. W. 996. The complaint alleges, however, that the owner of the deed of trust has offered to release the strip of land from the deed of trust.

(3). It is next insisted that the demurrer was properly sustained because it appears from the complaint that plaintiff has not been evicted from her possession. The suit is not primarily one for damages, and that relief is prayed in the event only that plaintiff's title is not quieted.

It is finally insisted that the deed from Carter to his wife is not a cloud on plaintiff's title, for the reason that the complaint alleges the execution of this deed subsequent to the execution of the deed to plaintiff, and that, if Mrs. Carter had any title, it would pass to plain-

tiff as an after-acquired title under § 1498, C. & M. Digest, because Mrs. Carter was a party to the warranty deed to plaintiff.

It is true an after-acquired title inures to the bene fit of the grantee of one who has conveyed real estate by a deed purporting to convey the same in fee simple absolute, but the allegations here are that the Carters owned the land conveyed to plaintiff, and that Mr. Carter later conveyed to his wife, "who is claiming to own said property adverse to the plaintiff." We think these allegations are sufficient to entitle plaintiff to maintain a suit to quiet the title against the claim of Mrs. Carter.

We conclude therefore that a cause of action was stated—very defectively, it is true—and that the demurrer to the complaint should not have been sustained, and the decree dismissing the complaint will therefore be reversed, and it is so ordered

FORT SMITH *v.* ROBERTS.

Opinion delivered July 2, 1928.

D. L. Ford and *Pryor, Miles & Pryor,* for appellant.

Warner, Hardin & Warner and *Wallace Bourland,* for appellee.

SMITH, J. Special act No. 629, passed at the regular 1919 session of the General Assembly (Special Acts 1919, page 870), is an act entitled "An act to consolidate the health and sanitary offices in the Fort Smith District of Sebastian County, to abolish existing offices, to create a district board of health therein, and give it jurisdiction to select certain officers and to superintend their duties, to provide for the expenses incurred in such service, and for other purposes."

The preamble of the act recites that the Fort Smith and Greenwood districts of Sebastian County have separate fiscal systems as distinct as two counties, and that the city of Fort Smith embraces seventy-five per cent. of the area of the Fort Smith district and over ninety per cent. of the population and of the assessed valuation of

said district, and that the city of Fort Smith is governed by a commission form of government, and that for these reasons the general laws of the State providing for the county health officers and city health officers result in an overlapping of duties and a confusion of jurisdiction, and that a local bill is therefore necessary to make effective the objects and purposes of act 96 of the 1913 General Assembly and other acts upon the subject of the protection of the public health, and act No. 13 of the Acts of 1913, page 48. Act No. 96 is an act creating a State Board of Health and prescribing its duties, while act No. 13 is the act providing Fort Smith with a commission form of government.

After the preamble set out above, the act of 1919 provides as follows: The county judge of the county, commissioner No. 1 of the city of Fort Smith, and a graduate physician elected by the county judge and the commissioner, are empowered to promulgate such rules and regulations, not in conflict with the rules and regulations of the State Board of Health, as may be deemed necessary to protect the public health in said district. The act abolished the county health officer provided by act No. 96 of the Acts of 1913 in so far as it applied to the Fort Smith district of Sebastian County, and also abolished the office of city health officer of the city of Fort Smith, and the office of city physician. In the place of the offices abolished, the Fort Smith District Board of Health was created, and given the power to appoint a district health officer, who should be subject to the orders of the district board of health and the State Board of Health. Various duties were imposed on the district board of health, which need not be recited, but the board was expressly given the right of supervision of all dairies, meat and grocery stores, etc., as to their sanitary condition.

The board of health of the Fort Smith district duly organized pursuant to act 629 of the Acts of 1919, and, among other actions taken by the board, was to provide for slaughtering animals for human consumption at an

abattoir to be erected in the suburbs of Fort Smith, and a graduate veterinarian was appointed to supervise its operation. In aid of the regulations of the board of health, the commissioners of Fort Smith passed an ordinance prescribing the fees which should be charged butchers for the use of the abattoir and the fines which should be imposed upon butchers who slaughtered animals in violation of the rules and regulations of the district board of health. The ordinance of the city provided various regulations in regard to the operation of the abattoir which were supposed to be conducive to sanitation in slaughtering animals. The city ordinance also provided that any citizen might erect an abattoir under plans and specifications to be approved by the district board of health, in accordance with the rules of the board of health and the city ordinance.

An abattoir was erected and paid for in the proportions provided by act 629 of the Acts of 1919, and, after it had been in operation something over two years, appellees, who had been patrons of the abattoir during that time, brought this suit to test the constitutionality of the act under which the abattoir had been erected and operated. They also alleged that the abattoir was being operated in an unreasonable and arbitrary manner, and that excessive fees were being charged for the services rendered. The plaintiffs prayed that the act of 1919 and the ordinance of the city and the rules and regulations of the district board of health passed in furtherance thereof be declared unconstitutional, and that the continued operation of the abattoir be enjoined, and that the city be enjoined from prosecuting plaintiffs or other persons for violations of the city ordinance and the rules and regulations of the board of health.

The court, with the consent of the parties, appointed a master to hear testimony and to report upon the operation of the abattoir, and, in this connection, an expert accountant was appointed by the master, who made an extended investigation of the revenues and expenditures of the abattoir and detailed report thereof. The report

of the accountant showed that the abattoir operated from January 1, 1925, to January 1, 1926, at a profit to the city and county of $264.82, while its operation from January 1, 1926, to April 1, 1927, was at a loss of $3,594.33, and there does not appear to be any question about the correctness of these figures, at least they are not shown to be incorrect. There may be some unnecessary or avoidable expense in the operation of the abattoir, but the master to whom the cause was first referred reported that there was not. This master further reported that the facilities furnished at the abattoir were reasonably sufficient for the purposes for which it was intended, although its facilities were not sufficient for all the butchers of the city to use it at the same time, but that an abattoir of that size would be impractical because of the great expense attached to its operation, but that the abattoir was kept open and in operation from 8 A. M. to 5 P. M. every week day, and that all butchers were thus afforded an opportunity to use its facilities.

The court set aside, on exceptions of the plaintiffs, the report of the accountant and that of the master, and proceeded to hear certain oral testimony, after which the cause was again referred to another master, whose report was later approved by the court. This last report appears, however, to have covered only the amounts paid by each of the plaintiffs since the establishment of the abattoir and the total amount charged against each of them, respectively, for services at the abattoir since the grant of a temporary restraining order by the court, and the number and kinds of animals slaughtered by each of the plaintiffs. The second master does not appear to have considered or to have made a report upon the cost of operating the abattoir.

The learned chancellor prepared an elaborate opinion in the case, in which he refused to hold unconstitutional the act of 1919 or the rules and regulations of the board of health or the ordinance of the city making these rules and regulations effective, but he did hold that

the fees charged at the abattoir are arbitrary and excessive, and are in the nature of a revenue, and are discriminatory against local butchers and stock raisers, and unduly favor packers whose meats are shipped into the city in interstate commerce, as these meats do not pass through the abattoir and are not subject to the fees charged local butchers who use the abattoir.

The first question presented is, of course, that of the constitutionality of act 629 of the Acts of 1919; and we concur in the opinion of the court below that the act is constitutional. The power of the Legislature to enact laws to protect the public health and to impower the cities and towns of the State to do likewise has always been recognized.

In the comparatively early case of *Waters* v. *Townsend,* 65 Ark. 613, 47 S. W. 1054, it was held that a city council may confer upon its board of health power to abate nuisances dangerous to public health, that power having been granted by an act of the General Assembly.

The leading case on the authority to regulate markets is the case known as the Slaughter-house Cases, reported in 16 Wallace 36, 21 U. S. (L. ed.) 394. In that case the Supreme Court of the United States upheld an act of the Legislature of Louisiana which granted to a corporation created by it the exclusive right for twenty-five years to have and maintain slaughter-houses, landings for cattle, and yards for inclosing cattle intended for sale or slaughter, within certain parishes of the State, including the city of New Orleans, and prohibiting all other persons from building, keeping or having slaughter-houses, landings for cattle, and yards for cattle intended for sale or slaughter within the defined limits, and requiring that all cattle and other animals intended for sale or slaughter in the district should be brought to the yards and slaughter-houses of the corporation, and authorizing the corporation to exact certain prescribed fees for the use of its wharves and for each animal landed, and certain prescribed fees for each animal slaughtered. It was held by the Supreme Court of the

United States that this grant of exclusive right or privilege, guarded by proper limitation of the prices to be charged and imposing the duty of providing ample conveniences, with permission to all owners of stock to land and of all butchers to slaughter at these places, was a police regulation for the health and comfort of the people, within the power of the State Legislature to pass.

The act here under review and the rules and regulations of the board of health and the ordinance of the city enforcing them are far less comprehensive in their scope than was the act of the General Assembly of the State of Louisiana which the Supreme Court of the United States upheld, and we all concur in the opinion of the chancery court that the act of the Legislature and the ordinance of the city making effective the rules and regulations of the board of health are not unconstitutional. *Trigg* v. *Dixon*, 96 Ark. 199, 131 S. W. 695; *Carpenter* v. *Little Rock*, 101 Ark. 238, 142 S. W. 162.

It is insisted, however, that the Legislature has not itself exercised this police power by appropriate legislation, but has delegated that function to an administrative board having no power to legislate; and this we conceive to be the real question in the case.

In the case of *State* v. *Martin and Line*, 134 Ark. 420, 204 S. W. 622, it was said that "it is a well-established rule of law that legislative bodies have no right to delegate the lawmaking power to executive officers or administrative boards, but it is settled in this State that the Legislature may delegate 'the power to determine some fact or state of things upon which the law makes or intends to make its own action depend'."

The case just quoted from involved the validity of a rule of the State Board of Health regarding the vaccination of children and the presentation of a certificate showing a successful vaccination as a condition precedent to enrollment as a pupil in the public schools of the State, and the rule was upheld as a valid exercise of the police power and as not being a delegation of legislative power to the board of health.

This case cited and approved the earlier case of *Davis* v. *State,* 126 Ark. 260, 190 S. W. 436. In the Davis case, act 86 of the Acts of 1915, page 338, was attacked as being unconstitutional, for the reason that it delegated legislative functions to the board of control of the Agricultural Experiment Station, in that it permitted the board of control "to promulgate necessary rules and regulations" to make effective the laws of the State in relation to cattle-tick eradication without prescribing a penalty for a violation of such rules and regulations. Pursuant to the authority of the act of 1915, the board of control promulgated various rules and regulations in regard to dipping cattle in tick-infested districts. It was conceded by counsel in that case that the Legislature had the right to delegate to the board the duty of promulgating rules. While the concession of counsel was not binding upon us, the legislation was upheld as a valid exercise of the police power.

In 12 R. C. L., page 1265, § 3 of the chapter on Health, it is said:

"The power granted to administrative boards of the nature of boards of health, to adopt rules, by-laws, and regulations reasonably adapted to carry out the purpose or object for which they are created, is generally held not to be a delegation of legislative authority in violation of the usual constitutional prohibition. Such a delegation generally comes within the rule that, while it is necessary that a law, when it comes from the law-making power, should be complete, still there are many matters relating to methods or details which may be, by the Legislature, referred to some designated ministerial officer or body, and that all such matters fall within the domain of the right of the Legislature to authorize an administrative board or body to adopt ordinances, rules, by-laws, or regulations in aid of the successful execution of some general statutory provision. But a statute authorizing a State board of health to make such regulations as in its judgment may be necessary for the protection of the people from dangerous contagious diseases,

and giving it power to designate what diseases are 'contagious' or 'dangerous' to the public health, has been held to be a delegation of legislative power not authorized by the Constitution."

At § 11 of the same chapter it is said:

"Health regulations are of the utmost consequence to the general welfare, and, if they be reasonable, impartial, and not against the general policy of the State, they must be submitted to by individuals for the good of the public. The constitutional guaranties that no person shall be deprived of life, liberty, or property without due process of law, and that no State shall deny to any person within its jurisdiction the equal protection of the laws, were not intended to limit the subjects upon which the police power of a State may lawfully be exerted in this any more than in other connections. Nor does the contracts clause of the Federal Constitution prevent the adoption of health regulations. However, legislative authority in this field of the police power, the same as in any other, is fenced about on all sides by constitutional limitations. It cannot properly extend beyond such reasonable interferences as tend to preserve and promote the enjoyment, generally, of those inalienable rights with which all men are endowed, and to secure which governments are instituted. The Legislature may not, under the guise of police regulation, arbitrarily invade private property or personal rights. The test when such regulations are called in question is whether they have some relation to the public health or public welfare, and whether such is, in fact, the end sought to be attained. A regulation imposing a burden on interstate commerce may of course be an invasion of the province of the Federal Government; but when it has real relation to the suitable protection of the people of the State, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by Congress pursuant to its constitutional authority."

The annotator, in the note to the text quoted, collected many cases supporting the text.

In the case of *Milwaukee* v. *Gross,* 21 Wis. 241, 91 Am. Dec. 472, there was involved a city ordinance establishing a slaughter-house and regulating its management, and declaring it unlawful to slaughter any animal within the corporate limits of the city except at the city slaughter-house, and it was held by the Supreme Court of Wisconsin that the ordinance was not so unreasonable as being in restraint of trade as to justify the court in holding it invalid. In the annotator's note to this case it was said by the annotator that the power to establish and regulate markets (a right which many decisions of this court have held was possessed by the cities and towns of the State) includes power to purchase a site and erect the necessary buildings and stalls upon it, and, when provided, to adopt such rules in regard to it and the business to be there transacted as may be deemed reasonable and just.

Of course, the regulations must be reasonable and just, and it is not permissible, under the guise of regulation, to exact such fees as would make the abattoir a necessary source of revenue to the city and county, although the fact that the abattoir was not operated at a loss would not make the city ordinance a revenue measure. Numerous decisions of this court have defined the difference between regulatory ordinances passed as revenue measures and those ordinances passed for purposes of regulation from which an incidental profit to the municipality is derived, a late case being that of *North Little Rock* v. *Kirk,* 173 Ark. 554, 292 S. W. 993. Those of the first class, which are enacted for the purpose of raising revenue, are invalid; those of the latter class, from which a profit may be incidentally derived, are valid.

We think the undisputed testimony shows that no profit is derived from the operation of the abattoir. This, however, is not the only test of the reasonableness of the regulations. The fees charged might not be a source of

revenue, and yet be so burdensome as to drive butchers using the abattoir out of business by depriving them of a reasonable profit in the operation of their business. We do not think that showing was made in this case. In the first place, the ordinance permits a butcher to erect his own abattoir upon plans approved by the district board of health.

It is essential that there be a place where animals may be butchered, and the nature of that business is such that its regulation is proper and necessary to protect the public health. All the cases on the subject so hold. The testimony shows that the charges first fixed by the city commission were unnecessarily high, and they were voluntarily reduced. The fees now charged are insufficient to pay operating costs, and the city and the Fort Smith District of the county are paying the deficit.

The fees now charged are as follows: Cattle, one year or older, 75 cents each; calves and cattle under one year, 35 cents each; hogs, 40 cents each; goats and sheep, 30 cents each. For this service charge there is furnished a superintendent and two helpers and a graduate veterinarian, with an inspection of the animals to be slaughtered both *ante* and *post mortem*. The abattoir consists of thirteen stockpens, chutes, two refrigerator boxes, an ice-machine, hooks, rollers, and other appliances necessary for handling carcasses, together with the necessary hot and cold water. The butchers are not required to clean the place after using it, as this work is done by the employees, whose wages are a part of the operating expense of the abattoir.

It is true that dealers in meats which are shipped into the city by the nonresident packers in interstate commerce avoid this expense which the local butchers bear, but we judicially know that such meats have been inspected under Federal laws, and the purpose of all the regulation by Federal, State or municipal authorities is to have the meats inspected so that it may be known that they are fit for human consumption.

It is argued that the testimony failed to show that any of the animals slaughtered at the abattoir have been rejected in either *ante mortem* or *post mortem* examinations, and that therefore the inspections are perfunctory and valueless. This does not follow. It is not to be assumed that the inspectors are not discharging their duties. It is more probable that, knowing there will be an inspection, no animals are brought to slaughter which are diseased.

The majority of the court have concluded that the testimony does not show that the fees charged are unreasonable, excessive, discriminatory, or arbitrary; that the legislation is not unconstitutional, and that the regulations of the district board of health are not unreasonable.

The decree of the court below must therefore be reversed, and it is so ordered, with directions to dismiss the complaint as being without equity.

MEHAFFY, J. I agree with the majority opinion that the law is constitutional, but in my opinion the act does not authorize the expenditure of money for the erection and maintenance of an abattoir. Mr. Chief Justice HART and Mr. Justice HUMPHREYS agree with me in these views.

BLANKS *v.* AMERICAN SOUTHERN TRUST COMPANY.

Opinion delivered July 2, 1928.

[redacted]

Compere & Compere and *Coleman & Riddick,* for appellant.

Buzbee, Pugh & Harrison, for appellee.

HUMPHREYS, J. Appellee brought this suit against appellant in the circuit court of Pulaski County, Second Division, upon a renewal note executed by him and others to recover $83,313.70. Appellant filed an answer, admitting the execution of the note, but denying liability thereon for the alleged reasons:

(1) That it was executed pursuant to a transaction prohibited by § 8, article 12, of the Constitution of the State, §§ 750 to 771, inclusive, of Crawford & Moses' Digest, and §§ 1703, 1727, of Crawford & Moses' Digest; also § 13 of article 19 of the Constitution of the State of Arkansas, and §§ 7354 and 7355 of Crawford & Moses' Digest; (2) that the note was a renewal note of one given in the first instance by appellant upon appellee's promise that he would not be required to pay it; (3) that the note was an accommodation note, and without consideration; (4) that appellee released some of his co-obligors without his knowledge and consent, which had the effect of releasing him; and (5) a payment of the note in full.

By consent the cause was tried by the court sitting as a jury. A verdict was returned for appellee and a consequent judgment rendered in its favor for the face of the note and accumulated interest, from which is this appeal.

On February 16, 1920, the Doyle-Kidd Dry Goods Company, a corporation engaged in the wholesale dry goods business, entered into a written contract with the American Bank of Commerce & Trust Company, a banking institution organized under the laws of Arkansas, to sell said bank $250,000 of its 7 per cent. preferred stock of the par value of $250,000 for $230,000, with the understanding that, at the expiration of three years after the delivery of the stock, the dry goods company

would either buy or find a purchaser at $92 per share for any of the stock the bank should be unable to sell to third parties at par. The faithful performance of the contract on the part of said dry goods company was personally guaranteed by T. N. Doyle, as trustee for the T. N. Doyle estate, B. P. Kidd, and appellant, all of whom were large stockholders, directors and officers in said dry goods company. T. N. Doyle and appellant were stockholders and directors, at the time of the execution of the contract, in the American Bank of Commerce & Trust Company. The contract for the sale and repurchase of the stock and the personal guaranty of appellant and his associates that the dry goods company would carry out its contract was negotiated by the vice president of the bank, Ed Cornish, and the president of the Doyle-Kidd Dry Goods Company, T. N. Doyle, but the contract was signed for the company by appellant. Pursuant to the agreement, on the 28th day of February, 1920, preferred stock in the amount of $250,000 par value was issued by the Doyle-Kidd Dry Goods Company to Ed Cornish, trustee for the American Bank of Commerce & Trust Company, which was delivered to the bank on the faith of the agreement and guaranty aforesaid, and the bank paid the dry goods company the sum of $230,000 in cash. Neither the dry goods company nor the bank complied with the requirements of the Blue Sky Law contained in §§ 750 to 771, inclusive, of Crawford & Moses' Digest, nor received any certificate of authority to sell the preferred stock of the dry goods company prior to the sales thereof by the dry goods company to the bank and by the bank to third parties. The dry goods company sold the stock below par to the bank, contrary to § 8, article 12, of the Constitution of the State, which is as follows:

"No private corporation shall issue stocks or bonds except for money or property actually received or labor done, and all fictitious increase of stock or indebtedness shall be void; nor shall the stock or bonded indebtedness of any private corporation be increased, except in pur-

suance of general laws, nor until the consent of the persons holding the larger amount in value of stock shall be obtained at a meeting held after notice given for a period not less than sixty days, in pursuance of law."

The dry goods company and its guarantors agreed to repurchase the unsold stock, at the expiration of three years, below par, and the guarantors did so contrary to § 1703 of Crawford & Moses' Digest, which prohibited the repurchase of same below par. The bank succeeded in selling only $82,550 of the stock to third parties at par within the three-year period. In the meantime the Doyle-Kidd Dry Goods Company changed its name to the Doyle Dry Goods Company. The guarantors were notified in January, 1923, that the bank was being criticized for carrying the stock in the manner it was, and that they must redeem the balance of the stock under the guaranty contract for $92 a share.

A short time before the expiration of the three-year period, the Doyle Dry Goods Company paid the bank $45,000 on the repurchase of the stock, and appellant and his co-obligors executed to the bank their note for $113,825.10, due in six months, in redemption of the stock, and retired 552 shares of the stock, and pledged 1,122½ shares thereof as collateral security for the payment of the note. The amount due at the time for the redemption of the stock was $109,054, but 6 per cent. advance interest was figured and included in the note, totaling $113,825.10. The amount of the note was arrived at by deducting 8 per cent. from the amount of the unsold stock, amounting to $167,450, then deducting from that amount $82,500 for the stock sold by the bank and $45,000 paid by it, and adding to the remainder six months' interest. When the note was signed by appellant and his associates, the Doyle Dry Goods Company was released from its original contract with the bank to redeem or find a purchaser for the stock.

After the execution of the note, the American Bank of Commerce & Trust Company consolidated with the Southern Trust Company, and the consolidated institu-

tion took the name of the American Southern Trust Company, and became the owner of the note of appellant and those who signed it with him at the time of said consolidation. The renewal notes were subsequently executed by appellant and his associates to appellee. The indebtedness was reduced from time to time from sales of stock which was attached as collateral, until the last renewal note upon which this suit was brought, and which was executed on the 23rd day of January, 1926, for $82,318.07. Appellant continued as director of the American Bank of Commerce & Trust Company until its consolidation with the Southern Trust Company, and then became director of the appellee, and continued in that capacity until January, 1927. He also continued as director and active vice president of the Doyle Dry Goods Company until January, 1927.

The note sued upon was dated January 23, 1926, due six months after date, bearing interest at the rate of 8¾ per cent. per annum, and was signed by W. B. Smith, H. W. Doyle, R. A. Doyle, and the appellant, J. P. Blanks. T. N. Doyle had signed the original and some of the notes executed pursuant to the guaranty contract, and did not sign the note sued upon, as he was dead at the time. The notes, when taken up by renewal notes, were turned over to appellant, except, perhaps, the last renewal note signed by T. N. Doyle, which was retained by the bank. W. B. Smith died after the execution of the note sued upon, and the representative of his estate was not made a party defendant on account of an agreement or an arrangement similar to the one made between the bank and the Doyles, who were not made parties defendant in the action. The bank entered into an agreement with A. H. Treeman of Ithaca, New York, not to sue the Doyles upon the renewal note and another note upon payment to it and the Union Trust Company of $17,136.28 to be applied on the renewal note and other notes, reserving the right to proceed in any manner against appellant, James P. Blanks, and, in the event suit should be brought against the Doyles by appellant

for contribution, the said bank would immediately return the money so paid to the Doyles. It does not appear how much of the amount paid by A. H. Treeman was applied as a credit on the renewal note.

Appellant offered to testify that, at the time he signed the original note executed pursuant to the guaranty contract, he signed it under agreement with Ed Cornish, vice president of the American Bank of Commerce & Trust Company, that he would not be required to pay it. This testimony was excluded and not considered by the trial court, over the objection and exception of appellant.

During the three-year period in which the bank agreed to sell the stock to third parties at par, it tentatively or conditionally sold El Dorado parties $64,000 of the stock. According to the testimony of W. A. Hicks, the stock was turned over to customers as a temporary investment until the bank could acquire other securities which its customers wanted. The bank treated the sale as an absolute one in making up its report to the State officials. The stock had been returned to it and was in possession of the bank at the time it called upon appellant and his associates to redeem the stock under the guaranty contract.

We deem it unnecessary to set out the substance of the testimony at greater length in order to determine the questions involved on this appeal.

The main contention of appellant for a reversal of the judgment is that the note sued upon was without consideration and void, because executed pursuant to a contract made in violation of the Constitution and statutes of the State. Although there is nothing in the record tending to show any intentional violation of the Constitution or Blue Sky Law in the transaction by either the Doyle-Kidd Dry Goods Company or the bank, yet the fact remains that the stock was sold below par in violation of the Constitution, and without obtaining authority from the Banking Department to sell same, contrary to the statutes of the State.

The general rule is that courts will not enforce contracts made in violation of the law, but will leave the parties to such contracts where it finds them, if they were *in pari delicto*. The penalties, however, incident to a violation of the Blue Sky Law are visited upon the seller of stock unless the buyer is *in pari delicto* with the seller. If the buyer is not *in pari delicto* with the seller, the general rule is that the buyer may, within a reasonable time, recover his money by tendering back the stock received by him. The rule against the enforcement of such contracts does not apply to directors and officers of business corporations who have obtained funds for the benefit of such corporations upon illegal agreements from banking institutions in which they are also directors. If the rule were applicable in such cases, it would open an avenue by which directors and officers could borrow the funds upon illegal contracts for themselves or corporations in which they are interested, and, after the funds have been spent, or perhaps lost in business transactions, defend, in case suit is brought against them or their corporations, upon the ground that the transaction is illegal. It was the duty of appellant to expend the bank's money in legitimate transactions, and he cannot be heard to say that he is not responsible because he expended the bank's money in purchase of stock contrary to law. Appellant cannot escape because he did not personally participate in the transaction on the part of the bank. He knew his company was getting the bank's money of which he was a director, for preferred stock which his company had no right to sell below par, and without obtaining authority to do so from the proper State official.

Appellant interposed, among other defenses to the note, a plea of usury. He was not dealing at arm's length with the bank, but in effect was dealing with himself in a dual fiduciary capacity. If the transaction was usurious, he should not have countenanced it in order to aid his company in selling a large block of its preferred stock to the bank of which he was a director. He is

estopped from setting up illegality of the contract in which he participated, as a defense to the suit upon the renewal note.

Appellant next contends for a reversal of the judgment upon the alleged ground that the original note was given without consideration, and that the renewal note upon which suit was brought is also void for that reason. It was a part of the original agreement in which appellant's company received $230,000 that he and his associates would guarantee the performance of the contract on the part of his company by redeeming the stock the bank was unable to sell during the three-year period at $92 a share. Instead of redeeming under the contract for cash, appellant and his associates elected to give a note to the bank in redemption or repurchase of the stock. At the time the original note was executed, the contract with the dry goods company was satisfied in full. Satisfaction of the contract with the dry goods company, which had been guaranteed by appellant and his associates, was a valid consideration for the original and all the renewal notes executed by appellant and his associates.

Appellant next contends for a reversal of the judgment because the court excluded his testimony to the effect that he agreed to sign the note under the promise that he would not be called upon to pay same. His evidence was in contradiction of the note which he signed, and tended to vary its terms. The court properly excluded the testimony. Even if the evidence were admissible, he could not interpose it as a defense to the suit upon the note, because it was his duty as a director not to entertain such a promise and act upon it to the detriment of his bank.

Appellant next contends for a reversal of the judgment on account of the contract made between the bank and A. H. Treeman not to sue the Doyles, and on account of a similar agreement made between the bank and the representative of W. B. Smith's estate not to sue the estate. We set out the substance of the agreement with

Treeman, and it does not amount to a release of the Doyles. The agreement provided specifically that if J. P. Blanks should sue for contribution, the bank would immediately return the money paid to it by A. H. Treeman, and expressly reserved the right in the agreement to proceed against appellant. If appellant at any time pays more than his *pro rata* share of the note, he will have the right, notwithstanding the agreement between the bank and A. H. Treeman, to proceed against the other makers of the note for contribution. He is not in any way injured by payment of a part of the note by A. H. Treeman.

Appellant next contends that he has paid the note if he had been given proper credits. He bases his claim of payment in full upon the failure of the bank to account for $64,000 of stock which it delivered to parties in El Dorado. The finding of the court that the delivery of the stock was conditional and not an absolute sale of the stock is sustained by the weight of the evidence. According to the testimony of W. A. Hicks, the delivery of the stock to the El Dorado parties was a temporary arrangement to take care of its customers until it could find or obtain securities which its customers wanted. It is true that, after the delivery of the stock, the bank treated it as a sale in its report to the State official, but this act is not conclusive that the delivery of the stock constituted a *bona fide* sale thereof. No transfer of the stock was ever made on the books to the El Dorado customers, and, as soon as the bank found securities which its customers wanted, the stock was returned to the bank, and the bank had it in possession as its own property at the time it called upon appellant and his associates to redeem the stock under the guaranty contract. The other claim of payment of appellant was based upon interest in excess of 10 per cent. alleged to have been paid by the Doyle-Kidd Dry Goods Company and the Doyle Dry Goods Company to the bank. If, as a matter of fact, interest in excess of 10 per cent. was paid in carrying out the transaction, it cannot be credited as a

payment on a renewal note, as appellant had no right to interpose the plea of usury as a defense.

No error appearing, the judgment is affirmed.

HART, C. J., dissents.

GOODRICH *v.* MITCHELL.

Opinion delivered July 2, 1928.

Strait & Strait, for appellant.

Sellers & Eddy and *E. A. Williams,* for appellee.

HUMPHREYS, J. This suit was brought in the chancery court of Conway County by appellant against appellee to quiet and confirm the title and possession in her against appellee to that part of the west half of the southwest quarter of section 14, township 6 north, range 18 west, in said county, lying north and east of Mountain Bluffs, consisting of about six acres of bottom land in a V shape, adjoining and immediately within the north boundary line of said tract.

Appellee filed an answer, denying appellant's title and right of possession to said six-acre tract of land, and alleging title and the right of possession thereto in himself through open, continuous, notorious and adverse possession of himself and his grantor for more than seven years, claiming to be the owner thereof.

The cause was submitted to the court upon the pleadings and depositions of witnesses, resulting in a finding that appellee acquired title to said six-acre tract of land by adverse possession thereof for more than seven years, and a consequent decree dismissing appellant's complaint for the want of equity, from which is this appeal.

The undisputed testimony showed that the six-acre tract in question is that portion of the west half of the southwest quarter of said section, township and range situated north and east of Mountain Bluffs and lying in a V shape on the north part of said tract, and which 80-acre tract of land, including the six-acre tract in dispute, was inherited by appellant and her brothers and sisters on November 15, 1889, and that appellant purchased the interest of her brothers and sisters therein on November 28, 1919. It also appears from the undisputed evidence that the lands immediately north of the Ellen C. Goodrich 80-acre tract were owned and had been owned for a number of years by H. James, who sold it to appellant in the year 1916. At the time of the purchase of the James tract by appellee, the south portion thereof was inclosed by fences on the east, west and north sides, and by the bluff, with wire fences across the ravines and gulches intersecting same on the south side. In other words, the bluff with the wire across the ravines and gulches served as the south side of the inclosure to keep the stock out. When appellee acquired the James tract, the bluff which served as a fence on the south side was pointed out to him as the south line of the James land. A part of the inclosed land was in cultivation at the time of the purchase, and a part of it was cleared in 1924, plowed in 1925, and put in cultivation in 1926. Appellee remained in the open, notorious, continuous and adverse possession of all the land north of Mountain Bluffs, which was pointed out to him as the south line of the lands he purchased from H. James, claiming title to the bluff under his purchase from James.

On June 6, 1922, appellee wrote the following letter to appellant:

"Miss Ellen C. Goodrich,
"Elm Terrace,
"Rocky Hill, Conn.

"Dear Madam: I am a neighbor of yours, owning the most of 14-6-18, of which the Goodrich heirs own the west half of the southwest quarter. Besides this, I own what is known as the Pawpaw Bend, lying in section 13, and 24-6-18, and 18 and 19-6-17. The Goodrich heirs also own the south half of 15-6-18, which lies on the side of the mountain, then I join you again on the west, having recently bought fractional 16 and 17-6-18. I am inclosing herewith a map showing the Goodrich land by cross, lying between my lands in section 14 and 16. I am also inclosing a picture of a part of my farm in section 13 and some of my stock.

"Wife and I start next week for our Winchester Club's convention, which meets at New Haven, Conn., from June 26 to 29. We will stop at the Taft Hotel. I do not know how far you live from New Haven, but I would like to meet you or some one representing you while I am up in Connecticut this time. Mr. Drew, vice president of the Winchester Repeating Arms Company, can tell you who I am. If you should ever care to offer your interest in your land in sections 14 and 15 at a price I can afford to pay, I would like to consider buying it.

"I trust you will pardon this abrupt letter, but I thought if we knew each other I might be of some service to you some time, whether we make any land deal or not.

"Yours very truly,
(Signed) "E. E. Mitchell."

In 1924 and again just before the institution of this suit, E. A. Woolverton surveyed the Goodrich 80-acre tract, locating the northeast and the northwest corners thereof. The north line of the north 40 ran through the field or cultivated lands of appellee, taking about six acres of the inclosed land or field. The record does not

reflect the exact time James purchased the land he sold to appellee north of the Goodrich 80-acre tract, but it does reflect that he used the bluff with the wire across the ravine and gulches as his south inclosure, and rented the inclosed land several years before selling same to appellee.

The only questions arising on the appeal, upon trial *de novo,* are the sufficiency of the bluff as an inclosure on the south side, and, if so, whether the letter written by appellee to appellant broke the continuity of his possession so as to destroy his claim of ownership under the seven-year statute of limitation.

Appellant contends that the trial court's finding upon both questions is contrary to the weight and preponderance of the evidence.

The bluff with the wire across the ravines and gulches was used as a south fence or inclosure of the field, and served to keep stock out of the crops raised therein. We think it was a sufficient inclosure upon which to base a claim of the lands by adverse possession.

Appellant interprets the testimony of appellee to mean that he only intended to claim such land as was embraced in his deed from James, or to the true lines according to the government calls in said deed, whenever they might be located by correct survey. We do not so interpret his testimony. He testified that, when he bought from James, his south line was pointed out as the bluff line, and that he thereafter occupied and intended and actually claimed title to all land up to the bluff.

Appellant argues, however, that appellee's letter to her offering to buy her 80-acre tract indicated very clearly that he was claiming no lands adversely beyond the true boundary lines of his own land. The letter was written in 1922, and would have indicated that he was claiming no part of appellant's land, had he known that a part of the 80-acre tract was inclosed in his field. There is nothing in the letter to indicate that he was cognizant of that fact when he wrote the letter. He referred in

the letter to government calls or description to the adjoining lands owned by each of them, and said nothing whatever concerning the location of the division line between them. There is nothing in the letter inconsistent with his open, adverse, continuous possession and claim of title to all the land north of the bluff.

The decree is affirmed.

LIGHT *v.* FEDERAL LAND BANK OF ST. LOUIS.

Opinion delivered July 2, 1928.

W. H. Bengel, for appellant.

J. R. Crocker, for appellee.

HUMPHREYS, J. On August 11, 1927, appellant purchased the northeast quarter of the northwest quarter of section 26, township 12 north, range 3 east, in Poinsett County, Arkansas, from F. R. Pipkin, subject to a mortgage Pipkin executed to appellee thereon, November 1, 1921, to secure the sum of $400, evidenced by a note bearing interest at the rate of 6 per cent. per annum, due and payable in equal semi-annual installments as follows: Fourteen dollars due and payable on the 1st day of May and November of each year from May 1, 1922, to May 1, 1954, inclusive, and one installment of $11.69, the last to mature, being due and payable on November 1,

1954, at which time all of the installments would have fully matured. It was declared in the mortgage that, upon the failure of the mortgagors to pay the indebtedness or any interest or installment or partial payment thereof when same should become due, or any taxes, liens, judgments or assessments against said land, the whole indebtedness might be declared due at the option of the mortgagee. On May 1, 1927, prior to the sale of the property to appellant, Pipkin breached the contract by failing to pay the installment of $14 due May 1, 1927, and by failing to pay the Drainage District No. 8 taxes for the years 1924, 1925 and 1926, and the State and county taxes for the years 1924, 1925 and 1926, whereupon appellee brought this suit to foreclose for the installment due and the unpaid taxes, subject to the remaining indebtedness of $360.38. A copy of the note was attached to the complaint and marked Exhibit A. The mortgage was attached to the complaint and marked Exhibit B. A separate demurrer of O. L. Light was filed to the complaint. The gist thereof is contained in the second and third paragraphs as follows:

"2. That the indebtedness referred to in the petition as Exhibit A (the note) is but one obligation payable in semi-annual installments, and that appellee does not have the right to foreclose upon any of said installments without declaring the entire indebtedness due.

"3. That appellee cannot, as it is seeking to do, foreclose the lien created and existing under Exhibit B (the mortgage), as to the payment on said note (Exhibit A) which is due, and yet have the lien declared to continue and exist as to the remainder of said note; that said note is but a single obligation, and is not severable for the purpose of foreclosure; that the extinguishment of the lien by foreclosure of the payment due, if permissible, would be an extinguishment of the entire lien."

F. R. Pipkin and his surety, the Harrisburg National Farm Loan Association, were made parties defendant in the action. Pipkin made default, and the Harrisburg National Farm Loan Association consented

to a decree in accordance with the prayer of the complaint.

The cause was submitted to the court upon the complaint, the note and mortgage, which were introduced in evidence, and the demurrer to the complaint, resulting in a judgment against F. R. Pipkin and his surety for the due installment of $14 with interest thereon at 8 per cent. per annum from May 1, 1927; and a decree of foreclosure against the land, together with the amount due for taxes, and an order of sale to satisfy same, subject to a continuing lien on said land in favor of appellee to secure payment of the remaining mortgage indebtedness, from which is this appeal.

Appellant contends for a reversal of the decree because the trial court ruled that it was not necessary to declare the entire indebtedness due in the accelerating clause in order to foreclose for the amount due; and that the extinguishment of the lien by foreclosure of the installment due would not extinguish the lien for the undue installments, or the balance of the indebtedness.

Appellant's contention for a reversal of the decree is refuted by the rule announced in the cases of *Land* v. *May,* 73 Ark. 415, 84 S. W. 489, and *Fox* v. *Pinson,* 172 Ark. 449, 289 S. W. 329. In the Land case this court said that the mortgagee "was entitled to have foreclosure for such as were due, in dealing with a number of notes which were executed by the mortgagor, some of which were due and some not." In the Fox case this court said: "The mortgagee can foreclose upon installments only which have matured, subject to the continuation of the lien upon the property to secure the unmatured installments." In each of these cases the installments were evidenced by separate notes, and there was no accelerating clause either in the notes or mortgages. We do not think that the instant case can be distinguished from the cases cited on that account. In sound logic there is no difference in a single note payable in installments and an indebtedness represented by several

installment notes. The accelerating clause in the mortgage in the instant case was inserted for the benefit of the mortgagee, and, under its provisions, was entirely optional on its part. There is nothing in the clause or mortgage requiring the mortgagee to declare the entire indebtedness due upon the failure to pay an installment when same should become due. We think that, notwithstanding the fact that the indebtedness in the instant case is represented by a single note, payable in installments, instead of a series of notes, and that an acceleration clause is contained in the mortgage, the principle of law announced in the Land and Fox cases, *supra,* is applicable, and controls the instant case. Of course, if the appellee should purchase the land at the foreclosure sale, then the lien would be extinguished in its entirety, since the title of the property would then be in appellee, otherwise not.

No error appearing, the decree is affirmed.

KIRBY, J., dissents.

NEW ENGLAND SECURITIES COMPANY *v.* WEST HELENA CONSOLIDATED COMPANY.

Opinion delivered July 2, 1928.

[redacted]

Bowersock, Fizzell & Rhodes, Roy D. Campbell and *Moore, Walker & Moore*, for appellant.

W. R. Satterfield and *J. G. Burke*, for appellee.

KIRBY, J., (after stating the facts). It is insisted, first, that the court erred in sustaining the demurrer to the complaints, and also in holding that the deeds of trust could not be reformed to show the correct description of the lands intended to be conveyed as against appellee Afflick, who claims to be an innocent purchaser, and both of these contentions are correct.

The descriptions appearing in the deeds of trust were not so indefinite as to be void, as shown from the exhibits themselves and the allegations of the complaints, and, so far as the description of the Spanish Grant is concerned, although the number of the grant was incorrect, it could be located by being north of the Little Rock road and other landmarks and the only land within any Spanish Grant belonging to the mortgagor company. In *Snyder* v. *Bridewell*, 167 Ark. 8, 267 S. W. 561, the court said:

"The general rule as to the sufficiency of a description to pass title to land under deed or mortgage in this State is that it shall be described with sufficient certainty to identify it. If not particularly and certainly described in the deed, the deed itself must make reference to something tangible by which the land can be located. *Doe ex dem. Phillips Heirs* v. *Porter*, 3 Ark. 18; *Tolle* v. *Curley*, 159 Ark. 175, 251 S. W. 377. The deed itself must furnish a key by which the land sought to be conveyed may be identified." See also *Darnell* v. *Bibb*, 143 Ark. 580, 221 S. W. 1061.

It is true that the words "corporation line" were used in some of the descriptions, indicating some municipal corporation, and that the town of West Helena had not been incorporated when the deeds of trust were executed, but the dedication deeds had been made and recorded, showing the lands platted, which were later incorporated as the town of West Helena, and the description in the trust deed in case No. 509 expressly states "except portions platted as a part of West Helena." Then, too, the town had been incorporated, including virtually the platted lands, as shown by the dedication deeds, long before appellee had acquired any interest therein. They were described with sufficient certainty, the deed itself making reference to tangible landmarks and to portions of the lands "platted as a part of West Helena;" the dedication deeds and plats of West Helena within the sections of lands described therein being of record, thus furnishing a key by which the lands conveyed could be identified.

The burden of proof was upon appellee to show himself an innocent purchaser of the lands under the pleadings herein, and no testimony was introduced on his part conducing to prove it. He purchased at a judicial sale only the equity of redemption in the lands, expressly recognizing in his bid his knowledge that they were mortgaged to secure the loans of $50,000, made by appellant company, and could not have acquired any right as an innocent purchaser. The rule *caveat emptor* applies to judicial sales, and a purchaser at such sales takes only such title as the debtor had, his purchase being subject to claims of which he had actual or constructive notice. Rorer, Judicial Sales, § 50; *Guynn* v. *McCauley,* 32 Ark. 112; and *Black* v. *Walston,* 32 Ark. 324.

Appellee had actual notice of the description of the land in the deeds of trust and constructive notice by their record, as well as constructive notice of the dedication deeds and plats of the lands as West Helena, made before the execution of the mortgages, and of the incorporation of the town of West Helena virtually as platted

in the dedication deeds, long before his attempted purchase of any interest in these lands. He could not therefore claim to be such an innocent purchaser as would prevent the court from reforming the deeds to more exactly describe the lands conveyed by the deeds of trust to conform to the intention of the parties in the making thereof, as shown by the undisputed testimony. *Tanner* v. *Manos*, 160 Ark. 293, 254 S. W. 676. The chancellor erred in holding otherwise.

There was no dispute as to the correctness of the amounts due as claimed in the several suits for foreclosure of the deeds of trust, nor of the right of appellants to recover such sums.

The decree is accordingly reversed, and the cause remanded with directions to overrule the demurrer and order a reformation of the deeds of trust in accordance with the prayer of the complaint, and for foreclosure thereof for the amounts claimed to be due, and for other necessary proceedings in accordance with the principles of equity and not inconsistent with this opinion.

WYSINGER *v.* TAYLOR.

Opinion delivered July 2, 1928.

Pat McNalley and *Jordan Sellers,* for appellant.

Joe Joiner, for appellee.

KIRBY, J. Appellant contends that the foreclosure and sale of the lot in controversy, under the deed of trust from the church to Pinson, grantor in her bond for title, to whom the purchase price of the lot had been fully paid, conveyed an equitable title to her in possession, which was superior to any right of appellees to redeem, notwithstanding the substitute trustee's name was not indorsed upon the deed of trust or the record of it in accordance with its terms.

Appellant was in possession of the lot, claiming to be the owner thereof, and had been since January 1, 1912, under the bond for title executed by Pinson, the beneficiary in the deed of trust, to whom she claims the lot had been turned over in settlement of the church's indebtedness to him. The testimony shows that she had been in possession of this lot continuously from the time of its purchase from Pinson until the bringing of this suit, and had paid all the agreed purchase price therefor, and was holding same under a trustee's deed regular on its face and sufficient to establish her title to the lot and to have the same quieted in her but for the attack made thereon and proof of its invalidity because of the sale having been made and the deed executed by a substituted trustee, whose name had not been indorsd on the trust deed or record of it in accordance with its terms.

The foreclosure and sale by the substitute trustee, after appraisement and advertisement duly made in accordance with the terms of the trust deed, for more than two-thirds of the amount of the appraisement, to Pinson for appellee, and the conveyance thereof, vested in her an equitable title, the purchase money having been paid, notwithstanding the trustee's deed was void because the appointment of the substitute trustee was not in writing. In *Daniel* v. *Garner,* 71 Ark. 484, 76 S.

W. 1063, a case where it was contended the sale made under the deed of trust was void because the appointment of the trustee who made it was not in writing, the court said, quoting syllabus:

"Where a sale by a substituted trustee was in accordance with the law and the terms of the trust deed, it vested in the purchaser an equitable title upon the payment of the purchase money, although the trustee's deed was void because the appointment of such trustee was not in writing." The court held there that, if the sale was in accordance with law and the deed of trust, it vested in the purchaser an equitable title, although no deed was made, and that such defense was both legal and equitable, and, if maintained, sufficient to defeat the action.

In *Arkansas Insurance Co.* v. *McManus*, 86 Ark. 120, 110 S. W. 798, the court said: "The equitable title, coupled with actual possession, bears with it all the incidents of legal title. This constitutes in effect the legal title for all practical purposes. Under such a title, the possessor may defend his possession at law as well as in equity."

It is true that was a case involving the construction of an insurance policy, wherein it was stated that the interest of the insured must be "unconditional and sole ownership, both legal and equitable," but appellees herein would have had no right under the terms of the deed of trust, under which this foreclosure and sale was attempted to be made, if in fact it had been made by the trustee designated therein, or had the name of the substitute trustee been indorsed thereon in accordance with its terms, since the purchaser at the sale was in possession of the lot, had paid the full purchase price thereof at the foreclosure sale, and would have acquired the legal title to the lot upon the conveyance thereof, except for the failure of the name of the substitute trustee to be indorsed upon the trust deed. She would, nevertheless, acquire the equitable title thereto, against which appellees have no more right to redeem from than

they would have had if the foreclosure had been regularly had and a conveyance made by the trustee named in the deed or the substitute trustee regularly indorsed thereon.

Appellant being in the actual possession of the lot, with the equitable title thereto, was entitled to have her title quieted as against appellees, who were without right to redeem from the attempted foreclosure at the time of the bringing of the suit, and the court erred in hold-holding otherwise. The decree is accordingly reversed, and the cause remanded with directions to quiet the title to the lot in controversy in appellant in accordance with the prayer of her cross-complaint.

PYLAND *v.* GIST.

Opinion delivered July 2, 1928.

Caraway, Baker & Gautney, for appellant.

Block & Kirsch, for appellee.

MEHAFFY, J. The appellees brought suit against J. E. Vaughan and Belle Vaughan, his wife, and Minnie Pyland, alleging that J. E. Vaughan and Belle Vaughan executed and delivered to J. P. Gist their promissory note for the sum of $1,000, due three years after date, and bearing interest at the rate of 8 per cent. per annum from date until paid, and that, to secure the payment of said note, J. E. Vaughan and wife made, exe-

cuted and delivered to Roy Grim, as trustee for J. P. Gist, a deed of trust conveying the northeast quarter of the northwest quarter of section 26, township 16 north, range 7 east, in the Eastern District of Craighead County, Arkansas. It was alleged that Minnie Pyland, a niece of J. P. Gist, induced him to deliver the note to her for the purpose of collecting only. That she failed and refused to surrender the note and deed of trust, but claimed that Gist had given it to her.

Vaughan and his wife filed answer, admitting execution of the note, and their readiness and willingness to pay, but that they were unable to determine to whom payment should be made, and refused to pay until the rightful ownership and possession of the note was determined. Minnie Pyland answered, admitting the relation between herself and plaintiff, Gist, admitted that she had the note and mortgage in her possession, but denied that it was given her for the purpose of collection, and asserted that it was given to her as a gift, and that it was duly assigned to her as such.

J. P. Gist, who was more than 80 years old, testified, in substance, that he lived in Dunklin County, Missouri; that he could not read and write, never went to school a day in his life; that Minnie Pyland was his niece, the daughter of his brother; that he gave her the note so she could collect it; that she asked him to give it to her, and that he did not care who collected it, just so it was collected. She was to collect it and pay it over to him, and had never done that. He had lost his hearing, or could not hear very well.

J. F. Miller testified that he knew Polk Gist, and had known him for more than 30 years; that he could not hear well for several years, and for the last four or five years had been very deaf, and that for the last few years his mind had not been very good; that this had existed for six or seven years. Witness also knew Minnie Pyland, and was present when there was a conversation between her and Senator Ely and his son. Ely and his son are practicing lawyers in Missouri, and had

a case in Missouri against Mrs. Pyland. Mr. Ely asked Mrs. Pyland about the land deal, and asked her how she happened to have the note, and she told Mr. Ely that her uncle, Polk Gist, lived in Missouri, and had turned it over to her to collect because she lived in Arkansas, and instructed her to deposit it in the Bank of Monette after she had collected it.

J. E. Vaughan testified that he owed the debt, and that Minnie Pyland, in a conversation with him, had said the note was in the bank, and that it belonged to her, and that no one was going to beat him out it. That she further said they have been taking his money just as fast they could get it, and this is one time they are not going to beat him out of it. Witness' wife was Gist's niece, the same relation to Gist that Mrs. Pyland is.

Allen Cluster testified that he was present when J. E. Vaughan had a conversation with Mrs. Pyland, and that Mrs. Pyland said: "Whenever it is to be paid, it is to be paid in my name, so he will not be beat out of it"; and further said, "he gave it to me for collection."

Tom Ely, Jr., testified that he was present when his father had the conversation with Minnie Pyland, and that Mrs. Pyland said that Mr. Gist lived in Missouri, and this land was in Arkansas, and he gave her this note to collect.

Robert Braden testified that he had known Gist practically all his life, and that he helped to make the transfer of the note by Mr. Gist to Mrs. Pyland; he identified the note, and at the time of the transfer he wrote the typewritten part and his name there, and that Mr. Gist said he wanted to give the note to Mrs. Pyland; that Gist could not write; there was very little conversation; Gist was hard of hearing. Mrs. Pyland and Gist came into the bank, and she stated that Mr. Gist wanted to transfer the note to her, and witness wrote the indorsement on it and explained it to Mr. Gist. Gist asked the witness if he could give the note to Mrs. Pyland, and witness asked him if that was what he wanted to do, and he said it was. He could not write,

and witness wrote his name. Mrs. Braden and Braden witnessed the mark.

Mrs. Braden testified about witnessing the mark, and that nothing was said about taking the note for collection.

Macey Pyland testified, in substance, that her husband was Mrs. Pyland's son; she knows Mr. Gist, and knew about the note from Vaughan, and knew that Vaughan had taken the bankrupt law, and Mr. Gist said that he had given the note to Minnie and she could make Vaughan pay it because she had a deed of trust to the land. She heard the conversation between Vaughan and Mrs. Pyland. She was also at Mrs. Pyland's when Mr. Ely and Mr. Miller came there, and heard that conversation, and Mrs. Pyland did not say she had the note for collection; she did say that "for collection" is not on that note.

Mrs. Minnie Pyland testified that Gist gave her the note, signed it over to her at the bank, and gave it to her, and that she left the note at the bank. That when he gave her the note she thanked him and told him that he would not want for a penny of it, that she would collect it. There was nothing said and no agreement or understanding that she would collect it for him or give it back to him. That at the time he signed the note over, Mr. Braden asked him did he understand that he was transferring the note, and he said yes.

There were some other witnesses who testified, but the evidence is conflicting, and we deem it unnecessary to set it out in full.

A promissory note or any chose in action or other evidence of debt, together with security, may be the subject of a gift *inter vivos,* and appellant contends that the proof conclusively shows that this was a gift *inter vivos;* that it is shown by the indorsement of the note and by the testimony of the Bradens and Mrs. Pyland, and that none of them are contradictory as to any fact, circumstance or detail of the transaction that took place at the time the gift was completed.

Gist testified that he gave the note to his niece for collection, and his testimony is corroborated by other witnesses. Mrs. Pyland testified that it was given to her absolutely and not for collection, and there is some corroboration of her testimony. It is therefore a question of fact, and the finding of the chancellor is conclusive here, unless it is against the preponderance of the evidence. This court has said: "While the numerical weight of the testimony is against the appellee, we do not think there is a preponderance of the evidence against the finding of the chancellor in holding that there was not a delivery of the deed with the intent to pass title. We have said that the question of delivery is generally one of intention as manifested by acts or words, and that there is no delivery unless there is an intention on the part of the actors in the transaction to deliver the deed in order to pass the title immediately to the land conveyed, and that the grantor shall lose dominion over the deed. As we have already said, we do not think the evidence in this case shows a delivery of the deed with the intention that the grantor shall not thereafter have any control or dominion over it. It is a question largely of intention, to be determined by the evidence, and we think the chancellor's finding is supported by a preponderance of the evidence." *Hardin* v. *Russell,* 175 Ark. 30, 298 S. W. 481.

"In appeals from the chancery court trials are *de novo,* but the findings of fact made by the chancellor are allowed to stand unless they are clearly against the preponderance of the evidence." *Henry* v. *Irby,* 175 Ark. 614, 1 S. W. (2d.) 49; *Doane* v. *Rising Sun Mining Co.,* 139 Ark. 605, 213 S. W. 399; *Hymer* v. *Bordeaux,* 129 Ark. 120, 195 S. W. 3; *Midyett* v. *Kerby,* 129 Ark. 301, 195 S. W. 674; *Houser* v. *Burchart & Levy,* 130 Ark. 178, 197 S. W. 28; *Ferguson* v. *Guydon,* 148 Ark. 295, 230 S. W. 260.

As this court has repeatedly held, to make a valid and effective gift *inter vivos* there must be an intention to transfer title to the property as well as a delivery by

the donor and an acceptance by the donee. There must be an intention on the part of the donor to relinquish the right of dominion on the one hand and to create it on the other, and delivery must be not only of possession but also of the dominion and control of the property, and it must appear that it was the intention of the donor to transfer the title. In this case Gist swears positively that he did not intend to give the note to Mrs. Pyland, but that he gave it to her for collection, and the chancellor found that it was not a gift, and his finding is supported by a preponderance of the evidence, and the decree is therefore affirmed.

SUPREME LODGE WOODMEN OF UNION *v.* MONTGOMERY.

Opinion delivered July 2, 1928.

J. DeWitt Shackleford and *John D. Shackleford,* for appellant.

Scipio A. Jones, for appellee.

MEHAFFY, J. The appellee brought suit in the Pulaski Circuit Court to recover $500 on an insurance policy issued by the appellant to Mary Martin Montgomery, mother of appellee.

The defendant admitted issuing the policy, and admitted that the assured paid the premiums, and that it was indebted to the appellee in the sum of $250, less amounts already paid. Appellant, however, contends that the insured was not entitled to recover $500 because she knowingly misrepresented her age, and the amount should be one-half of the $500, because it is alleged she gave her age as 42, when her correct age was 47. Mary Martin Montgomery had paid premiums for eight years. Defendant alleged in its answer that the age limit in the grade in which the insured was, was 45, that persons must be between 15 and 45 years, and above 45 they would be entitled to one-half the benefits. The policy was issued in December, 1918, and the insured died in September, 1926. There is no dispute about her being

in good standing at the time of her death, and the only controversy or dispute as to liability is the claim that she misrepresented her age, and for that reason is only entitled to half the benefits. Since this is the only issue in the case, except questions as to the admissibility of evidence and instructions of the court, it is unnecessary to set out the provisions of the policy or the evidence, except as it relates to the question of her age.

The appellant requested the court to give the following instruction:

"The court instructs the jury that, if they find from the testimony that a policy for $500 would not have been issued by the defendant except on the representation in the application that the insured was 42 years old, and if you further find from the testimony that, as a matter of fact, the age of the applicant at the time of making the application was 47 years of age, and the amount permitted would have been only $250, then your verdict will be for the defendant, and you will so find."

Appellant insists that the court erred in refusing to give this instruction. The instruction was improper, in the first place, because it directed the jury to find for the defendant if they found that her age was 47 instead of 42, although appellant admitted in its pleading that she was entitled to $149, that is $250, less the amounts which had been paid. Therefore it was improper, in any view of the case, to direct them to find for the defendant. The instruction was also improper for another reason. There is no testimony in the record tending to show that there was any misrepresentation as to her age, and the court properly directed a verdict for the plaintiff for $500, less the amounts which had been paid. It is conceded that, if her age was correctly stated in the application, she was entitled to $500, and the undisputed proof in this case shows that her age was correctly stated, or rather, there is no proof tending to show that it was not correctly stated.

The appellee testified that her mother said she was 38 at the time she entered the lodge. The proof of death,

sworn to by several persons, showed that she was 45 years of age at the time of her death, eight years after she became a member of the lodge.

Appellant complains of the action of the court in refusing to permit it to introduce what it claimed were copies of the constitution and laws of the order. Section 6097 of Crawford & Moses' Digest provides for amendments to constitutions and laws to be filed, and further provides as follows: "Printed copies of the constitutions and laws as amended, changed or added to, certified by the secretary or corresponding officer of the society, shall be *prima facie* evidence of the legal adoption thereof." This proof was not offered. Appellant insists, however, that, while this was the best evidence, secondary evidence is admissible where the same is offered without proper objection. Appellant offered to introduce what the witness said were copies of the constitution and by-laws. They were not certified, and the witness offering them was not the secretary, and there was no competent evidence offered by the appellant as to the provisions of the constitution or laws of the order.

The appellant states that it relies on the case of *Supreme Lodge Knights of Pythias* v. *Robbins,* 70 Ark. 364, 67 S. W. 758, which it states would be in point had proper objections been made to the testimony offered. In that case the court said: "The rejected evidence, that is, the copy of the constitution and by-laws, was not attached or set out in the bill of exceptions, and the court was not able to get a clear idea as to what this document was or purported to be, and is not able to say that the court erred in excluding it." The court further said, in that case: "But, even if the pamphlet had been included in the bill of exceptions, we would probably still have to hold that it was not shown to be a true copy by one having knowledge of the fact." The court also said in the same case: "With reference to evidence of a witness as to what the law was, that the laws of the order were matters of record on the books

of the order, and that they could not be proved by parol. * * * As it would be inconvenient to produce the original books, they should have been proved by an examined or an authenticated copy."

The objections to the testimony in the instant case were sufficient. The testimony offered was wholly incompetent.

Appellant also insists that the court erred in excluding the cards which were exhibits 1 and 2. The undisputed evidence shows that these cards were copied from the application, and the witness who offered to testify to them admitted that he did not make the copy, and he could not say that it was an exact copy; he had not examined it, and there was no evidence that the application itself could not be introduced. It is true the witness says the application was probably lost when they moved, but there is no testimony offered that any search had been made for it, and no offer to introduce a copy by any person who knew that it was a copy. There is therefore no competent evidence in the record that tends to show that the age of Mary Martin Montgomery was misstated in her application, and, since it is admitted in the pleadings that she had been a member, paying her dues for eight years, and admitted that, but for the misrepresentation as to her age, she would be entitled to the $500, there was nothing to submit to the jury.

Another reason why the exclusion of the cards was not error, is that it showed the payments made, and those payments were not disputed, and were deducted from the $500, and a verdict directed for the difference. Appellant claims that it had paid $149, being the difference between $250 and the amount paid, but the undisputed proof shows that the appellee never received the check, and it is also admitted in the evidence of appellant that, some time afterwards, the check was redeposited by the appellant, and, according to its own admission, it owed $149.

Appellant does not set out the testimony it offered, but simply calls attention to it in its motion for new

trial, and, in order to have it passed on by this court, it would be necessary for appellant to abstract the testimony. The answer in this case admits liability, admits that the assured paid premiums for eight years, that she was in good standing at the time she died, and that its only defense is that she misrepresented her age, and there is no competent evidence offered tending to show that there was a misrepresentation as to her age; on the contrary, the competent evidence that her age was correctly stated is undisputed. The court therefore did not err in directing the verdict for plaintiff for $500, less the amounts which had been paid, and the judgment of the circuit court is affirmed.

BRAGG *v.* THOMPSON.

Opinion delivered July 2, 1928.

Davis & Costen and *Berry, Berry & Berry,* for appellant.

Cecil Shane, for appellee.

McHaney, J. On December 4, 1926, appellant, Zac T. Bragg, and 33 others applied by petition in writing to the county court of Crittenden County, describing the territory proposed to be embraced, for the incorporation of the village of West Memphis. The territory described is rather elongated and odd shaped, running from its northern boundary south along both sides of State Highway 61 to its intersection with State Highway No. 70, a distance of one mile, thence east along both sides of 70 for a distance of one mile, thence south across the levee to the Mississippi River, a distance of about 1½ miles.

According to the map filed in this court, practically all of the land south of No. 70 and north of the Chicago, Rock Island & Pacific Railway has been platted with streets, lots and blocks. The land east of No. 61 has not been platted, and includes a 65-acre tract belonging to appellee, Thompson, and a tract on which appellant, Bragg, has his mill. All the Thompson land is very valuable, he having sold a one-acre tract at the intersection of the two concrete highways for $10,000, and other tracts for large sums of money. The remaining 65 acres are conceded to be worth not less than $65,000. Although this land has been planted in cotton, its chief value lies in the fact that it is adjacent to the two State concrete highways, the village called West Memphis, and is also near the metropolitan city of Memphis, Tennessee. The territory included south of the Chicago, Rock Island & Pacific Railway to the river is not so valuable, but was included to give the town a location on the river to enable it to get better freight rates. The owner of this territory is not objecting to its inclusion in the corporate limits of the proposed town. The petition contained all the necessary allegations as prescribed

by § 7664, C. & M. Digest, and contained the signatures of 34 persons who claimed to be inhabitants and qualified electors. The county fixed January 10, 1927, for a hearing on the petition, by an order requiring notice to be published as required by the statute. No hearing was had on the date set, but was adjourned from time to time until March 21, when the petition was granted and an order made incorporating the town of West Memphis. This order was not actually entered on said date, but was made. By an order *nunc pro tunc,* on August 19, the order of incorporation made March 21 was entered on that date for the former. It is as follows:

"An order incorporating the town of West Memphis. The above-styled cause came on to be heard on the 21st day of March, 1927, the same being an adjourned day of a special term of said court, duly and legally called, and the matter was heard upon the petition of Z. T. Bragg and thirty-three others, and was heard upon evidence in open court. And it appears to the court that said petition prays for the organization of a town in Crittenden County, Arkansas, under the name of West Memphis; and it further appears that said petition is signed by at least twenty qualified voters residing within the limits of the proposed town, as described in said petition; and it further appears that the limits of said town have been accurately described in said petition, and an accurate map and plat thereof has been made and filed in this court; and it further appears that the name proposed for said town is proper and sufficient to distinguish it from others of like kind in this State; and it further appears to be right and proper, in the judgment and discretion of this court, that said petition be granted. Wherefore it is considered, ordered and adjudged that the town of West Memphis be and is hereby organized and said petition for same granted, and the limits of said town are described as follows" (describing it).

The order actually entered on March 21 is: "This cause coming on to be heard on this 21st day of March,

1927, the same being an adjourned day of the special term duly and legally called, and the court having granted the petition in this matter, and the remonstrants having duly excepted and prayed an appeal to the circuit court, said appeal is hereby granted."

The precedent based on this order was not actually entered until August 19. Thereafter appellants and appellees discussed the matter of officers for said town, and politics entered into the matter. Thompson had neglected to pay his poll tax, and was ineligible for mayor. At the election held, Bragg was elected mayor and the other appellants to various offices of the town. This election was held July 5, and on the 12th, long after the time for appeal had expired, this suit was brought to enjoin the incorporation of the town and to prevent the officers from functioning as officers thereof. A temporary order was issued, and on final hearing it was made permanent.

A reading of the record in this case is convincing that the appellees were fully aware of every step taken in the organization of this little municipality. This being so, they had a full, complete and adequate remedy at law. Section 7668, C. & M. Digest, is as follows:

"One month shall elapse from the time such transcripts are forwarded and delivered before notice shall be given of an election of officers in such incorporated town, and any person interested may, at any time within the said one month, make complaint in writing, in the nature of an application for an injunction to the circuit court, or the judge thereof in vacation, having given at least five days' notice thereof, and furnished a copy of the complaint to the agent or agents of the petitioners, for the purpose of having the organization of such proposed incorporated town prevented."

This statute affords persons who desire to prevent the organization of a town, or for testing the legality thereof, a quick and adequate remedy for doing so. On the other hand, it is a short statute of limitations in favor of those who propose the organization. This

remedy was not pursued in this case. Instead, appellees waited for more than 90 days—until after the election of officers—to bring this action, and then in the chancery court. It is therefore a collateral attack on the judgment of the county court. In *Stumpff* v. *Louann Provision Co.,* 173 Ark. 192, 292 S. W. 108, this court said that "the county court is a court of superior jurisdiction, and its judgment, rendered in pursuance of such jurisdiction rightfully acquired, cannot be attacked collaterally." *Sharum* v. *Meriwhether,* 156 Ark. 331, 246 S. W. 501. Of course a judgment void *ab initio* may be so declared on collateral attack.

The judgment of the county court in this case is not void on its face. The matter in hand was clearly within the jurisdiction, made so by statute. Appellees argue that it is void because the corporate limits of the town include agricultural land, but not so. This case is wholly different from that of *Waldrop* v. *K. C. S. Ry.,* 131 Ark. 453, 199 S. W. 369, L. R. A. 1918B, 1081. There they attempted to organize a town taking in seven miles of territory along the railroad, where there was not even a village. The order was void for two reasons there: (1) because it was made at a time court was not in session, by the judge and not the court; and (2) it was an arbitrary abuse of discretion to incorporate a town where there was no semblance of any necessity for it. Here we have a thriving little village of a few hundred people, located on two railroads, the Mississippi River, and two hard-surface State highways, near the city of Memphis, Tenn. It has a compress covering 30 acres, electric lights, waterworks, hotels, rooming houses, ice plant, wood-working plants, various stores, meat markets, garages and oil stations, just as are found in any growing town. From 2,500 to 3,000 lots have been sold in the corporate limits, and houses are being built rapidly. Land values in the vicinity are very high, not because of their agricultural value, but solely because of the other matters herein mentioned. The facts in this case meet every test laid down in *Vestal* v. *Little Rock,* 54 Ark. 321, 15 S. W. 891, 16 S. W. 291, 11 L. R. A. 778.

We find it unnecessary to discuss all the points raised. While appellees alleged fraud in the procurement of the judgment, none is shown by the evidence. The conclusion we have reached is that the chancery court was without jurisdiction, and that the decree must be reversed, and remanded with directions to dismiss the complaint for want of equity. It is so ordered.

AMERICAN INSURANCE UNION *v.* ROWLAND.

Opinion delivered July 2, 1928.

Caraway, Baker & Gautney, for appellant.

Jeff Bratton, for appellee.

MEHAFFY, J. The People's Mutual Life Insurance Company, an assessment company, organized under the laws of the State of Arkansas, with its home office at Jonesboro, Arkansas, in the year 1916 issued a policy upon the life of Mrs. Jane Vandment of Paragould, Arkansas. Mrs. Vandment was placed in roll 3, and held certificate No. 869. The name of the company was afterwards changed to Mutual Life Insurance Company of Jonesboro. In June, 1920, the Jonesboro company entered into a contract with appellant, whereby appellant took over the membership of the Mutual Life Insurance Company, and the American Insurance Union became liable to the same extent on every policy issued until it had reached its highest assessment. The highest assessment in Mrs. Vandment's case was $1.49. After the merger, her payments were $1.74, twenty-five cents of this being for chapter dues. She paid her dues according to the contract from 1916 to 1926. She paid the same dues after the merger as before. The policy issued by the People's Life Insurance Company provided for the payment of assessments by members, and provided that, if death occurred within six months, the sum agreed to be paid was $100, but after six months the policy was to increase in value $12.50 on the first day of each calendar month for seventy-two consecutive months, until it reached its full value of $1,000, provided that the premiums were paid according to the contract. The policy had a disability clause, one of the provisions of which was that, in the event the insured became insane or dis-

abled by reason of insanity, premiums or assessments should cease during such disability.

When the appellant took over the Mutual Life Insurance Company of Jonesboro, it wrote to the members and certificate holders of the Mutual Life Insurance Company of Jonesboro, as follows:

"Dear Friend: Appended hereto is a rider to attach to the certificate or policy issued to you by the Mutual Life Insurance Company of Jonesboro, Arkansas. All you need to do is to attach this rider to your policy, and pay all assessments as usual. When this letter and rider is attached to your policy it is assumed by the American Insurance Union in accordance with the contract. You need not send us your policy.

"You are now a member of the American Insurance Union, entitled to all the rights and privileges of such members. Continue to send your assessments or premiums to the same place until further notice.

"Congratulating you upon your admission to membership in this splendid association, we are,

"Fraternally yours,

"American Insurance Union."

The rider which was inclosed, and which was to be attached to the policy, is as follows:

"The American Insurance Union hereby assumes the attached certificate of membership issued to the holder thereof by the Mutual Life Insurance Company of Jonesboro, Arkansas (or other company merged or affiliated therewith), and agrees to receive the holder thereof into membership in the American Insurance Union under said certificate in accordance with the terms and conditions of said certificate, the constitution and laws of the American Insurance Union, and the terms and conditions of the contract between the Mutual Life Insurance Company of Jonesboro and the American Insurance Union, dated June 1, 1920, a copy of which contract is on file in the Insurance Department of the State of Arkansas.

"Executed at Columbus, Ohio, this the 25th day of June, 1920. "John J. Sentz, President.

"Attest: Geo. W. Goglan, Secretary."

Mrs. Vandment was adjudged insane on June 27, 1926, by the probate court of Greene County, but her dues were paid up to and including August, 1926. Jane Vandment died in the State Hospital for Nervous Diseases at Little Rock, in December, 1926. The dues were paid and received by the American Insurance Union after the merger just as they were before the merger, until 1924, when the appellant sent a policy for $197 to Cail Rowland, and when he received same, he wrote the following letter:

"American Insurance Company,
Mr. C. L. Jordan, Cashier.

"Dear sir: I received the new policy March 24, on Jane Vandment for the amount of $197, but the policy I taken out in 1916 with the Mutual Life Insurance Company was for $1,000 after 72 months, so I have paid on it for 92 months now. So you can give me a policy for $1,000 or refund the amount I have paid in, so let me hear at once.

"Yours truly,
"Cail Rowland."

In reply to Rowland's letter, the appellant wrote as follows:

"Dear sir: In reply to your letter of recent date, we beg to advise that the officers of the Mutual Life Association found that the rates they were charging were inadequate to purchase the amount of insurance promised in the policies. They therefore merged with the American Insurance Union. This society agreed to carry the policies until they reached maximum assessment dates and then give each member choice of two options for continuing insurance in the American Insurance Union.

"A circular letter was sent her describing the different options from which she could select the type of policy she desired. She continued to pay maximum assessments of $1.49, which purchases at her attained age $197 effective insurance. This is the amount that will be paid in the event of death of this member

"There is no provision in these policies for cash settlement or return of premiums paid by the members. The member has had protection for the time she paid the premiums.

"Trusting this will be satisfactory, we are,

"Your very truly,

"American Insurance Union."

"Medical Department."

There was also introduced in evidence a copy of the contract between the Mutual Life Association and appellant and the testimony of witnesses as to the rules and regulations of the American Insurance Union, and also its constitution and by-laws. It is unnecessary to set out the testimony in full, but so much of the evidence as is necessary to call attention to will be set out in the opinion.

Appellant insists that an interpretation of the contract made between the American Insurance Union and the Mutual Life Insurance Company will settle almost all the disputed questions in this suit. It is insisted that it was under no obligation to take over the members of the Mutual Life Insurance Company of Jonesboro, and when it did take them over it was under conditions of a contract dated June 1, 1920. If this contract was the only contract, and if the insured had agreed to it, appellant's contention would be correct. However, after making this contract, appellant wrote to the insured and inclosed the rider. The letter stated: "Appended hereto is a rider to attach to the certificate or policy issued to you by the Mutual Life Insurance Company of Jonesboro, Arkansas. All you need to do is to attach the rider to your policy and pay your assessments as usual. When this letter and rider is attached to your policy, it is assumed by the American Insurance Union in accordance with the contract. You need not send us your policy." From the statement in the letter, "assumed in accordance with the contract," the assured had the right to believe that it meant the contract or

policy issued by the Jonesboro Company. The rider referred to in the letter has been set out above. It states:

"The American Insurance Union hereby assumes the attached certificate of membership issued to the holder thereof by the Mutual Life Insurance Company of Jonesboro, and agrees to receive the holder thereof into membership in the American Insurance Union under said certificate, and in accordance with the terms and conditions of said certificate, the constitution and laws of the American Insurance Union and the terms and conditions of the contract between the Mutual Life Insurance Company of Jonesboro and the American Insurance Union, a copy of which contract is on file in the Insurance Department."

Appellant did not send copy of its contract to the insured, but it contends that there is no liability, because an assessment was not paid in time. The clause exempting a member from paying assessments when insane is as much a part of the contract as any other provision in the contract, and the undisputed evidence shows that Mrs. Vandment was insane at the time appellant claims the assessment was not paid in time. Both parties to the contract are bound by it, but they are bound by all the provisions. The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties and give effect to that intention, if it can be done consistently with legal principles. In order to ascertain the intention of the parties, this court has said: "Courts may acquaint themselves with the persons and circumstances that are the subjects 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 view them and so as to judge of the meaning of the words and the correct application of the language to the things described." *Inter-Southern Life Ins. Co.* v. *Shutt,* 175 Ark. 1161, 1 S. W. (2d.) 801; *Wood* v. *Kelsey,* 90 Ark. 272, 119 S. W. 258; *Loudenbeck Fertilizer Co.* v. *Tenn. Phosphate Co.,* 121 F. 298, 61 L. R. A.402; *Hoffman* v. *Moffioli,*

104 Wis. 630, 80 N. W. 1032; *Rockefellow* v. *Merritt,* 76 F. 909, 35 L. R. A. 633; *Minn. Milling Co.* v. *Goodnow,* 40 Minn. 497, 42 N. W. 356, 4 L. R. A. 202.

Policies of insurance should receive a liberal and reasonable construction in favor of the beneficiaries. *Pfeiffer* v. *Mo. State Life Ins. Co.* 174 Ark. 783, 297 S. W. 847; *Conn. Fire Ins. Co.* v. *Boydston,* 173 Ark. 437, 293 S. W. 730; *Lord* v. *Des Moines F. Ins. Co.,* 99 Ark 476, 138 S. W. 1008; *Great Southern Fire Ins. Co.* v. *Burns,* 118 Ark. 22, 175 S. W. 1161.

This court has said: "Appellant is the author of the policy, so its provisions must be liberally construed in favor of the insured or beneficiary. Another way of stating the rule is that the limitations or restrictions upon the liability contracted for should be construed strictly and most strongly against the insurer. Another well settled rule of construction is that, if the limitations or restrictions against liability contain ambiguities, they should be resolved against the insurer rather than the insured or beneficiary." *Life & Casualty Ins. Co. of Tenn.* v. *Ford,* 172 Ark. 1098, 292 S. W. 389.

"A written contract should, in case of doubt, be interpreted against the party who has drawn the contract. Sometimes the rule is stated to be that, where doubt exists as to the construction of an instrument prepared by one party thereto, upon the faith of which the other has incurred an obligation, that construction will be adopted which will be favorable to the latter. * * * To state the same proposition conversely, it may be said that everything is to be taken most strongly against the party on whom the obligation of the contract rests." 6 R. C. L. 854.

"It is also a well settled rule in construing a contract that the intention of the parties 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 court 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." 6 R. C. L. 837-8.

Viewing this contract as a whole and keeping in mind the above rules, we see no difficulty in holding that the meaning of the contract is that the assessments shall be paid monthly, unless the insured becomes insane, and then the assessments cease. In the instant case, the insurer made the contract, and, even if the insured had an opportunity to read the merger contract, we still think the disability clause was valid and binding, and that during the period of insanity no assessments are required to be paid, and the policy did not lapse because of failure to pay.

It is also contended by the appellant that the amount of premiums which the insured paid purchased a policy for $197.35 and not a policy for $1,000. We think appellant has misconstrued the contract, and that it does not mean that, when members of the Mutual Life Insurance Company under the circle plan pay monthly assessments provided in their certificates until such time as said pay-

ments or assessments shall reach the maximum, said member shall then have a policy for which said assessments are sufficient to pay, but, on the contrary, the clause in the contract says: "And thereafter said members shall pay to the American Insurance Union each and every calendar month, a sum sufficient to meet the cost of their insurance and their proportionate share of the expenses of operation," etc. Under the contract the insured had a right, when payments had been made for seventy-two months, to pay such assessments as she was called on by the company to pay to keep in force the policy of $1,000. The insured in this case had reached the maximum in 1922, had at that time been paying two years to the appellant company. It was then the duty of the appellant company, if it intended to increase the assessments, if it was necessary to increase them in order to keep in effect the $1,000 policy, to notify the insured of the amount of the assessments. Instead of doing this, it continued for two years more to send notices of assessment of the same amount, and the insured continued to pay these assessments. In fact, there was never at any time any change in the assessments, and the insured had a right to believe that she was still paying on the old certificate in accordance with the terms of the letter and rider mailed to the insured to be attached to and become a part of the original certificate.

It is, however, insisted that a new policy of $197 was sent to the insured, and that she retained this policy, and is thereby estopped or is bound by a new policy for $197, and appellant quotes from and relies on the case of *American Insurance Union* v. *Benson,* 172 Ark. 1043, 291 S. W. 1007, and the case of *Knight* v. *American Insurance Union,* 172 Ark. 303, 288 S. W. 395. In the Benson case, above referred to, it is said by the court:

"The appellee bottoms his action against the appellant on the ground, under the merger contract, that the appellant had assumed the liability on her policy of insurance. The case in this particular is ruled by the recent case of *Knight* v. *American Insurance Union,* 172

Ark. 303, 288 S. W. 395, where we said: "The conclusion is irresistible that the insured member did receive the rider for a continuance, after the merger contract, until his death, to pay his assessments to the appellee. The undisputed testimony therefore justified the trial court in finding that Horace Knight, the assured member, received a copy of the consolidation contract and accepted its provisions. The appellant predicated his cause of action upon such contract, and, having accepted the same, he is bound by these terms."

One difference between the case of *Knight* v. *American Insurance Union* and the instant case is that in the Knight case the undisputed facts showed that the assured was notified of the terms of the merger contract, to be attached as a rider to his certificate of insurance. The undisputed evidence in that case was that the American Insurance Union at the time of the merger sent a copy of the contract as a memorandum to each and every member of the Home Protective Association, with a receipt attached to the rider for acknowledgment by the member. In the instant case the undisputed proof is that the appellant did not send to the insured a copy of the merger contract, and that it was not attached to the policy, but the letter sent stated that the appellant assumed the original contract, and that contract had the disability clause, and the insured was never notified until two years after the maximum assessment had been reached, and in the instant case the suit was based on the original certificate. In the Knight case it was based upon the merger contract. The Knight case and the Benson case are not in conflict with the decision in this case. This case is like the case of *American Insurance Union* v. *Robinson,* 170 Ark. 767, 281 S. W. 393, in which the court said: "The rider attached to the certificate of insurance issued to Mary S. Robinson by the American Mutual Benefit Association of Jonesboro was an absolute assumption of liability under certificate No. 908, class 4, issued by the latter fraternal organization to Mrs. Robinson." Mrs. Robinson never received the

merger contract and never heard of it. In the instant case, Mrs. Vandment never received it, and the only thing she ever heard about it was that the letter stated it was on file with the Insurance Department.

It is contended that Rowland paid on the new policy, and that it had the number of the new policy and not the number of the old certificate, but he was advised in the beginning that he would pay his assessments as usual, and that, when the letter and rider were attached to the policy, it was assumed by the American Insurance Union in accordance with the contract. That necessarily meant the contract of insurance or certificate to which the rider was to be attached. The insured was under no obligation or duty to accept the new policy, and the policy did not lapse because of the failure to pay the premium on it, the insured at the time being insane.

Each party requested a peremptory instruction, and requested no other instructions. This amounted to a submission of the question of liability to the court, and the court's finding under such circumstances is as effective as the verdict of a jury. If there is any substantial evidence upon which to base the finding, it will not be disturbed. *Webber* v. *Rodgers,* 128 Ark. 25, 193 S. W. 87. We think the evidence was ample to justify the court in finding for the plaintiff in the sum of $1,000 and interest, and the judgment is affirmed.

WILSON *v.* STATE.

Opinion delivered July 2, 1928.

Watkins & Pate, for appellant.

H. W. Applegate, Attorney General, and *Walter L. Pope*, Assistant, for appellee.

MEHAFFY, J. The appellant was indicted, tried and convicted for unlawfully, feloniously and carnally knowing and abusing a female under the age of 16 years. Appellant filed his motion for a new trial, which was overruled, exceptions saved, and he prosecutes this appeal to reverse the judgment of conviction.

Opal Sutton testified that she was 16 years old on March 24, 1928; that she knew W. A. Wilson; met him in December, 1927, and later, in December, met him again at Mrs. Carmack's house, and that other persons at Mrs. Carmack's went away and left her and Wilson alone. That, after they were left alone, they went back into the bedroom, and Wilson had intercourse with her; that she has had no improper relations with him since that time; that she and Wilson were in bed together from about 2 o'clock to 4 o'clock in the afternoon. She admitted that she had made statements to others that she had had no improper relations with Wilson; that she made these statements because she was scared. She testified that she had never had such relations with men before that time; before the trial she made a sworn statement that she had never had improper relations with Wilson. She had sworn in the municipal court in North Little Rock that she had such improper relations, and also had sworn to the same facts before the Pulaski County Grand Jury.

She had made the statement that her statement that she had had improper relations with Wilson was not true to a number of persons, and had signed and sworn to a written statement that Wilson had at no time ever had intercourse with her.

Her mother, A. Sutton, testified that Opal Sutton was 16 years of age on March 24, 1928; that Wilson came to her house and wanted Opal to go to a show, but she did not permit her to go. That Mrs. Carmack came to her house and begged her to let Opal go to her house, saying that they were giving a little party, and she let Opal go.

Henry Niehaus had known Opal Sutton for about four months; did not know Wilson; took Opal Sutton to Mrs. Carmack's house on Sunday.

Juanita Holland knew Opal Sutton, and knew Mrs. Carmack; had seen Opal Sutton with May Carmack.

Arlene Snow testified that she had known Wilson something more than a year; also knew Mrs. Carmack, and had been to Mrs. Carmack's house; that Wilson lived at his filling station on Park Hill, and May Carmack lived in a residence near the filling station. She had been on one of the parties; she was then at the industrial school under the care of the probation officers, and had been there since the trouble arose.

Opal Sutton was recalled, and testified that no one tried to get her to leave town; some one told her that money had been offered to take her out of town, and that she had better watch her step. That Jack Ives told her that Wilson offered him money to take Opal out of town, or marry her, or something; that she had no idea of going away with Ives; that Jack Ives was a bootlegger.

The appellant, Wilson, testified that he ran a filling station north of Park Hill, where he lived; that Opal Sutton went to the home of May Carmack, which was his former home, in December, 1927, and he was there, but that he had no improper relations with her. That May Carmack was appellant's former wife, and Jack Carmack, May's husband, and Henry Hodges were there at the time, and appellant's wife was with him. Appellant

testified at length about the house party and about being at May Carmack's; he testified positively that he had never had any improper relations with Opal Sutton. He also testified that Opal Sutton wanted to talk to him, and that he met her, and that she wanted to make it right and get right herself. That he was afraid to talk to her, and got her to go to Mr. Pate's house, and then to Mr. Pate's office next morning, and Mr. Pate was not there, but Mr. Watkins was, and the girl made this statement, and signed it and swore to it before Mr. Longstreth.

Appellant urges that the judgment of conviction should be reversed on two grounds. (1) It is insisted that the court erred in permitting certain questions to be asked appellant on cross-examination. He was asked, "You have had lots of parties at your present place?" and he answered "No." Then he was asked the question, "When did you quit?" These questions were objected to, and the court stated that it would be competent to show his habits, associations, etc. The prosecuting attorney asked him also, on cross-examination, in speaking of Arlene Snow, "Hasn't she spent the night upstairs over your filling station in your room?" Appellant objected to this question. The prosecuting attorney was then permitted to ask the same question about Catherine Johnson, and asked the appellant, "Hasn't she spent the night up there?" The court stated: "He has a right to cross-examine him and to inquire into his habits, his associations and associates. His association with young girls, and old girls, for that matter, to inquire into his past life and habits, but not as proof of this particular charge or any charge at all, but only as going to his credibility as a witness, and the jury will so regard it as only going to his credibility as a witness, and not as proof of this particular charge." The prosecuting attorney then asked appellant if he had had intercourse with Catherine Johnson, and also asked him if he had ever had intercourse with Arlene Snow. He asked the same question as to Pearl Valentine. All these questions were objected to by appellant, and the court again said:

"The jury will understand that this cross-examination only goes to the credibility of the witness, and it is to be considered for nothing else and has no bearing upon the guilt or innocence of the defendant on this charge." Prosecuting attorney was also permitted to ask appellant: "Arlene Snow and Holland, this Holland woman, all came out there?" He then asked appellant: "All three of these girls have been at your house, upstairs, upon a party, or whatever you call it?" He was also asked: "Did you ever run Wood out of the room so you could have intercourse with Pearl Valentine?" He was then asked by the prosecuting attorney: "Didn't you have him (Buddie Wood) out there selling liquor at $2 a pint?" The prosecuting attorney then asked him: "Have not you had so many parties out there that you are now under a charge of running a disorderly house?" All of these questions asked the appellant were objected to and exceptions saved, and appellant now urges that it was error to permit appellant to be asked these questions, and for that reason the case should be reversed.

It was not error to permit the prosecuting attorney to ask the witness the questions objected to. This court has said, quoting from Stephens on Evidence, "When a witness is cross-examined he may be, in addition to the questions hereinbefore referred to, asked any questions which tend, (1) to test his accuracy, veracity, or credibility; or (2) to shake his credibility by injuring his character." After the court quoted the above it continued: "We are not called to approve the rule stated so broadly, but it is always competent to interrogate a witness on cross-examination touching his present or recent residence, occupation and associations, and if, in answer to such questions, the witness discloses that he has no residence or lawful occupation, but drifts about in idleness from place to place, associating with the low and vicious, these circumstances are proper for the jury to consider in determining his credibility. That such a life tends to discredit the testimony of the witness, no one can deny; when disclosed on cross-examination, it

is exclusively for the jury to determine whether any truth can come from such source, and if so, how much. The right to impair the evidence of a witness by cross-examination must not be confounded with the right to impeach a witness by evidence introduced by the opposite party. * * * Yet it is held that, for the purpose of discrediting his testimony, the witness may be asked upon cross-examination as to specific acts." *Hollingsworth* v. *State,* 53 Ark. 387, 14 S. W. 41.

The court in this case told the jury that this testimony only went to the credibility of the witness, that it could be considered for nothing else, and that it had no bearing upon the guilt or innocence of the defendant on this charge. Under the instructions of the court, the jury could not have considered this evidence as proof of the charge against him, but they could only consider it as affecting his credibility as a witness. This court, in a recent case, quoted with approval the following:

"It has always been held that, within reasonable limits, a witness may, upon 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." *Bowlin* v. *State,* 175 Ark. 1115, 1 S. W. (2d.) 553. See also *Whittaker* v. *State,* 171 Ark. 762, 286 S. W. 937; *Barton* v. *State,* 175 Ark. 120, 298 S. W. 937; *Garrison* v. *State,* 148 Ark. 370, 230 S. W. 4.

This court has uniformly held that a defendant, on cross-examination, may be asked questions which affect his credibility as a witness, and that it is not improper to do so, although the questions may be about specific acts. Of course it is proper for the court to tell the jury, as was done in this case, that such evidence is not proof of the charge for which he is being tried, but that

it can be considered only as affecting the credibility of the witness, and that they cannot consider it for any other purpose.

It is next insisted that the evidence is not sufficient to sustain the verdict. The court gave the following instruction to the jury: "In this case the defendant, like any other defendant charged with a crime, is presumed to be innocent. This is the presumption that begins with the commencement of a trial and continues throughout the trial, or until the evidence convinces you of his guilt beyond a reasonable doubt, and that the offense was committed in this county and State within three years next before the finding of the indictment."

The jury therefore, under the instructions of the court, could not convict the defendant unless they believed from the evidence beyond a reasonable doubt that he was guilty. The prosecuting witness testified positively as to their relation, and the appellant testified positively that no such relation ever existed. The weight of the evidence and credibility of the witnesses were questions for the jury. This court does not pass upon the credibility of witnesses nor upon the weight of the evidence. If there is competent evidence of a substantial character, the verdict of the jury is controlling here. The testimony of the prosecuting witness was sufficient to warrant a conviction. "It is well settled in this State that, in the prosecution for carnally knowing a female under 16 years of age, a conviction may be had upon the uncorroborated testimony of the prosecutrix alone." *Seaton* v. *State,* 151 Ark. 240, 235 S. W. 794.

The judgment of the circuit court is affirmed.

WALLACE *v.* STATE.

Opinion delivered July 2, 1928.

Cobb & Cobb, for appellant.

H. W. Applegate, Attorney General, and *Walter L. Pope,* Assistant, for appellee.

McHANEY, J. Appellant was indicted, tried, convicted and sentenced to three years in the penitentiary on a charge of carnal abuse committed on the person of Thelma Anderson, a girl eleven years of age.

His first assignment of error for a reversal of the case is that the court erred in permitting the prosecut-

ing attorney to ask this little girl leading questions regarding the commission of the offense. It is not an abuse of discretion for the trial court to permit the prosecuting attorney to ask leading questions to the young and inexperienced or ignorant. *Murray* v. *State,* 151 Ark. 331, 236 S. W. 617. No abuse of discretion was shown in this particular case, as the questions the witness was required to answer were of a very delicate and embarrassing nature, and she was not only young, but ignorant and inexperienced.

The next assignment of error is that the evidence is insufficient to support the verdict. The testimony of Thelma Anderson, the prosecuting witness, was of itself sufficient to sustain the verdict, *Wilson* v. *State, ante,* p. 885, but in addition to her testimony was the positive testimony of two eye-witnesses, or persons who claimed to be eye-witnesses, to different acts of intercourse, and this was sufficient to take the question of the guilt or innocence of appellant to the jury.

The final assignment of error is that the prosecuting attorney made an improper statement in his closing argument to the jury. The following statement was objected to: "They all take them out of very poor homes, where the mother is out working for a living. I am unable to express my contempt for that thing; the evidence shows that he took her out of a poor home while her mother was out at work, and ruined her." On objection being made to the above argument, the court said: "The jury will understand they will consider only the evidence in the case; it is all right for the prosecuting attorney to call to their attention the seriousness of the crime and the importance of proper deliberation by the jury; I think the argument in that respect is all right; the jury will know, in determining the guilt or innocence of the defendant, they will be governed solely by the evidence in the case." Thereupon counsel for appellant said: "I object to both the argument and the remarks of the court." There does not appear to have been any ruling upon the last objection, nor any excep-

tion; but, even conceding that the effect of the above is that, the court overruled the objection and appellant excepted, still we do not think the argument open to the objection made by counsel. While there may not be any direct evidence in the record that she came out of a poor home while her mother was out at work, and ruined her, the jury was able to observe from her appearance and that of her mother and father, who were witnesses in the case, whether she was from a poor home or not. We are of the opinion that the remarks of the court in passing on the objection were proper, as the prosecuting attorney had the right to call the attention of the jury to the seriousness of the crime with which appellant was charged, and that is all the court meant and all the jury could have understood from what the court said. The court did not assume that a grievous crime had been committed, but that one had been charged, and that appellant was being tried therefor. It did not amount to an expression of an opinion on the evidence. The court did not say that appellant had committed a grievous crime, but the effect of what he said was that appellant was charged with such a crime, and that the prosecuting attorney had the right to discuss it. *Adams* v. *State,* 176 Ark. 916, 5 S. W. (2d) 946.

Judgment affirmed.

CHESNUTT *v.* YATES.

Opinion delivered July 2, 1928.

John N. Cook, for appellant.

J. D. Shaver, Henry Moore, Jr., and *Ben E. Carter,* for appellee.

McHaney, J. This action was brought by appellant, a citizen and taxpayer of Miller County, to enjoin appellee, as collector of Miller County, from paying to the treasurer of the city of Texarkana $20,000 in warrants issued by the city to various persons, employees and others, to whom the city was indebted, during the year 1926. The city treasurer, the State National Bank and the Southern Surety Company were all made party defendants.

It appears from the pleadings and the evidence that, subsequent to the adoption and effective date of the so-called Amendment No. 11 to the Constitution of this State, December 7, 1924, up to and including December 31, 1924, the city of Texarkana allowed claims and issued warrants in excess of its revenues for the same period of time in the sum of $4,828.59; that for the year 1925 the city allowed claims and issued warrants in excess of its revenue for that year in the sum of $13,279.13; and that for the year 1926 the city allowed claims and issued warrants in excess of its revenue in the sum of $4,199.84, making a total for the three years of $22,-307.56 of allowances made and scrip issued in excess of its revenues for those years.

It further appears that all the warrants which are involved in this controversy were issued in 1926. It further appears that, during the fall of 1926, $20,000 was borrowed from the State National Bank by the mayor and chairman of the finance committee of the city

council, the chairman of the finance committee executing in the name of the city his four promissory notes, one for $7,500, one for $2,500 and two for $5,000 each, which were indorsed by the mayor and the chairman of the finance committee and the amount thereof placed to the credit of the city treasurer. As the city drew its warrants to pay its debts for which the city council, from time to time, had made allowances, the city treasurer paid same out of said funds so borrowed from the State National Bank, and attached the warrants so taken up to the notes held by the State National Bank as collateral thereto. In the spring of 1927 the collector of Miller County took up these warrants to the extent of $20,000 in the hands of the State National Bank and turned them in to the city in making his settlement with the city. This had the effect of retiring the notes given to the bank. The interest thereon was paid from time to time by the city. It is not alleged or attempted to be proved that any of the parties to this transaction realized any profit therefrom. The warrants that were taken up by the city treasurer out of the funds borrowed from the bank were taken up at par. The court dismissed the bill for want of equity, dissolved the temporary injunction theretofore issued, and this appeal is from that judgment.

As heretofore stated, this action arises under and grows out of Constitutional Amendment No. 11, the pertinent part of which reads as follows:

"The fiscal affairs of counties, cities and incorporated towns shall be conducted on a sound financial basis * * *; nor shall any city council, board of aldermen, board of public affairs, or commissioners of any city of the first or second class, or any incorporated town, enter into any contract or make any allowance for any purpose whatsoever, or authorize the issuance of any contract or warrants, scrip, or other evidences of indebtedness in excess of the revenue for such city or town for the current fiscal year; nor shall any mayor, city clerk, or recorder, or any other officer or officers,

however designated, of any city of the first or second class, or incorporated town, sign or issue any scrip, warrant or other certificate of indebtedness in excess of the revenue from all sources for the current fiscal year."

This amendment was declared adopted by this court in *Brickhouse* v. *Hill,* 167 Ark. 513, 268 S. W. 865. It was held to become effective December 7, 1924, in *Matheny* v. *Independence County,* 169 Ark. 925, 277 S. W. 22.

In *Kirk* v. *High,* 169 Ark. 152, 273 S. W. 389, this court said:

"We think the amendment means just this: that, if a county, city or town avails itself of the provision 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 revenue. 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." The city of Texarkana issued bonds to take up its indebtedness to December 7, 1924.

In *Nelson* v. *Walker,* 170 Ark. 170, 279 S. W. 11, after quoting the above from *Kirk* v. *High,* the court said:

"In other words, the amendment leaves nothing to the discretion of the county judge in increasing the county's outstanding indebtedness. He has no power to do so. It must be conceded that this interpretation of the amendment makes it far-reaching and drastic, but it is so written in the amendment, and we cannot hesitate to declare the effect of its plain and unambiguous language."

In *McGregor* v. *Miller,* 173 Ark. 459, 293 S. W. 30, in the opinion on rehearing, the court said:

"The brief on the petition for rehearing discusses the question of priority of warrants issued by a county where the total amount of warrants issued exceeds the

revenues. This is a condition which the amendment was intended to prevent. If such a condition arises, those warrants issued in excess of revenues are void. 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."

It will therefore be seen from the foregoing that contracts made and warrants issued by the city of Texarkana during the year 1926, at a time when the revenues for that year had not been exceeded, were valid. The record in this case fails to disclose whether these particular warrants in the hands of appellee were issued before or after the revenues for the current year had been exhausted. The presumption of law is that they are valid, as they appear to be so on their face, and the burden of proof rested upon appellant to show the invalidity of the particular warrants in controversy. The total revenues for the city of Texarkana for the year 1926 amounted to $88,062.28. The total amount of scrip issued during that year was $92,261.17, making an excess of scrip over revenues of $4,199.89. Appellant was not able to testify, nor did any other witness, that these particular warrants were invalid at the date of their issuance. Having failed to show the invalidity of these particular warrants, appellant must fail in this action. The decree of the chancery court is therefore correct, and it is affirmed.

EXPORT INSURANCE COMPANY *v.* ROYSTER.

Opinion delivered July 9, 1928.

Price Shofner, for appellant.

Edward B. Dillon and *Louis Tarlowski,* for appellee.

HART, C. J., (after stating the facts). Counsel for appellant assign as error the action of the court in instructing the jury as follows:

"Now, gentlemen, when the plaintiff proves that his car was delivered to the garage and that he went back for it and that it was missing, without his knowledge or consent, then that would be *prima facie* evidence of the fact that the car was stolen."

We think counsel for appellant are correct in their contention. The policy insures the owner against loss or damage to the automobile by reason of theft, robbery or pilferage. Liability is claimed for loss suffered by reason of the automobile being stolen by one of the servants of the Smith Auto Livery Company while it was stored in the garage of that company. There is nothing in the policy that indicates that the word "theft" was used in other than its legal signification.

There is a conflict in the authorities as to whether or not, to constitute larceny, it is necessary to show that there was an intent to convert the property to the use of the taker. On the one hand it is held that, to constitute the offense of larceny, it is not necessary that the taking should have been with an intent to appropriate the property to the use or benefit of the taker. The felonious intent consists in the purpose of depriving the owner of his property, and no benefit to the guilty agent may be sought, but only injury to the owner. On the other hand, this court has held, in common with other courts, that, to constitute larceny, there must be an intent to convert the property to the taker's own use. *Dove* v. *State*, 37 Ark. 261. The reason for so holding has been tersely given by the Court of Appeals of Kentucky in *Ford* v. *Commonwealth*, 175 Ky. 126, 193 S. W. 1026, where the court said:

"To constitute the crime of larceny, the intent with which the property was taken must be felonious. In the language of the common law, it must be done *animo furandi*. To take property in the absence of an intention to steal, that is, an intention to convert the same to the use of the taker and permanently to deprive the owner thereof, is not larceny, though under proper conditions it may constitute a trespass."

The authorities on both sides of the question may be found annotated in 12 A. L. R. 804-809. In the case-note referred to, it is said that the weight of authority is against the view taken by this court in the Dove case, but we can perceive no good reason for overruling the rule laid down in that case, for it seems to have been fol-

lowed by the court ever since. At the least, it has not been expressly overruled, and our attention has not been called to any case where the doctrine there announced has been impliedly overruled.

Therefore we adhere to the rule announced in that case, and it necessarily follows that the instruction complained of was erroneous. Where, to constitute larceny, the taking must have been with an intent to appropriate the same to the taker's own use and benefit, an instruction which defines larceny merely as a taking with an intent to deprive the owner thereof is erroneous. Such is the effect of the instruction complained of.

Moreover, we think the instruction is erroneous because it, in effect, is an expression of the opinion of the trial judge as to the weight to be given to certain proved facts, and this, under our Constitution, can never be done.

It is also earnestly insisted by counsel for appellant that the evidence is not legally sufficient to sustain the conviction. We cannot agree with counsel in this contention. While the jury might have found that the servant of the Smith Auto Livery Company took the car out of the garage for a drive and intended to return it to the garage, and was prevented from doing so because of the wreck of the car, still, on the other hand, the jury might have found that the servant intended to appropriate the car to his own use, and was prevented from doing so because it was so badly wrecked when it collided with the iron pole at Ninth and Broadway Streets.

Because the court erred in instructing the jury as above set forth, the judgment will be reversed, and the cause remanded for a new trial.

SMITH, J., concurs.

VON MOSCH *v.* WALDROP.

Opinion delivered July 9, 1928.

C. H. Herndon, for appellant.

Isaac L. Awtrey, for appellee.

HART, C. J., (after stating the facts). The decree of the chancery court was correct. In *Chaffin* v. *Harpham,* 166 Ark. 578, 266 S. W. 685, it was held that a delivery in escrow is irrevocable until failure to perform the stipulated conditions. Again, in *Ford* v. *Moody,* 169 Ark. 649, 276 S. W. 595, it was held that, when a deed is delivered merely as an escrow, to take effect upon the performance of some condition by the grantee in the future, no title passes until the condition has been performed, and it is immaterial that the grantee obtains possession of the instrument before the condition is performed.

In the case at bar, the record shows that Richardson sent the deed to the Caddo Valley Bank to be delivered to Gust Von Mosch upon the payment of the purchase money. Von Mosch was notified that Richardson was in need of money, and wished to sell at once. In each subsequent letter about the transaction Richardson notified Von Mosch that he was in pressing need of money, and must receive payment of the purchase price of the land quickly. On November 19, 1927, Richardson wrote Von Mosch, assuring him that the title was O. K., and that the Caddo Valley Bank had loaned him $100 on it. He had agreed to sell the land to Von Mosch for $125, to

be paid in cash. He notified Von Mosch that he had an obligation coming due on November 28 that he must meet, and also that he had been offered a little more money than he asked Von Mosch for the land. He notified Von Mosch, however, that he was willing to stand by his proposition provided it was accepted within a reasonable time. The fact that he referred to November 28 as the date upon which he was in pressing need of money showed that he considered that a reasonable time. Instead of paying the purchase price of the land, Von Mosch waited until after Richardson had sold the land to Waldrop and had executed a deed to him for it, which Waldrop had filed for record.

It does not make any difference that Waldrop had notice that Von Mosch claimed title to the land. Under the facts presented, Von Mosch could only claim title to the land provided he complied with the condition upon which the sale was made. He was notified in express terms that Richardson was badly in need of money on the 28th day of November, and, under the circumstances, we think it was his duty to have sent the money promptly so that Richardson could meet his obligation. Not having done so, Richardson had the right to sell the land to some one else; and it did not make any difference whatever that the purchaser had notice of the contemplated sale to Von Mosch, because the latter failed to comply with the stipulated condition upon which the land was offered to him, and, upon his failure to do so, Richardson had a perfect right to sell the land to Waldrop. Waldrop paid the purchase money for the land and filed the deed for record before Von Mosch attempted to comply with the condition upon which he purchased the land. That condition was that he should pay the purchase price in cash. He did not offer to pay the purchase price until after the deed from Richardson to Waldrop had been delivered and filed for record and Waldrop had paid the purchase money to Richardson.

The result of our views is that the decree of the chancery court is correct, and it will be affirmed.

DORR, GRAY AND JOHNSTON *v.* FIKE.

Opinion delivered July 9, 1928.

McCaleb & McCaleb, for appellants.

Gustave Jones and *Ira J. Matheny,* for appellee.

HART, C. J., (after stating the facts). A physician or other person undertaking to use X-rays is held to the same measure of responsibility as in administering other forms of medical treatment. He impliedly contracts with the patient that he possesses ordinary skill in administering X-rays, and that he will exercise reasonable skill, care and diligence in his treatment or diagnosis of the patient. *Runyan* v. *Goodrum,* 147 Ark. 481, 13 A. L. R. 1403, 228 S. W. 403.

In discussing the question in that case the court said:

"The doctrine of *res ipsa loquitur* does not apply in such cases, because the testimony shows that, on account of the idiosyncracies of the X-ray machine, one person of a certain type and temperament would be susceptible to a burn while another person of a different type, under the same circumstances, would not be burned. Moreover, it is shown that burns do occasionally occur, in the ordinary course of the exposure, in spite of the highest diligence and skill to prevent them."

The facts in this case are substantially the same as the facts developed in the case of *Dorr, Gray & Johnston* v. *Headstream,* 173 Ark. 1104, 295 S. W. 96. The defendants in the two cases are the same, and the cases were tried before the same circuit judge. An examination of the record discloses that the same rulings were made in the two cases on the admission of evidence and on the instructions. Therefore we do not deem it necessary to again consider the assignments of error which were argued and determined in that case. We have carefully compared the records in the two cases, and find that the same principles of law governed the court in the trial of the two cases, and we do not deem it necessary to reiterate what was said in discussing the various assignments of error in the Headstream case.

In addition to the assignments of error in that case, it is here contended that the court erred in refusing to make the complaint more definite and in excluding from the jury the testimony of the plaintiff as to the loss of time suffered and the expenses incurred in buying medicines and in medical treatment, because he did not itemize these amounts, and because the defendants had no opportunity to meet the issue on these points. We do not deem this assignment of error well taken. The plaintiff in his complaint states the facts upon which his cause of action is based. He alleges facts tending to show that the injury to his back was permanent, and that he has suffered great pain therefrom. He prays for general damages, and he asks for special damages on account of loss of time and on account of money expended for medi-

cines and medical attention. In his testimony plaintiff stated that he was damaged in the sum of $3,713 for loss of time and for expenses incurred in buying medicines and paying for medical attention. He alleges that he suffered special damages for loss of time on account of inability to work, and for amounts expended for medicines and medical attention.

It is well settled in this State (and no citation of authorities is necessary to support the position), that all a pleader is required to state are the facts upon which he relies for a recovery, where general damages are claimed. From the very nature of things, general damages are incapable of segregation into different items. As we have just stated, the plaintiff alleged special damages for loss of time from his usual work, and for medical expenses incurred. He was not required to itemize these amounts or to state how many days or months he was unable to work and the exact amount of money he expended for medicines and medical attention. That was a matter which should be developed in the proof, and good pleading did not require that he should state the evidence upon which he based his claim for damages in his complaint. All he was required to do was to put the defendants upon notice that he expected to recover special damages for loss of time and for expenses incurred for medicines and medical attention.

It is next insisted that the court erred in instructing the jury to consider plaintiff's diminished earning capacity in arriving at their verdict. We do not consider this assignment of error well taken. The impairment of the power to earn money implies that the injured person can follow some wage-earning occupation, and that his ability to earn money, though reduced, is not totally destroyed. Hence his impairment of earning capacity begins when the injured person is able in some degree to follow a wage-earning occupation. *Blue Grass Traction Co.* v. *Ingles,* 140 Ky. 488, 131 S. W. 278.

In the present case the evidence for the plaintiff tended to show that his injuries were permanent, and,

under his claim for general damages, he was entitled to show that his earning capacity had been impaired so that, when he was able to go to work, he could not earn as much as he had previously done.

His claim for allowance for loss of time was a different matter. His claim in that respect as an element of damage was a claim for special damages, and was actionable as such, because his loss in that respect was due to the fact that he could not follow any wage-earning occupation for a specified length of time.

Again, it is insisted that the court erred in refusing to instruct the jury that there was no evidence that the plaintiff had been delirious since receiving the X-ray treatment on account of that treatment. Therefore the defendants asked the court to instruct the jury that this fact could not be considered by the jury as one of the plaintiff's grounds for recovery of damages in the case. We do not think the court erred in refusing to so instruct the jury. The jury might have inferred from the evidence for the plaintiff that he was delirious for several weeks on account of the pain and suffering he endured from the defendants' negligence in administering the X-rays to him.

We have carefully examined the record, and have reached the conclusion that the case was tried according to the principles of law decided in the case of *Dorr, Gray & Johnston* v. *Headstream,* 173 Ark. 1104, 295 S. W. 16. Hence we find no reversible error in the record, and the judgment will therefore be affirmed.

BEASLEY *v.* PARNELL.

Opinion delivered July 9, 1928.

Martin Fulk and *Cockrill & Armistead*, for appellant.

H. W. Applegate, Attorney General, *George R. Steel*, Assistant, and *W. R. Donham*, for appellee.

HART, C. J., (after stating the facts). The office of Commissioner of Revenues was created by act 88 of the Acts of 1925, as amended by acts 79 and 115 of the Acts of 1927. Act 88 of the Acts of 1925 abolished the office of Insurance Commissioner and State Fire Marshal and created the office of Commissioner of Insurance and Revenues, and prescribed his duties and powers. Acts of 1925, page 260. Inasmuch as the correctness of the decision of the circuit court in the main depends upon the construction to be placed upon § 5 of the act, we copy it in full. It is as follows:

"Section 5. The Governor, by and with the consent of the Senate, shall appoint a Commissioner of Insurance and Revenues, who shall be a citizen of this State, of well-known business ability, at least thirty years of age, who shall hold office for a term of four years, or until his successor shall be appointed by the Governor. If the Senate be not in session when such appointment is made, the appointee shall qualify and hold office until his appointment be rejected by the Senate when it next convenes. Said Commissioner of Insurance and Revenues shall receive a salary of $4,000 a year, to be paid

as other salaries are paid, and he shall devote his whole time to the duties of the office. Whenever there shall be a vacancy in the office of Commissioner of Insurance and Revenues, the Governor shall fill such vacancy by appointment. The Commissioner of Insurance and Revenues, his deputies and assistants, shall take, subscribe and file in the office of Secretary of State the constitutional oath of office, within five days from the time of the notice of their appointment."

Section 6 provides that the Commissioner is empowered, with the approval of the Governor, to appoint two deputies and three stenographers, each of whom shall receive a salary as designated in the section.

Section 2 of the act says that, for and during the period of thirty years from the time this act goes into effect, there is created and established the office of Commissioner of Insurance and Revenues. In this connection it may be stated that the Legislature of 1927 passed an act to create the Department of Insurance Commissioner and State Fire Marshal, and to define his duties. This office is created for a period of thirty years, and the act provides that the Governor, by and with the consent of the Senate, shall appoint an Insurance Commissioner and State Fire Marshal, who shall hold office for a term of six years and receive the annual salary provided for in the act. This act also provides that the Commissioner is empowered, with the approval of the Governor, to appoint certain assistants, with a stipulated salary.

It is a rule of universal application that, where an office is filled by appointment and a definite term of office is not fixed by a constitutional or statutory provision, the office is held at the pleasure of the appointing power, and the incumbent may be removed at any time. But the power of removal is not incident to the power of appointment where the extent of the term of office is fixed by Constitution or statute. *Patton* v. *Vaughan,* 39 Ark. 211; *Ex parte Henne,* 13 Peters (U. S.) 230; and *Lake* v *United States,* 103 U. S. 227.

No power of removal is expressly provided for in the statute under consideration, and this makes it necessary for us to decide whether the incumbent had a fixed term of office or not. The circuit court properly held that there are two methods of establishing a fixed term of office: One is where the statute provides that the appointed officer should hold for a given number of years and until his successor shall be appointed and qualified, and that the other is where a fixed period of time is provided in the statute when the appointment shall be made.

In the first case, where a statute provides that the appointed officer shall hold office for a definite period of years and until his successor is appointed, the word "and" must be given its ordinary meaning and be construed conjunctively. The period of years fixed by the statute and the phrase "and until his successor is appointed" form but one contingency, and both events must take place before the incumbent can be removed, in the absence of a statute providing for his removal.

Counsel for appellant claim that the language of the statute brings the case squarely within the rule announced in *Bruce* v. *Matlock,* 86 Ark. 554, 111 S. W. 990, and *Warren* v. *McRae,* 165 Ark. 436, 264 S. W. 940. We do not agree with counsel in this contention.

In *Bruce* v. *Matlock,* 86 Ark. 554, 111 S. W. 990, it was held that the Governor of the State did not have the power to remove a member of the board of trustees of the State charitable institutions. The decision was based upon the construction of the statute creating the board of trustees for the State charitable institutions and the application of the principle that, where a fixed period of time is provided, in the statute for the appointment to be made, this is exclusive and prohibitory of any other mode of appointment, and creates a fixed term of office. In that case the statute provided that the Governor shall biennially appoint one board of trustees for the School for the Blind, the Deaf Mute Institute, and Insane Asylum, to be composed of six members, one from

each congressional district, who shall have charge of said institutions and discharge all duties now required by law. In discussing the question, the court said:

"The word 'biennial' means once in two years. We do not say that the use of the word under all circumstances necessarily imposes a limitation upon the space of time which must intervene. It may, under some circumstances, be held to mean that the thing in question shall occur as often as once in two years. But we think that the use of the word in this instance clearly carries with it the meaning that a term of two years is fixed, and that appointments to membership on the board shall be made every two years, conformably to the expiration of the term. The fixing of a time for making appointments necessarily implies a fixed tenure for the appointee, for, if the executive can remove him and appoint another at will, the command to appoint biennially is superfluous."

The case of *Bryan* v. *Patrick,* 124 N. C. 651, was cited in support of the holding. In that case the court said: "It appears to this court that 'to be appointed biennially' *ex vi termini* implies a two-years' term of office."

That this was the idea had by this court in deciding the case is clearly shown by the subsequent case of *Warren* v. *McRae,* 165 Ark. 436, 264 S. W. 940. In that case the court held that the position of county election commissioner, being a public office with a fixed term, and there being no power of removal conferred by statute, the State Board of Election Commissioners had no power to remove county election commissioners after their appointment and qualification. In that case the statute provided for the appointment of county election commissioners by a board of State officers, and it specified that appointments should be made biennially, not more than ninety days nor less than thirty days prior to the election. The court held that the language of the statute provided for a fixed term of office, and based its holding on *Bruce* v. *Matlock, supra.* Chief Justice McCulloch, who delivered the opinion of the court in both cases, said:

"Our decision in *Bruce* v. *Matlock, supra,* is, we think, decisive of the question. There was involved in that case the question whether or not membership on the board of trustees for the charitable institutions of the State was a public office, and whether or not the Governor, who appointed the members, had the power to remove them. The statute authorizing the appointment of the trustees did not, in so many words, prescribe the duration of the term, but merely specified that the Governor should 'biennially' appoint the board. We held that the use of that word necessarily implied a term of office of two years. We held that the position constituted a public office, with durative term, duties and emoluments specified, and that the Governor had no power of removal."

This shows that the court based its holding in each case upon the fact that the time of appointment, having been specifically named, indicated that it was exclusive, and that the appointment could be made at no other time than that provided in the statute. Hence the language used by the Legislature clearly showed that it meant that the appointment should not be made except during the prescribed time, and, that being so, the term of office became fixed when the appointment was made.

Such is not the case in the statute under consideration. It provides for the commissioner to be appointed, who shall hold office for a term of four years, or until his successor shall be appointed by the Governor. But it is insisted that the word "or" should be construed to mean "and," in order to effectuate the intent of the Legislature. Counsel invoke the well-known rule that "or" may be construed to mean "and," or *vice versa,* in order to harmonize the provisions of a statute or to carry out the manifest intent of the Legislature. The court would not be justified in making the proposed substitution unless the whole context of the statute requires, plainly and beyond question, that it be done in order to give effect to the intention of the Legislature. The reason is that, where words have a settled legal meaning,

it is dangerous to conjecture that they were used in other than their legal signification. *Travers* v. *Reinhardt,* 205 U. S. 423, 27 S. Ct. 563, and *Brown* v. *Rushing,* 70 Ark. 111, 66 S. W. 442.

In its ordinary sense the word "or" is a disjunctive particle that marks an alternative, generally corresponding to "either," as "either this or that"; it is a connective that marks an alternative. 29 Cyc. 1502.

The substitution of "and" for "or" is not necessary in order to harmonize the provisions of the statute, and there is nothing in the context to indicate that such substitution was in the minds of the members of the Legislature. We think that the Legislature used the disjunctive conjunction "or" in its ordinary and generally accepted sense. It established the alternative, and gave the Governor the power of allowing the incumbent to remain in office for the full period of time prescribed by the statute, or of removing him before that time had expired.

The circuit judge gave an additional reason, which is entitled to some weight, why the disjunctive "or," as used in the statute, should not be held equivalent in meaning to the copulative conjunction "and." He said that it was clear that the word "or" was used in a disjunctive and not in a copulative sense because the act provided that the office should exist and the act be in force for a period of thirty years. He pointed out that, if a four-years' term had been contemplated, the duration of the office provided for in the act would have been in some multiple of four, as was done when the office of Insurance Commissioner and State Fire Marshal was created. In that act the duration of the office of Insurance Commissioner and State Fire Marshal was established for a period of thirty years and the terms of office fixed at six years, making five equal terms.

Again, the circuit judge properly pointed out that some effect should be given to the provisions of the act that no employees could be appointed except by and with the consent of the Governor.

Finally, it is suggested that, as the act provides that the Governor, by and with the consent of the Senate, shall appoint the Commissioner of Insurance and Revenues, the chief executive alone is not the appointing power, and that the Commissioner could only be removed by the joint action of the Governor and the Senate. We do not think this position is tenable when the language used is considered with the context of the act. In the same sentence there is a provision that the incumbent shall hold office for a term of four years, or until his successor shall be appointed by the Governor. Continuing, the section provides that, if the Senate be not in session when the appointment is made, the appointee shall qualify and hold office until his appointment be rejected by the Senate when it next convenes. Hence we are of the opinion that it was contemplated by the Legislature that a vacancy might occur by the death, resignation or removal of the incumbent by the Governor; and it was the intention of the Legislature that the Governor could fill such vacancy and that the appointee would hold office until the next session of the Legislature.

The Governor is the chief executive of the State, and the Legislature has made him responsible for the conduct of this office. This is done by giving him the power to remove an incumbent and by requiring the incumbent to select his employees and assistants with the approval of the Governor. Section 5 expressly provides that, whenever there shall be a vacancy in the office of the Commissioner of Insurance and Revenues, the Governor shall fill such vacancy by appointment.

If the word "or" be given its ordinary meaning as a disjunctive particle, in the phrase, "who shall hold office for a term of four years, or until his successor shall be appointed by the Governor," this gives the Governor the power to remove the Commissioner, and to appoint a successor in his place.

It follows that the judgment of the circuit court must be affirmed.

KIRBY, J., dissents.

HOLLAND *v.* NAKDIMEN.

Opinion delivered September 24, 1928.

Chester Holland and *Daily & Woods*, for appellant.

J. B. McDonough, Jr., and *J. B. McDonough*, for appellee.

HART, C. J., (after stating the facts). The correctness of the decree of the chancery court depends upon the validity or invalidity of act 118, passed by the Legislature of 1927, having for its purpose to regulate the rate of interest which may be paid by banks in the State of Arkansas on deposits. Acts of 1927, p. 357.

Section 1 of the act reads as follows:

"That from and after the passage of this act it shall be unlawful for any bank, savings bank or trust company, or other association of persons engaged in the business of receiving deposits within this State, to

either directly or indirectly offer to pay or pay a rate of interest in excess of four per centum per annum upon such deposits, irrespective of the nature thereof."

Section 2 provides that any officer of any such bank violating the provisions of the act shall be guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not less than $25 nor more than $100, and each transaction of such a nature as described in § 1 shall constitute a separate offense.

All the textwriters agree that the business of banking is so closely related to the public welfare that it properly falls within the police power of the State, and the adjudicated cases so hold.

In Thompson on Corporations, 3 ed., vol. 1, § 491 (460), it is said:

"Perhaps no class of corporations are more completely under police regulation of the States than banking companies. The police power, in its visitorial aspect, as exercised by Congress and the several States, extends to the minutest details of the banking business. These corporations are not, strictly speaking, *quasi* public in their nature; but they are of such a character that the State can and does protect the public by any and all reasonable regulations necessary to that end. The peculiar relation that banks sustain to the public, and by this is meant their depositors, is such that it is the business and the duty of the State to see that corporations embarking in such an enterprise are entitled to the confidence of the public, and that depositors who, in good faith, intrust their money to these institutions shall be protected."

Continuing, the learned author quoted with approval the following: "The *quasi* public nature of the banking business, and the intimate relation which it bears to the fiscal affairs of the people and the revenues of the State, clearly bring it within the domain of the internal police power and make it a proper subject for legislative control." Further on in the same section

the author quoted with approval from *Blaker* v. *Hood,* 53 Kan. 499, 36 Pac. 1115, 24 L. R. A. 854, as follows:

"Enactments controlling the loaning of money and regulating the rate of interest upon the same have been sanctioned from the earliest times, and the nature of the business done by banks dealing in money, receiving deposits for safekeeping, discounting paper, and loaning money, is such, and is so affected with a public interest, as to justify reasonable regulation for the protection of the people. The confidential and trust relations which exist between the bank and its patrons, and the difficulty that depositors and those dealing with the bank necessarily encounter in detecting irregular practices and in ascertaining the real financial condition of banks, are sufficient to justify inspection and control."

In *Noble State Bank* v. *Haskell,* 219 U. S. 104, 31 S. Ct. 186, the court said that the police power extends to all the great public needs, and held that it includes the enforcement of commercial conditions, such as the protection of bank deposits and checks drawn against them, by compelling cooperation so as to prevent failure and panic. Hence it was held that statutes of the State of Oklahoma subjecting State banks to assessments for a depositors' guaranty fund are within the police power of the State and do not deprive the banks assessed of their property without due process of law or deny to them the equal protection of the law, nor do they impair the obligation of the charter contracts. In discussing the subject, Mr. Justice Holmes, who delivered the opinion of the court, said:

"Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If, then, the Legislature of the State thinks that the public welfare requires the measure under consideration, analogy and principle

are in favor of the power to enact it. Even the primary object of the required assessment is not a private benefit, as it was in the cases above cited, of a ditch for irrigation or a railway to a mine, but it is to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand. The priority of claim given to depositors is incidental to the same object and is justified in the same way. The power to restrict liberty by fixing a minimum of capital required of those who would engage in banking is not denied. The power to restrict investments to securities regarded as relatively safe seems equally plain."

Following this opinion, it was held that a similar act of Nebraska providing for a guaranty fund and prohibiting banking except by corporations formed under the act, was not unconstitutional. *Shallenberger* v. *First State Bank,* 219 U. S. 114, 31 S. Ct. 189.

We think the principles of law above announced control the present case, and that the act under consideration is a valid one, and is not unconstitutional. If the State, under its police power, may provide a guaranty fund for the protection of depositors and prohibit banking, except by corporations formed under the act, it would certainly seem that declaring the rate of interest which a bank might lawfully pay on deposits, if reasonable, is not so unnecessarily oppressive and arbitrary as to render the act invalid.

It is the contention of the plaintiffs that it has been paying four and one-half per cent. interest on time deposits, and that it is an unreasonable requirement to restrict banks to paying only four per cent. on such deposits. We do not think so. If the business of banking is a proper subject for legislative control, and its regulation falls within the internal police power of the State, the Legislature would clearly have the right to restrict the rate of interest in a reasonable way on time deposits to prevent banks, by agreeing to pay a large

rate of interest on time deposits, from ever becoming insolvent. The act was passed to prevent officers of banks from paying a too high rate of interest on time deposits, recklessly, or in a vain effort to prevent threatened insolvency. The people, of necessity, must deposit their savings in banks, and any reasonable regulation for the protection of such depositors falls within the police power of the State. Small depositors of savings from their daily wages have no means of making an investigation into the solvency of the banks into which they put their money. Hence it is proper for the Legislature to enact laws regulating, restraining and governing the banking business.

It is next insisted that the act in question is an attempt to regulate commerce between the States. It is claimed that the statute places a direct burden on interstate commerce which Congress alone may control. It is insisted that the act is broad enough to include deposits, even when received for the purpose of transmission to another State. The statute was passed for the purpose of regulating and safeguarding the receiving of deposits, which precedes the later transmission of money, although leading to it. *Engel* v. *O'Malley,* 219 U. S. 128, 31 S. Ct. 190. The Supreme Court of the United States in that case cited the case of *Musco* v. *United Surety Company;* 196 N. Y. 459, 90 N. E. 171, 134 A. S. R. 851, and approved the reasoning of that court on the subject. The Court of Appeals of New York said that the acts of receiving the deposits and of subsequently transmitting them, although they may be related, are still entirely distinct.

Again, it is claimed that the act is invalid because it infringes upon the power of Congress to regulate and govern national banks. The City National Bank was organized under the laws of the United States, and is subject to all the acts of Congress regulating and governing national banks. On February 25, 1927, an act of Congress was approved which provided, among other things, the following:

"Any national banking association may make loans secured by first lien upon improved real estate, etc. Such banks may continue hereafter, as heretofore, to receive time and savings deposits and to pay interest on same, but the rate of interest which such banks may pay upon such time deposits or upon savings or other deposits should not exceed the maximum rate authorized by law to be paid upon such deposits by State banks or trust companies organized under the laws of the State wherein such national banking association is located."

Thus it will be seen that the act of Congress expressly provides that national banks may not pay upon time deposits or upon savings accounts a rate of interest exceeding the maximum rate authorized by law to be paid on such deposits by State banks in the same State where the national bank is located.

Finally, it is insisted that the act under consideration went into effect March 7, 1927, and that, in so far as the plaintiff, Mrs. C. C. Scott, is concerned, it would violate a contract which the bank had previously made with her to pay her four and one-half per cent. on time deposits until June 30, 1927. When Mrs. Scott and the bank made this contract they knew that the regulation and control of banks came under the internal police power of the State and that this contract must be subject to all laws then in force or which might thereafter be passed.

The result of our views is that the act under consideration is a valid exercise of the police power of the State, and the chancery court erred in not so holding. Therefore the decree will be reversed, and the case will be remanded, with directions to the chancery court to sustain the demurrer of the defendants to the complaint and to dismiss the complaint for want of equity. It is so ordered.

INTER-SOUTHERN LIFE INSURANCE COMPANY *v.* HOLZHAUER.

Opinion delivered July 9, 1928.

Bullion & Harrison and *Utley & Hammock*, for appellant.

Joseph Morrison, for appellee.

WOOD, J. The Inter-Southern Life Insurance Company, successor to North American National Life Insurance Company, is a corporation authorized to do the business of life insurance in Arkansas. It will hereafter, for convenience, be called appellant. The State manager for the appellant was Green H. Dale. Paul H. Logsden was an insurance solicitor under Dale. As such solicitor he was authorized to sell policies for appellant. On August 6, 1925, Paul H. Holzhauer signed an application for a policy which, so far as is material here, is as follows:

"I hereby agree, for myself and any person who may have or claim an interest in any contract which may be issued upon this application, * * * that there shall be no contract of insurance until the policy shall have been delivered to me and the first premium paid to said company or to its duly authorized agent * * *. That I have read a sample blank form of the policy applied for * * *, which policy I agree to accept; and I agree that no statements, promises, or information made or given by the person soliciting or taking this application shall be binding on the company, unless his statements, promises or information be reduced to writing and presented to the officers of the company, at the home office, in this application. I also understand that no person is authorized to erase, waive or change in any manner any of the blanks or printed matter furnished by the company, or to promise any other terms or conditions than those published by the company in its printed matter. I agree that if the policy contains provisions for double indemnity or disability benefits,

such provisions shall immediately terminate, if I enter military, naval, aerial, Red Cross, or other relief services."

On September 4, 1925, the appellant issued to Holzhauer a policy which contained, among others, the following provision, which is material here:

"This policy is issued in consideration of the application therefor, copy of which is attached hereto and made a part hereof. The privileges, provisions and conditions * * * stated on the following pages form a part of this contract as fully as if recited over the signatures hereto." * * * Only the president or the secretary has power on behalf of the company (and then only in writing) to make or modify this or any contract of insurance, * * * and the company shall not be bound by any promise or representation heretofore or hereafter given by any person other than the above * * *. This policy and the application herefor (a copy of which application is attached hereto) constitute the entire contract between the parties. * * * This policy takes effect and becomes binding upon the company only upon actual delivery thereof to the applicant. * * * Provisions for accidental death benefit issued as a part of and attached to policy No. 17989 on the life of Paul G. Holzhauer. In consideration of the application herefor, which is made a part hereof, and a copy of which is attached to the policy, * * * in the event of the accidental death of the insured, such accident occurring more than one year after date hereof and under the conditions described herein, the North American National Life Insurance Company of Omaha, Nebraska, promises to pay to the beneficiary named in said policy the sum of $2,000, in addition to the sum insured under the said policy. * * * The provisions of said policy and the application therefor concerning misrepresentations * * * are hereby referred to and by such reference made a part hereof."

The policy was inclosed to Holzhauer with a letter, which is as follows:

"Inclosed please find your policy No. 17989 for $2,000, being the same as applied for and explained by our Mr. P. H. Logsden, agent." The letter was dated at Little Rock, September 4, 1925, signed by G. H. Dale, State manager of the company. The policy was received by Holzhauer and retained by him until the date of his death, which occurred the fifth or sixth of January, 1926. The sole cause of his death was through violent and external means—the breaking of his leg, and shock and physical suffering incident thereto.

The insured was 26 or 27 years of age. He was a rice farmer; could read and write English, and attend to his own business. The policy was received through the mail with similar policies sold to the insured's brothers. The insured and his brother, Herman, carefully examined the policies. They did not read the whole thing, because they took it for granted that it was a good policy and like Logsden told them it was. The father of the insured was a German and his mother a Russian. He was born at Gillett, Arkansas, and educated at that place in a Lutheran school. He was duller than the balance of the family, and relied on his brother Herman's judgment. Logsden, the appellant's soliciting agent, had authority to sell life insurance for the appellant with disability benefits and double indemnity riders. Logsden had never seen a copy of the double indemnity rider, and had never had it explained to him. Other soliciting agents for appellant sold the double indemnity the same way as Logsden did. He never had any copy of the double indemnity rider, and was instructed by the manager that it would go into effect when the policy was issued, and he sold Holzhauer the policy with that understanding. The premium for double indemnity was $2 per thousand extra, and Holzhauer paid the $4 for the extra $2,000 insurance. Logsden did not know until after Holzhauer was dead

that the double indemnity rider provided that it should not go into effect until one year after the date of its issue. The appellant, at the time it issued its policy and at all times while doing business in Arkansas, had on file with the insurance company the identical form of a double indemnity rider which was attached to the policy issued to Holzhauer, and no other. Appellant did not write or issue double indemnity insurance in any form except that attached to Holzhauer's policy. After the death of Holzhauer and proof of same had been made to the appellant, appellant tendered to the beneficiary in the policy the sum of $2,000 in full settlement of the policy, which was refused.

Pauline Holzhauer, the beneficiary in the policy, hereafter called appellee, instituted this action in the chancery court, in which she set up the policy. She alleged compliance with the terms of the contract on the part of the insured, and that appellant had refused to comply with the terms of the contract by paying the amount of insurance due, to-wit, $4,000. She prayed that the contract of insurance with the double indemnity rider be reformed so as to be in force and effect from the date of the policy, and for judgment in the sum of $4,000, with interest, penalty and attorney's fees. In its answer, the appellant denied liability for any greater sum than $2,000.

The above states the facts upon which the chancery court entered its decree granting the prayer of appellee's complaint and rendering a decree in her favor in the sum of $4,000, with interest at 6 per cent., 12 per cent. penalty, and attorney's fees of 10 per cent. of the amount recovered. From that decree is this appeal.

1. The only two persons that were present at the time the application was signed were the insured and Logsden, the appellant's agent, who was authorized to take applications for the appellant's policies, or, as the testimony shows, "to sell appellant's policies." The application shows that the insured contemplated that a policy might be issued which contained double

indemnity or disability benefits. The uncontroverted testimony of Logsden, who took the application, shows that the insured applied for a policy containing double indemnity or disability benefits. He paid the premium for a policy that should contain such features. The application, which was prepared by the appellant, did not show when the double indemnity rider attached to the policy would take effect. The soliciting agent explained to the insured that the rider providing for the double indemnity insurance, which was attached to and of course a part of the policy, would take effect when the policy took effect. Since there was no one present at the time the written application was signed by the insured except himself and Logsden, the testimony of Logsden establishes conclusively that the insured applied and paid for a policy that should contain disability benefits and double indemnity insurance, and that this feature of the policy should take effect and be in force at the time the policy was issued. But, when the application for the insurance was received and approved by the appellant, it issued its policy, which contained disability benefits and double indemnity insurance in a rider attached thereto, which rider provided that that feature (disability and double indemnity) should not take effect until one year after the date of the policy.

The company accepted the premium paid by the insured for double indemnity insurance, and issued its policy providing for such insurance, which should go into effect one year after the issuance of such policy.

The appellant contends, first, that the appellee is not entitled to a reformation of the contract, and is bound by the terms of the policy as written, because the application and the policy constitute the contract, which was not to become effective until the policy was delivered; that, after the policy was delivered, it was accepted by the insured and retained by him without any objection to its provisions for a period of four months, when his death occurred. To sustain this con-

tention, appellant relies upon the doctrine announced in 1 Joyce on Ins. 267, § 66G, as follows:

"But it is also held that, if a person received a policy of insurance ostensibly in response to an application therefor, which he signed and parted with in the belief, induced by the fraud of the agent taking same, that it called for a policy different from that which it called for in fact, he is bound, as a matter of law, to examine the policy within a reasonable time after it comes to his hand, and to discover obvious departures therein from the one which he supposed he was to get, and promptly, upon discovering the same, to rescind the transaction, give the company due notice thereof, and do all on his part which justice requires to restore the former situation, or he will be held to have accepted the policy as satisfying his application, so as to be precluded from rescinding the same. And the insured is charged with notice of the contents of a written application executed by him, and which, by the terms of the policy, is made a part thereof."

Learned counsel for the appellant also cite and rely upon the following cases of our own court: *New York Life Ins. Co.* v. *Adams,* 151 Ark. 123, 235 S. W. 412; *Carrigan* v. *Nichols,* 148 Ark. 336, 230 S. W. 9; *Gray* v. *Blackwood,* 117 Ark. 100, 165 S. W. 958; *Gray* v. *Blackwood,* 112 Ark. 332, 165 S. W. 958; *Gray* v. *Stone,* 102 Ark. 146, 143 S. W. 114; *Smith* v. *Smith,* 86 Ark. 284, 110 S. W. 1038; *Remmel* v. *Griffin,* 81 Ark. 269, 99 S. W. 70.

Where an insurance company issues its policy and takes in payment therefor the note of the insured, if the insured retains the policy an unreasonable time, he cannot, when sued on the note, defend on the ground that the policy does not express the terms of the contract, unless he can prove that he failed to read the policy and to return same within a reasonable time with his objections thereto, because of some act of the company which misled and prevented him.

Judge BATTLE, speaking for the court in *Remmel* v. *Griffin, supra,* says:

"It was his duty to examine the policy in a reasonable time after he received it—that is, in such time as he could have done so—and, if he rejected it, to so inform the insurance company, or its agent, and, failing to do so, he is deemed to have accepted it. After such acceptance he cannot avoid the payment of his note on the ground that he did not read the policy, unless he was induced by the insurance company, or its agent, not to do so."

Unless the insured was induced by the insurance company, or its agent, not to read his policy, it would be manifestly unjust to the company to allow him to retain the policy an unreasonable time, or until his note became due, and then plead that the policy did not express the contract. Because, in the meantime, he had been insured, and if he had died the company would have had to pay. Hence under those circumstances he would be estopped. Such is the doctrine announced by Mr. Joyce, *supra,* and the cases cited *supra.*

Where the soliciting or sales agent of an insurance company takes an application for a policy of insurance, telling the applicant that the policy, when issued, if he desires that kind of a policy, will contain, in addition to straight life insurance, a provision for disability and double indemnity insurance, and that the policy will take effect when issued, both as to the straight life and double indemnity insurance, then, when the policy is delivered, it is the duty of the applicant, the insured, to read the policy to see if it expresses the contract, and, if it does not, to return the same within a reasonable time, and to thus notify the company of his objections thereto. This the insured must do, unless the company, or its agent, has done some act which is calculated to, and does, mislead him and prevent him from reading and returning the policy. But, if the insurance company, or its agent, having real or apparent author-

ity so to do, has so misled the insured and caused him not to read and return the policy, then the insurance company, when suit is brought against it by the beneficiary to reform and to recover on the policy, as he alleged it should have been written according to the understanding between the sales agent and the insured that it would be written, cannot defend on the ground that the insured did not read the policy and did not notify it of his objections thereto, or return the policy within a reasonable time. For, under such circumstances, it would be obviously unfair and unjust to the insured and his beneficiary to permit the company to take advantage of its own wrong, and to thus defeat the beneficiary from recovering on the policy. Under such circumstances, the company is estopped.

This brings us, in the final analysis, to the crux of the lawsuit—that is, whether the letter from the appellant's State manager to the insured, taken in connection with the other facts, was sufficient to estop the company and thereby enable appellee to obtain the relief sought. A majority of the court has reached the conclusion that the appellant is estopped.

We have not overlooked the well-established doctrine that a local and special insurance agent, having only authority to solicit applications for insurance and to collect premiums, but not to issue policies, would have no power to issue policies or to bind the company to enter into a contract of insurance in conformity with any representations he may have made. Such an agent has no power to make contracts for the company. See *Mutual Insurance Company* v. *Abbey,* 76 Ark. 328-31, 88 S. W. 950, and cases there cited; *American Insurance Co.* v. *Hornbarger,* 85 Ark. 337-45, 108 S. W. 213; *Pacific Mutual Life Insurance Co.* v. *Carter,* 92 Ark. 378, 123 S. W. 384; 124 S. W. 764; *Home Life and Accident Co.* v. *Haskins,* 156 Ark. 77, 245 S. W. 181. Logsden was not authorized, as a merely local and special soliciting or sales agent of the appellant, to bind the appellant to

issue a policy containing disability and double indemnity insurance to take effect when the policy was issued. The application signed by the insured himself specified that there should "be no contract of insurance until a policy shall have been delivered," etc. Our decision is not bottomed upon the idea that Logsden had authority, real or apparent, to bind the company to issue a policy according to his promise and representation. But our decision is grounded upon the fact that the letter of Dale misled the insured, as his brother testified, and caused them not to read the policy as closely as they would have done had they not been relying upon the explanation of Logsden. The letter was certainly calculated to so mislead the insured.

It will be observed that the insured applied for a policy containing disability and double indemnity benefits, and the written application does not show when this character of insurance was to take effect. Logsden testified that the insured "wanted double indemnity to be in force and effect from the time the policy was issued." He explained to the applicant that such insurance "would be in effect from the time the policy was issued." Logsden, at that time, had not seen the disability rider, but he testified that he told the applicant "it would take effect when the policy was delivered;" "that" says he, "was my instructions from Mr. Dale." He "just told us to add all the features and charge $2 per thousand for the double indemnity." The insured settled for the rider and the policy at the time the application was taken.

While Dale denied, in his testimony, that he gave Logsden such instructions, we are convinced that he is mistaken, and that Logsden is correct in his testimony. It occurs to us that Dale's letter shows conclusively that he knew that Logsden had explained the policy. It shows that he knew that the applicant was applying for a disability and double indemnity policy, which did not show on the face of the application when it went into

effect. Therefore it had to be explained, and the general manager informed the insured that the policy issued was "the same as applied for and explained" by P. H. Logsden, agent. Where agents of foreign companies represent them as general managers or managers, they have generally large discretionary powers in regard to making insurance and transacting business relating thereto. Their powers are similar to those of officers of the company. A resident agent, designated officially as manager, has authority to employ another to solicit risks, contract therefor, to deliver policies, and collect premiums, and the acts of the agent so appointed, done within the employment, will bind the company. He may also waive conditions in the policy, and estop the company by his acts within the scope of his authority. It certainly was within the scope of Logsden's authority, as soliciting or sales agent, to explain the terms of the policy which the company authorized him to sell. He could not make any headway without doing so. The company, through its manager, authorized him to do so; knew that he had done so, and by his letter expressly ratified the explanation Logsden had made. Had Dale simply inclosed the policy to the insured without comment, the case would have been entirely different. The proof that appellee is entitled to the relief sought is "full, clear and decisive." *McGuigan* v. *Gaines,* 71 Ark. 614, 77 S. W. 52; *Parker* v. *Carter,* 91 Ark. 166, 120 S. W. 836; *Waddell* v. *Bowdre,* 151 Ark. 474, 236 S. W. 599; *Augusta Cooperage Co.* v. *Black,* 153 Ark. 133, 239 S. W. 760.

We do not find any intentional or actual fraud on the part of the agents of appellant. The law warranting the relief under the facts proved by the appellee is well expressed by Corpus Juris, vol. 32, p. 1135, par. 242, as follows:

"Even where there is a mistake, and both parties act in good faith, yet when the mistake is that of the company or its agents, and it reasonably induces the

other party to believe that he is insured, the company is estopped to deny the effectiveness of the insurance. The delivery of a policy with the assurance that it is in compliance with the application is a waiver of an agreement that the insured would notify the company if the policy were not right." See also note 4 (b). See also *Fidelity Insurance Company* v. *Parmer,* 91 Conn. 410, 99 Atl. 1052. See also *Connecticut Fire Insurance Co.* v. *Wigginton,* 134 Ark. 152, 263 S. W. 844; *Stewart* v. *Fleming,* 96 Ark. 371, 131 S. W. 955. The appellant is clearly estopped from asserting that the policy is different from that which its agents represented it would be. The decree is therefore correct, and is affirmed.

SMITH and KIRBY, JJ., dissent.

POWELL *v.* STATE.

Opinion delivered July 9, 1928.

Robert L. Rogers, O. A. Graves and *McMillan & McMillan,* for appellant.

H. W. Applegate, Attorney General, *Walter L. Pope,* Assistant, for appellee.

WOOD, J. Earl Powell was indicted as accessory before the fact to the crime of arson, alleged to have been committed on January 23, 1928, by Marcus Faulkner.

Mrs. Wright testified that she was the owner of the property on which a picture show was being operated by R. D. Wright in Gurdon, Clark County, Arkansas. The building was destroyed by fire, December 20, 1927. R. D. Wright testified that in the building in which he maintained a theater there was also a barber shop, restaurant, and offices up stairs.

The defendant also operated another picture show at Gurdon. The building had been damaged in March, 1926, by a fire similar to the last one, and defendant had rebuilt the same. The defendant was in the picture show business at Gurdon at the time of the first fire. The first fire resulted in a total loss of equipment and machinery, and the damage was more than $5,000. The first fire was set in the man-hole under the booth; the man-hole was made for the plumbers and electricians to go under there and do their work. Witness, on August 19, sold a negro a ticket to the show. When the negro entered the theater, he had a package under his arm. He came out, complaining that he had a headache. The next morning at two o'clock the building was dynamited, and badly wrecked. The explosion was on the brick wall where the negro sat. Witness noticed that the negro had a bundle when he went in, but did not notice the bundle when the negro came out. After

the explosion, witness went to the defendant and told defendant that he didn't believe in dirty competition, and offered to buy defendant's show business for a fair price. The defendant and witness had several conversations, and defendant recently offered to buy witness' picture show business. Witness offered defendant his business for $40,000. One night the defendant came to witness' ticket office, and stated he thought the property was worth the money, and that he would let witness know in a few days. That occurred about thirty or forty days before the fire. The defendant did not come around in a few days, and witness then called on him about it, at which time he stated the price was too much. Witness was one of the aldermen of Gurdon, and the defendant was fire chief. The fire-fighting equipment in Gurdon consisted of a big truck which operates on its own power, and 1,500 feet of hose. It was an efficient outfit. On the night of the last fire, the truck wasn't there for a long time. It was pushed by hand to the railroad track, where a truck had to be hitched to it to pull it over the track. Witness did not see the defendant at the fire that night. Witness got a high-powered flashlight, and went on the roof, looking for tracks. The first building, next to the theater, was four feet higher than the next building going up the street toward the hotel, and in fighting the fire it was not necessary to go on the second roof. Witness and a man named Newton, who accompanied witness, went over to the hotel, where the owner told witness about Faulkner's having a room there, and that he had requested to be moved back after she had moved him out. Witness traced tracks to Faulkner's room in the hotel. Witness informed the sheriff. They guarded Faulkner's room until daylight. When it was light, the city marshal, the sheriff and his deputy saw the tracks, and went in and arrested Faulkner, after having fitted his shoes in the tracks. There was frost all over the roofs of the houses, and it was easy to trace the tracks.

We need not set out any further testimony tending to prove that Faulkner burned the building, for he was a witness, and testified that he did burn the same, and that he was hired to do so by the defendant. Mrs. Epperson testified that she operated the Commercial Hotel and the restaurant therewith in December, 1927. She knew Marcus Faulkner, and first saw him December 14, when he came and registered at the hotel, where he had a room and was staying on the night of the fire, and where he was arrested after the fire. Faulkner, by mistake, went to room No. 12, which is on the opposite side from the theater. He later asked for room No. 1, on the side next to the theater. Faulkner was taken out of No. 12 and was given room No. 39, and afterwards he asked for room No. 1 again. Witness knew the defendant. He took some of his meals at witness' restaurant. Powell was in and out all during the day. He sometimes entered the hotel through the hall, sometimes through the dining-room, and on through the hotel door. He came and went in the lobby of the dining-room, and it was not unusual for him to be around the hotel. He didn't spend much time at the hotel; came and took his meals and went out, as others did. She didn't see him at the hotel the night before the fire nor the morning after the fire, but he came into the cafe in the afternoon of that day for something to eat.

Bill Jamerson was a colored porter at the Commercial Hotel. He was such on the night that the Wright Theater burned. He saw Faulkner two or three times around the hotel before the theater burned, and he also saw Powell around the hotel often. Witness explained the situation of the lobby and the barber shop and the lavatory. The lavatory was on the left of the hall—the barber shop on the right. Witness stated that he had seen Powell and Faulkner in the lavatory. Powell was in a pay-station toilet, and Faulkner came in and washed his hands. Both were in the back room, where the toilets were. Witness was sweeping at the time,

and went out, after he got through with his duties, and left Powell and Faulkner in there. Witness did not see nor hear them talking to each other. Witness saw Powell in the hotel frequently. He ate his meals around there all the time. Witness saw him in the pay station once; nearly everybody uses the lavatory.

Milton Morton testified that he operated a barber shop in the same building as the Commercial Hotel. About the middle of the week before the fire, witness saw Powell come into the barber shop from the back of the hotel; he did that on an average of two or three times a week. Customers in witness' shop, as a rule, used the hotel lavatory; there was nothing unusual in Powell coming into witness' shop and going into the hotel lavatory; different ones did that.

H. Shepard testified that he was marshal of Gurdon the night of the fire. Powell was the fire chief at that time, and, as such, had charge of the fire equipment and the house in which it is kept. Witness did not see Powell at the fire on December 20, 1927. Witness was at the fire, and found that they had to push the engine to get it there, and he helped to push it. The fire-plug was operated with a wrench by which the cap was taken off of same, the hose attached, and the water turned on. The thing you turn the water on with is on the top over the plug—the wrench goes with the truck. There are special wrenches for the plugs. The firemen tried to turn on the water, and couldn't do it. There was but one wrench with the engine that night. There are five sides on the thing with which you turn on the water, and there are four wrenches that go with the truck. Since the fire witness had found one or two wrenches in the fire-house, under some rubbish. The wrench they had that night had been hammered on all sides, and wouldn't go on the plug. The wrench was exhibited to the jury. The water was turned on that night with a little monkey wrench that witness got over it. Witness couldn't say how many keys there were to the fire-

house. Witness had one in his possession. The fire chief had one, and there was one that stayed at the council room. There were supposed to be several more.

A. L. Horton testified that he was night marshal at Gurdon on December 20, 1927. The door to the house where the fire engine stays is generally operated with a little stick. The doors come together, and generally the doors were opened by running a little stick in to raise the latch and open the bars. That couldn't be done that night. Nails were stuck up over the bars at the ends. After the doors were opened, the truck couldn't be driven out; it had to be pushed out and hitched to another truck. The regular driver was there, but he couldn't drive the fire-truck. Usually the doors to the engine room were left so anybody could flop the stick that fastened them and get in, but, on the night of the fire, nails had been put in, as stated, to keep them from opening it.

Roy Gates testified that he worked on the fire-truck the morning after the fire; the truck would not run. The carburetor was off from the needle valve so it couldn't get any gas. The valve underneath the gas had been fastened up with a pair of pliers, and witness had to loosen it with a pair of pliers. When it wasn't screwed too tight, it could be started with the hand, but on this occasion it had to be unscrewed with pliers. It had been put out of business—so it wouldn't run.

Doan Yeager testified that he knew Earl Powell, the defendant, and saw him the morning before the fire. Witness and others were warming by a fire at the planing mill when defendant Powell drove up and said, "What's the matter, not having more fire?" He took a piece of waste out of his pocket, and said, "I reckon that'll burn." The waste is stuff that automobile mechanics use to work on cars with in their business. Powell had this in his hands, lit it in the fire, and threw it on the ground, and said, "Reckon that'll burn," and witness said, "Sure, it will burn."

John Martin testified, over the objection of the defendant, that he knew Luther Holliman at Hope, where witness and Holliman lived. Witness also knew Marcus Faulkner. Witness, at the time of the fire, was working for the Natural Gas Company at Gurdon. Before coming to Gurdon, witness had frequently seen Marcus Faulkner around Luther Holliman's place of business. He had seen Faulkner in Hope, around in the company of Luther Holliman. He had seen him around there several times, but didn't know about his hanging around there most of the time. The defendant duly excepted to the ruling of the court in admitting this testimony.

J. H. Lookadoo, the sheriff, was recalled, and testified that, after Powell was arrested, he asked a party or two to make his bond, and then said he wanted to call his uncle at Hope—witness believed it was Luther Holliman—over the 'phone. He called him Uncle Newt, or Uncle Luke. Witness believed it was Uncle Luke.

Marcus Faulkner testified that he knew the defendant, but had not known him very long. Witness set fire to the theater. Powell hired witness to do it. Over the objection of the defendant, witness testified that Holliman sent witness to Gurdon. Holliman talked with witness about one week before, at Holliman's place of business. When witness went to Gurdon from Hope, he traveled from Hope to Emmet on the train, and then got off the train and got in Mr. Holliman's car, and he brought witness to Powell's filling station, and Powell was not there at the time, and Holliman went into the filling station and called him. Holliman introduced witness to Powell. Powell told witness that he wanted to see him. Witness told Powell that witness did not have any money. Powell gave witness $5, and told witness to go over to the hotel. Witness went there, and Powell came over to the hotel and told witness to go down and go to the first show, and, after the first show was over, to go to his picture show. Witness met

Powell between his show and the drugstore, and Powell took him in his car and carried him down the street a piece, and showed him the place he wanted burned, and how to get in there, and brought witness back to the hotel, and said he wanted witness to burn the theater, and told him how to get in a window. Powell said he wanted the theater burned on Monday, because the firemen would be away, and said that he, Powell, would be out of town. Powell told witness to burn it with waste that he had put there in a little box. Witness was to get $150 for burning the theater. Witness knew the negro Bill Jamerson. Jamerson came into the lavatory at the hotel when witness and Powell were in there. When Jamerson came in, Powell went to washing his hands. Powell talked to witness about burning the theater, in the back of the hotel. Defendant duly excepted to the ruling of the court in admitting the above testimony. Witness then detailed how he went from his room at the hotel out of the window and across into the Wright building, and set fire to same. Witness, further along in his testimony, stated that he was in the lavatory with Powell two or three times; that the darkey came in three times when witness and Powell were in there. They were in there twice on Monday, and he came in both times, and also on Thursday evening. On the first meeting on Monday, when the darkey came in, witness turned and washed his hands, and the darkey walked out. Powell did not wash his hands then. Powell was to pay witness $150 Wednesday morning. He didn't pay the money. Witness got $5 one day, $5 another day, and the promise of $150, and for that the witness burned the building.

The defendant testified that he was chief of the fire department at Gurdon, and had been ever since they had had a fire department. He also operated a picture show since he had been at Gurdon. His duty as chief was to see that fires are put out, and to take care of the men and the fire equipment. He had a key to the building where the fire-truck was kept, but seldom

used it. They entered by thrusting a stick under the latch through a crack in the door. Two or three days before the Wright Theater burned, witness was in the place where the fire truck was kept, and took it out and put gas in it. It ran at that time with its own motor. He did not examine the carburetor. There was nothing wrong with the fire-truck at that time. It worked all right. Witness never looked at the wrenches. They were in the back of the truck, in a box. Witness denied that he had put the carburetor out of fix. Witness was not in Gurdon on the night of the fire. He was in Little Rock. He left Gurdon for Little Rock on Monday, about twelve o'clock, and returned to Gurdon on Tuesday morning, on No. 5, which gets to Gurdon about 10 o'clock A. M. Witness stated that he had a key also to the garage where the fire-truck was kept. There was a key also in the council room; Ross Moore had one; and there was still other keys. Witness testified that he had nothing to do with the advising or encouraging or prompting Marcus Faulkner to set fire to the building. He denied that he was acquainted with Faulkner, and stated that he never saw him until he saw him in court. He denied that he had ever met Faulkner in the lavatory of the hotel, and denied all statements that Faulkner had made connecting witness with the burning of the theater.

The court, at the instance of the State, gave the following instruction:

"A. If you find from the evidence in this case, beyond a reasonable doubt, that the witness, Marcus Faulkner, in Clark County, Arkansas, at any time within three years before the indictment in this case was returned into court, willfully, feloniously and maliciously set fire to and burned the building about which the witnesses have testified, and that the building was the property of the witness Lulu May Wright, that that property was at the time in the possession of R. D. Wright, and you further find from the evidence in this

case, beyond a reasonable doubt, that the defendant, Earl Powell, in Clark County, Arkansas, at any time within three years before the indictment was returned into court, and before said building was burned by the said Marcus Faulkner, unlawfully, willfully, feloniously and maliciously advised or encouraged the said Marcus Faulkner to set fire to and burn said building, then you will convict the defendant, and assess his punishment at imprisonment in the penitentiary for some period of time not less than two nor more than ten years."

The defendant objected generally to the instruction, and also specifically because the instruction used the word "or" before the word "encouraged," instead of the word "and." The defendant asked the court to instruct the jury to return a verdict of not guilty. The court refused to give such instruction, and the appellant duly excepted to the ruling of the court.

At the request of the defendant the court gave several instructions on the question of the corroboration of an accomplice, and also on the presumption of innocence, burden of proof, and reasonable doubt. The jury returned a verdict finding the appellant guilty, and assessing his punishment at six years' imprisonment in the State Penitentiary. Defendant's motion for a new trial was overruled, and defendant was sentenced by judgment of the court in accordance with the verdict, from which judgment is this appeal.

1. The appellant contends that there was not sufficient testimony to meet the requirements of the law as set forth in our statute and decisions concerning the corroboration of an accomplice. Section 3181, C. & M. Digest, provides that a conviction cannot be had in a case of felony upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and a corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof. The law, as prescribed by our statute *supra*.

and announced in numerous decisions of our court, was correctly declared by the trial court, and appellant does not contend otherwise. He only insists that the testimony was not sufficient to justify the trial court in submitting the issue of corroboration to the jury, and urges therefore that the court should have granted his prayer to direct the jury to find a verdict of not guilty.

Of the many decisions of this court passing on the question of a corroboration of an accomplice, not one of them is authority for any other decision on that question, because each case necessarily must depend upon its own peculiar facts, and no case is found where the facts are precisely the same. After a somewhat extensive review of our cases where the sufficiency of the testimony to meet the requirements of the statute has been challenged, it occurs to us that the testimony in this record is amply sufficient to have warranted the court in submitting to the jury to determine whether the testimony of the accomplice had been corroborated as the statute requires. The court did not err therefore in refusing appellant's prayer for instruction.

In *Kennedy* v. *State,* 115 Ark. 480, 171 S. W. 878, we approved an instruction in the following language: "While the defendant cannot be convicted on the uncorroborated testimony of an accomplice, the amount of such corroborating evidence which should be required is a question solely for the jury, and it is sufficient, if there is any such evidence, to warrant you in convicting the defendant, provided it, taken with all the other evidence in the case, convinces you of his guilt beyond a reasonable doubt." Guided by this declaration of law, we are convinced that the court did not err in submitting to the jury, under the facts of this case, whether or not the testimony of the accomplice, Faulkner, when considered in connection with other evidence, was of sufficient weight to convince them of the appellant's guilt beyond a reasonable doubt. The circumstances tending to show Faulkner's guilt were very strong, and the jury would have been fully warranted

in finding him guilty, independent of his confession. His confession shows that his only motive was purely mercenary, and the testimony for the State tending to prove that appellant and Wright were rivals in the picture show business at Gurdon, that two or three efforts had been made by some one to destroy by fire and explosion the building in which he operated his picture show, and because of this Wright had suspected and approached the appellant to purchase his business or to sell out to appellant, and that these negotiations had not been successful, was relevant on the issue as to whether or not appellant had a motive for destroying Wright's property. The fact, testified to by the accomplice, that he was directed by Holliman, appellant's uncle, to go to Gurdon, that appellant wanted to see him, and that he was taken to Gurdon by Holliman and introduced by him to the appellant, was relevant testimony as tending to show how Faulkner came in contact with the appellant. While appellant denies this circumstance, Holliman did not testify. As a circumstance tending to corroborate the accomplice as to his acquaintance with Holliman, and the opportunity for Holliman to have done as Faulkner testified he did do, the testimony of the witness Martin, to the effect that he had seen Faulkner around Holliman's place of business in Holliman's company, corroborated Faulkner. The testimony of Faulkner was that, when he got to Gurdon and was introduced to Powell, Powell told him to go to the hotel, and, after showing Faulkner the theater he wanted burned, he took witness back to the hotel and showed him how to get in the theater from the hotel, and told him that he wanted it burned on Monday because the firemen would be away and he would be out of town, and to burn it with waste that he had placed in a box.

Appellant, to be sure, denies all these circumstances, and denies that he had ever seen Faulkner, but here again there is testimony tending to corroborate the testimony of Faulkner in some of the circumstances detailed by him. The testimony of Mrs. Epperson, the

hotel keeper, that Faulkner, when he came to the hotel, was first assigned to a room on the side next to the theater, and when he found that, by mistake, he was placed in the wrong room, and again placed in the room next to the theater, from which he went and set fire to the theater, tends to corroborate the testimony of Faulkner. Faulkner's testimony was to the effect that appellant had shown him how to set fire to the theater from a room in the hotel. Mrs. Epperson's testimony tended to prove that Faulkner was assigned a room in the hotel from which he emerged and passed over the roofs to the theater building. The testimony of Faulkner was also, in a manner, corroborated by the negro porter, Jamerson, who testified that he saw Earl Powell and Faulkner together in the lavatory of the hotel; that Faulkner came in while Powell was there, thus showing that, notwithstanding appellant's denial that he had ever seen Faulkner, he did see him, according to the porter, and had an opportunity to talk with him. Faulkner testified, in this connection, that the porter came into the lavatory while he and Powell were in there, and that he and Powell talked about it in the back of the hotel. The testimony of Faulkner, it occurs to us, is also corroborated by the testimony of the appellant himself, showing that he was out of town on the night of the fire, as Faulkner had testified that he said he would be. Also the testimony of Faulkner that appellant was connected with the burning of the theater is corroborated most strongly in the circumstances detailed by the witness tending to prove that the appellant was fire chief of the town, having full control over the fire-truck and other equipment, and that some one had so injured the entire fire equipment on the night of the fire as to put it practically out of commission. The testimony in detail shows how this was done, which we need not here repeat. The testimony of Faulkner was corroborated by the witness who testified that appellant had prepared and exhibited a waste that would burn

The testimony of Faulkner to the effect that appellant told him he wanted the building burned Monday night because he would be out of town and that the firemen would be away, and to burn it with certain waste that he had prepared, was all corroborated. The jury had the right to conclude that some one who must have been interested in the destruction of this theater building by fire had destroyed the effectiveness of the fire equipment so that it could not be used for the extinguishment of the fire, and the jury had the right to lay this responsibility at appellant's door, because, under the proof, he had complete control over the fire-fighting apparatus and the house which contained it. In the absence of proof by appellant to the contrary, the jury had a right to conclude that the appellant had barred the doors and crippled the machinery so that the burning of the theater on the night mentioned could not be prevented.

We will not pursue the matter further. Our conclusion is that the court was warranted in submitting the issue to the jury, and that there was substantial testimony from which the jury was justified in finding that the accomplice, Faulkner, was corroborated in the manner and to the extent required by our statute and decisions. See *Scott* v. *State,* 63 Ark. 310, 38 S. W. 339; *Cook* v. *State,* 75 Ark. 540, 87 S. W. 1176; *Kennedy* v. *State, supra; Ernest* v. *State,* 120 Ark. 148, 179 S. W. 174; *Rogers* v. *State,* 136 Ark. 161, 206 S. W. 152; *Brown* v. *State,* 143 Ark. 523, 222 S. W. 377; *Haskin* v. *State,* 148 Ark. 351, 230 S. W. 5; *Casteel* v. *State,* 151 Ark. 69, 235 S. W. 386; *Middleton* v. *State,* 162 Ark. 535, 258 S. W. 995; *Strum* v. *State,* 168 Ark. 1012, 272 S. W. 359

2. The objection of appellant that the court erred in not using the word "and" instead of "or" in instruction No. A is without merit. True, our statute, in § 2308, defines an accessory as "one who stands by, aids, abets, or assists, or who, not being present, aiding, abetting or assisting, hath advised and encouraged the perpetration of the crime." But in the next section,

No. 2309, it is provided that "he who thus aids, assists, advises or encourages shall be deemed in law a principal, and shall be judged accordingly." For all practical purposes the words "advise and encourage," or the words "advise or encourage" should be used interchangeably or synonymously in the administration of the criminal law. At least, they mean so nearly the same thing that no nice and critical distinction should be drawn between them, and this court has not heretofore done so. See *Boze Smith* v. *State,* 37 Ark. 274; *Williams* v. *State,* 41 Ark. 173; *Brown* v. *State,* 55 Ark. 593, 18 S. W. 1051. Our lawmakers did not intend that these terms should be used in any hypertechnical sense. It is difficult to see how, if one "advises" another to commit a crime, he does not in that act also "encourage" him to commit it ; and, on the other hand, when one "encourages" another to commit a crime, he also in a sense "advises" him to commit the crime. This is necessarily the case, unless we indulge in refinements of distinction which, we are sure, were not in the minds of the lawmakers when they defined the term "accessory to a crime" and prescribed his punishment. Any definition of the word "accessory" or of the words "advise" and "encourage," given by standard literary or legal lexicographers, will show that, where one is charged as an accessory before the fact by advising and encouraging the commission of a crime, as in the case at bar, proof that he either advised or encouraged the commission of the crime will sustain the charge. See Funk & Wagnalls, also Webster, s. v., advise, encourage; also see 1 R. C. L., p. 131, 132, §§ 1, 2 and 3; 1 Wharton, Crim. Law, § 263 *et seq;* 1 Brill's Cyc. Crim. Law, § 237, 241; 1 McClain's Crim. Law, § 204, 208; 1 Bishop's Crim. Law, § 600 *et seq.,* and § 653. Under our statute (§§ 2308, 2309, 2311, C. & M. Digest), one who is charged with being an accessory before the fact may be convicted if he advised *and* encouraged or if he advised *or* encouraged the commission of the crime.

3. The court did not err in admitting the testimony of Marcus Faulkner to the effect that Holliman talked with him and directed him to see the appellant. Nor did the court err in admitting the testimony of John Martin that he had seen Faulkner in company with Holliman at Hope and around Holliman's place of business. Appellant denied that he had ever seen Faulkner. Holliman was appellant's uncle, and it was relevant testimony to show how Faulkner came in contact with the appellant. It is one of the incidents in the chain of circumstances proper to be related by Faulkner in his narrative explaining his connection with the crime charged.

There is no reversible error in the rulings of the trial court, and its judgment is therefore affirmed.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA *v.* KRONE.

Opinion delivered July 9, 1928.

Cravens & Cravens, for appellant.

Earl U. Hardin and *W. L. Curtis,* for appellee.

WOOD, J. This was an action instituted by Gus Krone, doing business as Southern Cigar & Candy Company (hereafter called, for convenience, Krone) v. J. D. Wheeler and the Indemnity Insurance Company of North America (hereafter called company). Krone was in the cigar and candy business in Fort Smith, Arkansas. Wheeler was employed by him as bookkeeper and cashier. The company executed an indemnity bond to Krone in the sum of $2,000, indemnifying Krone against any loss which he might sustain by reason of larceny or embezzlement committed by Wheeler against Krone during a period of one year, beginning March 14, 1926, and ending March 14, 1927. The cause was submitted to a jury. It was proved by the undisputed testimony on the part of the plaintiff that Wheeler, during the period covered by the bond, did steal or embezzle from Krone $2,646.03.

The court, over the objection of the company, permitted the introduction of the following:

"Fort Smith, Arkansas, June 7, 1926. I, Joe D. Wheeler, of my own will and accord, do hereby acknowledge and admit that I did steal and use for my own use the sum of $2,646.03 from the Southern Cigar & Candy Company during the fall and summer of 1925 and the

winter of 1925 and the spring of 1926. (Signed) J. D. Wheeler." On typewriter: "Jno. D. Wheeler. Witness: W. R. Johnson, John Arch, Vance Hill."

To this ruling the company duly excepted.

Among other prayers for instructions the company presented the following:

"No. 2. You are instructed that if you believe, from a preponderance of the evidence in this case, that the plaintiff, without previous notice to and the consent of the defendant, Indemnity Insurance Company of North America, in writing, made any settlement with J. D. Wheeler for any loss under the bond sued on herein, or that the plaintiff did any act whereby the liability of the said J. D. Wheeler to the plaintiff was changed in any material respect, then you are instructed that your verdict should be for the defendant; and in this connection you are further instructed that the acceptance by the plaintiff, if any, of a certain amount of cash from the said J. D. Wheeler, if any, and the acceptance of a note, if any, of the said J. D. Wheeler *et al.*, which said cash and note was to apply on the alleged shortage of the said J. D. Wheeler, if it was to be applied to the plaintiff, if any, would be such a change in the liability of the said J. D. Wheeler to the said Gus Krone as would be material."

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

The court granted the following prayer of the company:

"You are instructed that if you believe, from a preponderance of the evidence in this case, that the plaintiff, without previous notice to and the consent of the defendant, Indemnity Insurance Company of North America, in writing, made any settlement with J. D. Wheeler for any loss under the bond sued on herein, or that said plaintiff did any act whereby the liability of the said J. D. Wheeler to the plaintiff was changed in any material respect, then you are instructed that your verdict should be for the defendant."

At the instance of Krone, the court gave the following instruction:

"You are instructed that if you find from the testimony that the defendant surety company was present by its attorney and acted in conjunction with attorney for plaintiff in trying to effect a settlement or to obtain reimbursement from J. D. Wheeler, or his estate, or third person, for the money alleged to have been stolen or embezzled, such action upon the part of the plaintiff would not constitute a breach of the conditions of the bond which provides for written notice to the surety company of the intended effort to effect settlement."

To this ruling, the company duly excepted.

The company answered the complaint, and denied liability. The defendant, Wheeler, although duly served with summons, did not answer. Judgment was rendered against him by default in the sum of $2,553, the jury having returned the verdict against him for that sum. The jury returned a verdict in favor of Krone against the company in the sum of $2,000. Judgment was entered in favor of Krone against the company for that sum, from which the company appeals.

1. The court did not err in allowing Krone to introduce the written confession of Wheeler set out above. There are two reasons why this confession was admissible: first, because it was of the *res gestae*. The very terms of the bond made the company liable for loss to Krone "caused by any act of larceny or embezzlement upon the part of the employee in the performance of the office or position in the service of his employer and occurring during the continuance of this bond, and *discovered at any time within six months* after the expiration or cancellation of this bond. The larceny or embezzlement of Wheeler, as shown by his written confession, was while he was still in the employ of Krone as cashier and bookkeeper, during the period covered by the bond. The plaintiff, Krone, could not recover against the company unless he proved that Wheeler was guilty of embezzlement, and, as said by us in the recent case of *Fidelity & Deposit Co.*

of Maryland v. *Cunningham, ante,* p. 638, it was competent in the trial of this cause to prove his admission." In that case the plaintiffs sued the surety and the principal on the bond, in which there was a joint and several liability of the principal in the bond and the surety, whereas in this case there was no joint and several liability of principal and surety expressed in the bond. But in that case the bond, as in the case at bar, made the surety liable for loss to the obligee by reason of any personal act or acts of larceny or embezzlement committed by the principal in the discharge of his duties in his official position. The matter essential to be proved in that case, as in the case at bar, before the liability of the surety attached under the bond, was the fact of the larceny or embezzlement of the principal in the discharge of the duties of his official position. Hence the doctrine of that case is clearly applicable here as to the admissibility of the confession of the principal as showing his embezzlement.

The undisputed testimony shows that the confession of the principal was made while he was still in the employ of Krone, and was in response to inquiries made by him of Wheeler concerning the defalcation, of which Krone suspected he had been guilty. It will be observed that the language of the bond itself contemplated that the company would be liable for any larceny or embezzlement committed by Wheeler *during the continuance of the bond, if such larceny or embezzlement were discovered within six months after the expiration or cancellation of the bond.*

Now, any larceny or embezzlement committed by Wheeler during the period covered by the bond, to the extent of $2,000, is a liability against the company on its bond. Any admission or confession of such larceny or embezzlement, in response to an inquiry made by the obligee, during the period covered by the bond, is a part of the *res gestae,* because the bond itself contemplates that discovery may be made of such dereliction of the principal, and, as before stated, one of the most effectual methods of discovery is the voluntary confession of the

principal. As cashier and bookkeeper, it was certainly a part of Wheeler's business to account for the funds of his employer coming into his hands, and it was in the course of such business or employment for him to give an account to his employer, when requested or required by him to do so. Therefore, when Wheeler was requested by his employer to give an account of the funds which he had handled for him, his confession that he had stolen such funds is certainly of the *res gestae* in any inquiry involving the issue as to whether such funds were embezzled or stolen by Wheeler during the period covered by the bond. As we construe the written confession of Wheeler, in connection with the testimony of Krone, it was but tantamount to an accounting to Krone for the money that had come into his (Wheeler's) hands as cashier. Krone certainly had the right to demand of Wheeler, while the relation of employer and employee still existed, to render an account of his stewardship; and when Wheeler, in rendering an account to Krone, stated the amount of funds which had come into his hands, and that he had stolen such funds, his confession was a part of the act of accounting. As we take it, the statement of the principal (Wheeler) of the amount of funds that had come into his hands belonging to Krone and his confession that he had stolen the same, was during and in the course of his employment and in the line of his duty, and was therefore of the *res gestae* in this action by Krone against Wheeler and the surety on his bond.

Mr. Elliott states the law which is precisely applicable to the facts of this record as follows:

"The admissions of the principal are not ordinarily admissible against his surety, unless they are a part of the *res gestae*. Where, however, the admission of the principal involves his own conduct, and is made during the transaction of the business for which the surety is bound, such as an admission accompanying litigated acts or made by the principal pursuant to a request for information which it was his duty to answer in the discharge of his office, or the like, so as to be properly part

of the *res gestae*, it is receivable against the surety. But it is not necessarily conclusive in an action against the latter. It has been held, however, that the admission of a surety in a suit against both principal and surety is receivable against the principal as well as against the surety." 1 Elliott, § 253.

In *Guaranty Co. of North America* v. *Phoenix Ins. Co.*, 124 Fed. 170, 59 C. C. A. 376, it is said: "The admission of a servant, the principal, in an employee's bond, with respect to matters pertaining to his guaranteed duties, made while he is engaged in their discharge, is competent evidence against the surety on his bond." Many cases are cited to sustain the opinion. See also *Bailey* v. *McAlpin*, 122 Ga. 616, 50 S. E. 388; also *Bank of Brighton* v. *Smith*, 12 Allen 243, 90 Am. Dec. 144.

But, on the other hand, if the statement of Wheeler, above set forth, had been made after the period covered by the bond had expired and after the relation of employer and employee had ended and in response to an inquiry made by Krone as to whether Wheeler had embezzled funds while he was Krone's cashier, then such statement unquestionably would not be of the *res gestae*, for the reason that it would not be a statement made while in the course of his (Wheeler's) employment and while in the performance of his duty as cashier. Such statement would then be but the narrative of a past transaction and not of the *res gestae*, and therefore not admissible. The declarations of a principal made subsequent to the act to which they relate, and not made during the transaction of the business for which the principal is bound, are not of the *res gestae*, and would not be competent and relevant testimony in an action alone against the surety. There is really no conflict in the authorities on these well established rules of law; but, as is said in *Dietrich* v. *Dr. Koch Veg. Tea Co.*, 56 Ok. 636, 156 Pac. 188, "the difficult proposition is not to lay down the law, but to apply it. It is easy to say that, if the admissions of the principal constitute a part of the *res gestae*, they would be admissible against a surety, otherwise not." But it is by no

means an easy problem to determine always, as we have found in this case, just when the admission of a principal in an action against the surety is of the *res gestae.* However, we are convinced that the statement of Wheeler was admissible as of the *res gestae,* for the reason, as stated above, that he made the confession in response to his employer's investigation and inquiry for an accounting, while he was engaged in the performance of his duty as cashier and bookkeeper, to render an account for the funds he had received and the disposition made thereof. These facts, we believe, make the statement and confession a part of the *res gestae,* and therefore admissible. While the facts are different, the rule of law is recognized and stated in *State* v. *Newton,* 33 Ark. 276, 289, where we said, "the surety is bound by the acts and declaration of his principal, being within the scope of the business, as a part of the *res gestae;*" and in *Williams* v. *Elrod,* 128 Ark. 207-210, 193 S. W. 514, we held that the declarations of an agent or employee relating to a transaction in which he had real or apparent authority to act, and during the very transaction in which he was engaged, is of the *res gestae.*

We concede that the case of *Stetson* v. *City Bank of New Orleans,* 2 Ohio St. 167, upon which counsel for appellant rely to sustain their contention that the confession of Wheeler was not a part of the *res gestae,* is a thoroughly considered case upon the subject under review; but, while the court announces the correct doctrine of law, it occurs to us it misapplied it to the facts of that case. For we are convinced that the admissions or confessions of the principal in that case as to the extent of his defalcation, made to the other officers of the bank, while he was still cashier, were in the very line of his duty and during the course of his employment, and should have been admitted as a part of the *res gestae,* and binding on his surety, while the confessions made after his employment had ended were not of the *res gestae.*

The second reason why the statement was admissible in this case is because the action was against both the principal and the surety. While the principal did not appear and answer, he was not dropped from the action, but it was prosecuted through to a final judgment as a joint action against him and the appellant, his surety. The statement adduced was relevant testimony to establish the amount of his liability, and, to the extent of the bond, the liability also of the appellant as his surety. When the suit is against the principal and surety jointly, on a joint or joint and several obligation, an admission or declaration of the principal which is competent evidence against him is also generally held to be competent evidence against the surety. See Brandt, Suretyship and Guaranty, 295. The liability here was joint to the amount of $2,000.

In *Singer Mfg. Co.* v. *Reynolds,* 168 Mass. 588, 47 N. E. 438, 60 A. S. R. 417, Reynolds was the principal in a bond given for the faithful performance of his duties as an employee of the plaintiff corporation. Leonard was the surety on his bond. Reynolds made a statement, during the period covered by the bond, precisely similar in effect to the statement made by Wheeler in the case at bar. The plaintiff corporation instituted a joint action against Reynolds and Leonard, his surety, to recover the money which Reynolds, in his written statement, admitted he had received as agent of the corporation, and had embezzled. The trial court admitted the statement of the principal, over the objection of the surety, and the Supreme Court of Massachusetts held that the ruling was correct, saying: "The admission of the principal was, under our decisions, admissible against both." Such is the effect of our recent holding in *Fidelity & Deposit Co. of Md.* v. *Cunningham, supra.* See also *Rotan* v. *Nichols,* 22 Ark. 245, where we announced the principle that "the admissions of a person united in interest with a party to the suit are admissible in evidence against such party." Citing 1 Greenleaf on Evidence, § 171. The confession of

Wheeler, being freely and voluntarily made, is conclusive against him if made in good faith, and it is at least *prima facie* evidence against the appellant, his surety, because they are his privies in law and jointly liable with him to the amount of the bond. See *Stevens* v. *Crawford,* 1 Ga. 574, 44 Am. Dec. 680; also *Dietrich* v. *Koch Veg. Tea Co., supra.*

2. The bond upon which the action was founded contained the following provision: "If, without previous notice to and consent of the surety thereto in writing, the employee in his employment, after having become aware of any act which may be made the basis of any claim hereunder, or make any settlement with any employee for any loss hereunder, or do any act whereby the liability of the employee to him is changed in any material respect, this bond shall be null and void, both as to any existing or future liabilities hereunder." Without setting out and commenting upon the issue as to whether Krone had made a settlement or done any act without the consent of appellant, whereby the liability of Wheeler to Krone was changed in any material respect, it suffices to say that, after a careful consideration of the testimony on this branch of the case, we are convinced that it was an issue for the jury as to whether such a settlement had been made or act done. This issue was submitted to the jury in appellant's prayer for instruction No. 3, which the court granted. The appellant's instruction was couched substantially in the language of the bond. The court, having granted the prayer of the appellant, did not err in refusing appellant's prayer for instruction No. 2, covering the same issue. Appellant's prayer for instruction No. 3 was not argumentative, and was a correct declaration of law on the issue raised under the terms of the bond above set forth. Our conclusion is that this prayer presented the issue in terms as favorable to appellant as it was entitled to under the evidence.

Appellant's prayer for instruction No. 2 was argumentative, and invaded the province of the jury. The court ruled correctly in refusing such prayer, especially

in view of the fact that the court granted appellant's prayer No. 3, covering the same matter, but not in an argumentative form. Under the controverted facts adduced in evidence the court did not err in refusing to tell the jury as a matter of law that the acceptance of a certain amount of cash from J. D. Wheeler, if any, and the acceptance of the note, if any, of J. D. Wheeler *et al.*, was a change in the liability of Wheeler to Krone which would be material as affecting the liability of appellant to Krone under the terms of the bond. If such a settlement had been made by Wheeler with Krone, appellant does not prove that this would change Wheeler's liability in any material respect, that is, in any respect that would be detrimental to appellant. Appellant does not prove or attempt to prove that any alleged settlement between Wheeler and Krone would result in any loss or damage to the appellant, and it is difficult to see how it could be otherwise than beneficial to appellant. Therefore the appellant is not prejudiced, and is not in an attitude to complain when the court refused to grant an argumentative instruction on this issue, after having presented the issue at appellant's request in almost the exact language of the appellant's bond, upon which the alleged liability of appellant is predicated.

There are no reversible errors in the rulings of the trial court. The judgment therefore must be affirmed.

THOMAS *v.* MAGNOLIA PETROLEUM COMPANY.

Opinion delivered July 9, 1928.

D. T. Cotton, Watkins & Pate and *Trimble & Trimble,* for appellant.

Cockrill & Armistead, for appellee.

SMITH, J. Appellant filed a complaint in which he alleged that U. R. Lindsey owned a truck, which was driven by his son, Dale Lindsey, in the delivery of the different articles sold by the Magnolia Petroleum Company, hereinafter referred to as the company. The tank on the truck in which gasoline was contained and delivered was owned by the company. Dale Lindsey drove a load of gasoline belonging to the company from the town of Marshall to the town of Leslie, and, after making the delivery of the gasoline, he invited appellant and a number of other boys to ride on the truck to a picnic which was on his return route to the town of Marshall, and a short distance out of the town of Leslie. The invitation was accepted, and Dale Lindsey started on his return trip, and, in doing so, he drove his truck "at an unlawful rate of speed and in a manner so negligent, wanton, reckless and careless of the lives of all of his passengers that, out of the town of Leslie about two miles, as he approached a bridge across a stream, he failed to cross said bridge, but drove his truck off of said bridge, and the same fell some twelve or fifteen feet to the bottom of the stream, which was solid rock," and severely injured appellant, who brought this suit to recover damages to compensate his injury.

Lindsey and his son and the company were all made defendants, but a demurrer filed by the company was sustained as to it, and the cause of action against the company was dismissed, and this appeal is from that judgment.

The question presented is whether a cause of action was stated against the company. The authorities on this subject are numerous and in direct conflict.

The case chiefly relied upon by appellant as supporting his contention that a cause of action was stated is that of *Higbee Co.* v. *Jackson,* 101 Ohio St. 175, 128 N. E. 61, 14 A. L. R. 131. This was an opinion by the

Supreme Court of Ohio, and the first syllabus reads as follows: "Where an employee, to whom the owner has committed the operation of an auto truck in the owner's business, permits an infant to ride on the truck, in violation of his instructions, and the infant is injured by the wanton and willful conduct of the employee, while in the course and in the scope of his employment, the owner is responsible."

There was a very vigorous dissenting opinion in this case by Justice Jones, who characterized the majority opinion as "supported neither by sound legal reason nor by judicial authority in other States." The dissenting Justice reviewed many cases, and, concerning the syllabus quoted, had this to say:

"That the rule of principal and agent is involved in this case is recognized by the syllabus, which establishes liability for 'conduct of the employee while in the course and within the scope of his employment.' However, the syllabus begs the entire question when it declares that here the wanton conduct of the employee was done within the scope of his employment. If the acts of the employee were 'in the course and within the scope of his employment,' then his principal would be liable, whether his acts constituted wanton or 'mere' negligence. This principle is elementary."

The case of *Zampella* v. *Fitzhenry,* 97 N. J. L. 517, 117 Atl. 711, 24 A. L. R. 666, reviews the development of the doctrine *respondeat superior* from the time of William the Conqueror, and is a learned and interesting opinion. It was there held by the New Jersey Court of Errors and Appeals that "the driver of an automobile truck has no implied authority from his employer to invite children to ride on it, and therefore the employer is not liable, in the absence of express authorization of the act, for injury to a child thrown from the truck when riding by the driver's invitation."

There is an extended annotator's note to the case last cited, collecting many cases on the subject, and the briefs of opposing counsel cite these and other cases.

We attempt no review of these cases, as we have announced the principles in former decisions of this court which are controlling here.

In the case of *Railway Co.* v. *Bolling,* 59 Ark. 395, 27 S. W. 492, the syllabus reads as follows:

"A child of tender years cannot recover from a railroad company for injuries received by him while riding on a hand-car, caused by the negligence of its employees who were propelling the car, if the company's rules forbade such employees to take any one on the hand-car except an employee, and there was no custom to permit persons to ride on the hand-car shown to have been known to or acquiesced in by the officials of the company."

In the case of *Little Rock Traction & Electric Co.* v. *Nelson,* 66 Ark. 494, 52 S. W. 7, it was held that a boy ten years of age, riding upon a street car without paying fare, by invitation of a motorman in charge of the same, who had authority to receive and let off passengers, was not a trespasser. The motorman had no authority to admit passengers except upon the payment of fare, but he did have authority to "receive and let off passengers," and the court said: "The invitation of the motorman (to ride) is an act within the general scope of his employment, for which he is responsible to his master. If the boy accepts it innocently, he is no trespasser, and it is the duty of the company to extend to him the diligence due to passengers of his age and discretion" (Citing cases).

The case of *American Ry. Ex. Co.* v. *Mackley,* 148 Ark. 227, 230 S. W. 598, cites many cases of this court dealing with the liability of the master for the unauthorized torts of the servant committed during the course of his employment, and it was there said that "the doctrine of all these cases is that the test of the master's liability is, not whether a given act is done during the existence of the servant's employment, but whether it was committed in the prosecution of the master's business."

In the note to § 1214, Berry on Automobiles (5th ed.), 901, many cases are cited which discuss the "scope of employment" of a chauffeur or driver of another's car. The author there says: "The master is not liable for his servant's acts if, at the time of the acts complained of, he has become *ad hoc* the servant of another, and engaged in the business of that other, and under his direction and control. Nor does it follow that a chauffeur is acting within the scope of his employment merely because he is operating his master's automobile at the time of an accident."

In the case of *Keller* v. *White,* 173 Ark. 885, 293 S. W. 1017, a recovery was sought against the Pierce Petroleum Corporation upon the ground that plaintiff's intestate had been killed through the negligence of the corporation's employee while driving an automobile owned by the corporation. It was there said:

"Our analysis of the testimony has convinced us, however, that the court should have given a peremptory instruction in favor of the Pierce Petroleum Corporation, because the undisputed evidence showed that the trip from Eudora to Lake Village was not taken in performance of White's duties for said corporation or for its benefit, even if there were sufficient evidence to make the issue of his agency one for the jury. It is quite clear that White, Buchanan and H. T. Keller were on a trip to satisfy their own appetites rather than upon a mission for the benefit of the corporation in a business way. White was not acting within the scope of his authority as agent of the company or in the performance of his duties for it and for its benefit" (Citing cases).

Appellant cites and relies upon the case of *Campbell Baking Co.* v. *Clark,* 175 Ark. 889, 1 S. W. (2d.) 35, in which an agent, driving a truck over a route for the purpose of delivering and selling merchandise, in returning to the principal's place of business towed an automobile to his own car, which, as it passed through a filling station at the intersection of two streets, skidded and struck the

plaintiff's car and damaged it, and injured the plaintiff. The master was held liable, although the agent had exceeded his authority in towing the car, because he had not abandoned his principal's business, that is, returning the truck to the principal's place of business was an act within the scope of the servant's employment, and he negligently discharged his employment by towing the car.

So here, if Lindsey, while driving appellant, had struck another car, his principal would have been liable for that act if it had been negligently done, because driving the truck on his return was within the scope of his employment; but permitting appellant to become the guest or the passenger of the driver was an unauthorized act which was beyond the scope of the servant's employment. We said in the Campbell case that, although an agent may exceed his authority to the extent even of violating instructions, if, at the time the servant injures another, he is engaged in the business he was employed to perform, his employer is responsible for injuries resulting from his torts; but this is true because the servant is acting within the scope of his employment.

Had the owner of the automobile which was being towed in the Campbell case sued for the damages to it, we would have had the question here presented, but such was not the case. In such a case it would, no doubt, have been held that the driver of the truck had become *ad hoc* the servant of the owner of the automobile, as he had gone beyond the scope of his employment in attaching the automobile to his truck; but that fact did not relieve the servant's principal from liability for the damage done to the automobile of a third party while driving the truck in a negligent manner in pursuit of the servant's employment.

Appellant also cites and relies upon the case of *Bennett* v. *Bell,* 176 Ark. 690, 3 S. W. (2d), 696, in which it was said:

"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."

That case, however, was a suit against the owner of a car who drove it himself. Here the demurrer which was sustained by the court does not affect the appellant's right to sue the driver of the truck in which he was riding when injured.

We quote the *syllabi* of a few late cases.

"The owner of an automobile delivery truck *held* not liable for injuries to a child eight years old, who fell off while riding by the permission or at the invitation of the chauffeur, without the owner's knowledge or consent, and without necessity therefor." *Barker* v. *Dairymen's Milk Products Co.*, 205 Ala. 470, 88 Sou. 588.

"Where ordinary truck driver invited or permitted a third person to ride on the truck, such third person assumed whatever risk there was in riding on the truck and whatever risk that might arise from his alighting and leaving the truck, and could not recover from the master by reason of such driver's conduct in negligently starting the truck before he was off, such third person being a trespasser, even though a boy 14 years of age." *Hughes* v. *Murdoch Storage & Transfer Co.*, 269 Pa. 222, 112 Atl. 111.

"The driver of a delivery truck, employed to make deliveries of goods, acts outside of the scope of his employment where he, for companionship and for his own pleasure, and without the knowledge of his employer, invites a friend to ride on the truck with him, and the employer is not liable for injuries to the guest of the driver, sustained from the negligence of the latter, even though the negligence be willful and wanton." *Morris* v. *Fruit Co.*, 32 Ga. App. 788, 124 S. E. 807.

"The driver of an automobile truck used by a mercantile company in deliveries invited a lady acquaintance to ride on the step, and in the course of the ride she was injured. The driver had no authority to invite persons to ride on the truck. *Held*, that in such case he was

not acting within the scope of his employment, and his master, the company, was not liable; for a servant, to be acting within the scope of his employment, must be engaged in doing some act under authority from his master." *McQueen* v. *People's Store Co.,* 97 Wash. 387, 166 Pac. 626.

"Where truck driver had no authority to transport guests, he was not, in any part of his conduct towards a guest riding on the truck, acting within scope of his authority, and the guest could not recover for his wanton, willful and reckless misconduct in driving the truck." *O'Leary* v. *Fash,* 245 Mass. 123, 140 N. E. 282.

The *syllabi* in the cases of *Tate* v. *Atlantic Ice & Coal Corporation,* 25 Ga. App. 797, 104 S. E. 913, and *Waller* v. *Southern Ice & Coal Co.,* 144 Ga. 695, 87 S. E. 888, are to the same effect.

We conclude therefore that the demurrer was properly sustained as to the company, for the reason that, under the allegations of the complaint, Lindsey was not acting within the scope of his employment in permitting appellant to ride on the truck.

The judgment will therefore be affirmed, and it is so ordered.

KING *v.* STERNBERG.

Opinion delivered July 9, 1928.

Dobbs & Young, for appellant.

Clinton R. Berry, for appellee.

SMITH, J. N. R. Clark brought suit in the Johnson Chancery Court against C. E. Rogers, and alleged that the defendant was indebted to him in the sum of $2,600, that appellant owned a stock of goods worth less than $12,000, and that he owed other creditors $16,000, and was insolvent.

On September 17, 1926, plaintiff and defendant, by their respective attorneys, appeared before the chancellor in vacation, who made an order in which it was recited that Luther King was appointed receiver to take charge of defendant's stock of goods and fixtures, and the receiver was directed to make an inventory and to prepare and report to the court a list of defendant's creditors.

On September 29, 1926, the receiver reported that he had made the inventory, and the stock of goods invoiced $10,354.39, the fixtures $1,010, and the accounts approximated $4,000. The receiver further reported that "he has an offer to purchase said stock of goods and fixtures at 62½ cents on the dollar, in case the sale can be made at once, and that said offer is a fair price for said stock of goods and fixtures." The report recited that D. A. Blackburn was the proposed purchaser.

Upon the consideration of this report the chancellor ordered that the receiver make the sale of the stock of goods and fixtures at 62½ per cent. of the invoice price, and to put the purchaser in possession thereof, and to report his action under the order.

On the day this order was made, the receiver and Blackburn, who were partners under the firm name and style of King & Company, took possession of the stock of goods and fixtures, and began to sell the goods for cash or on credit, as they pleased.

On October 15, 1926, Rogers was adjudged a bankrupt by the United States District Court for the Western District of Arkansas, and Henry Sternberg was named as trustee, and on February 21, 1927, the trustee filed an intervention in the cause in which the receiver had been appointed, alleging the orders of the chancellor herein recited, and praying judgment against King for the invoice price of the stock of goods and fixtures. There was a prayer that King be required to file his final report, and that he pay into court the sum of $7,101.74, this being the sum at which the receiver had reported the sale could be made.

A demurrer was interposed to this intervention, which the court overruled, and King thereupon filed a response, which contained the following recitals: That he and Blackburn were in negotiation with Rogers for the purchase of the stock of merchandise, and it was discovered that, as Rogers had numerous creditors, compliance with the Bulk Sales Law would entail considerable delay, and it was then agreed that Clark, as a creditor,

should bring a suit which would confer jurisdiction on the chancery court to appoint a receiver and order the sale of the goods and fixtures, but that King should act as receiver only for such length of time as was required to make an inventory, when he was to be removed as receiver and another person appointed as his successor.

The response further alleged that, in accordance with this understanding, suit was brought by Clark as a creditor, and, pursuant to the appointment of King as receiver, he made the inventory under the mistaken belief that his appointment was valid, and "with the assurance that, when he made the inventory, the chancellor would appoint another receiver." In compliance with the agreement under which the suit was brought, King made the inventory, and, after doing so, was advised that his appointment was void, and that he and his partner, Blackburn, would not obtain title to the goods under the order of sale made by the chancellor in vacation and Blackburn thereupon refused to pay any part of the purchase price. King, at the instance of certain creditors, kept the store open and sold goods, keeping an account thereof. After the appointment of the trustee in bankruptcy, King offered to surrender to him the stock of goods and to account for the goods sold, but the trustee refused to accept this offer. It was alleged that the goods were not worth more than forty per cent. of the wholesale price. King denied that he was a purchaser of the goods, and prayed that he be held liable only as a trustee for the use of the general creditors.

On October 18, 1926, King filed a report of his receivership, showing that the goods and fixtures on hand amounted to $6,391.96, and that he had proceeds of sales amounting to $3,107.77. The receiver reported that he expended in taking care of the goods and in making the inventory the sum of $232.50.

The trustee in bankruptcy filed exceptions to the report of the receiver, and alleged that King was indebted to the estate of the bankrupt in the sum of $7,102.74, with interest thereon from September 29, the date on which

the chancellor ordered the goods turned over to the purchaser. The trustee in bankruptcy objected also to the allowance of any compensation to King for his own services, and prayed the court to allow a fee to compensate the trustee's attorney for services in this litigation.

The court found, on the final submission, that King, as receiver, was himself the purchaser of the stock of goods and the fixtures, and had been in continuous possession of the property, selling such of it as he could and adding to the stock by additional purchases, and that he should account for the purchase price, to-wit, $7,102.74. The court further found that King should be allowed $232.50, and that he should be charged interest from December 22, 1926, the date of the demand by the trustee in bankruptcy for the proceeds of the sale. The court refused to allow a fee to the attorney for the trustee in bankruptcy.

From this decree King has appealed, and the trustee in bankruptcy has prayed a cross-appeal.

For the reversal of this decree appellant insists: (1) that the proceeding in the chancery court was wholly void, and he should be held liable only as trustee, and not as a purchaser; (2) if the proceedings were not wholly void, there was no sale, and he should not be held as a purchaser; (3) that he acted in good faith at all times, and held the goods as trustee for Rogers until the appointment of the trustee in bankruptcy, and that the offer to purchase which was submitted to the court was upon condition that the purchaser acquire a good title to the property sold, and that, as he did not acquire such title, he should be permitted to return the unsold goods and to account for those sold at their invoice, or the price at which he had sold them.

It may be said that appellant offered to introduce testimony on the final hearing of this cause to the effect that he acted in entire good faith in the matter, and that the chancellor was fully apprised of all the facts in the case before any order of any kind was made, and that the

goods had deteriorated and depreciated in value; but the court refused to consider any of this testimony.

We think it unnecessary to consider any of the arguments advanced by counsel for appellant in support of the theories above stated, and it may be conceded that the effect of the excluded testimony was that appellant had acted in good faith throughout the matter, and that the goods now on hand and unsold are not worth their invoice price.

If it be conceded that the orders of the chancellor made in vacation were void and that appellant's appointment as receiver was unauthorized, appellant is still liable. A receiver improperly appointed may be required to account for assets which came into his hands by virtue of his appointment, and such is the effect of the decree of the court from which this appeal comes.

The trustee in bankruptcy did not attack the sale to appellant. He accepted as correct the inventory made by appellant himself and appellant's own estimate and report as to value, and asked only that appellant be required to account to him for this value.

There was a sale by appellant as receiver to a copartnership of which he was a member. This sale was made without notice of any kind to the general creditors, and without advertisement, and upon representations to the chancellor that it could not be made at all unless made at once. There was no condition in the receiver's report or the chancellor's order that the sale should be dependent upon its validity. It was an absolute sale, although unauthorized, and we see no inequity in holding appellant to his bargain and in requiring him to settle in accordance with its terms.

The goods were converted to appellant's own use, and he has sold a considerable portion of them, and his liability for their value cannot be affected by his good faith. The court did not err in refusing to consider testimony tending to show a depreciation in the value of the goods, as appellant was liable for the value of the goods at the time of their conversion, and this liabil-

ity cannot be reduced by their subsequent depreciation. Appellant fixed the value of the goods at 62½ per cent. of their invoice price, and reported a purchaser at that price, and there can be no injustice in requiring him to account for them at that value.

Certain questions are raised upon the cross-appeal which must be considered. One of these is the allowance to appellant for his services in making the inventory and appraisement. We think this allowance should not have been made. The order of the chancellor appointing appellant receiver provided that he should be appointed receiver "with the express stipulation, however, that there is to be no costs incident to such receivership," and that the receiver should serve as such "without fee or commission to himself." It may be further said that the services of appellant in making the inventory appear to have been rendered, not for the benefit of the general creditors, but to enable him to determine what price he could afford to pay.

The court charged interest on the value of the goods from the date of the demand of the trustee in bankruptcy for the purchase money, and on the cross-appeal it is insisted that the interest should have been charged from the date appellant took possession of the goods and fixtures; and we think this contention is also correct. The rule is that one who converts another's property is liable for its value from the date of the conversion. *Hudson* v. *Burton,* 158 Ark. 619, 250 S. W. 898; *Lipscomb* v. *Delong,* 158 Ark. 24, 249 S. W. 14; *Newburger Cotton Co.* v. *Stevens,* 167 Ark. 262, 267 S. W. 777; 140 A. L. R. 1279.

It is further insisted on the cross-appeal that the court should have made an allowance of a fee to the attorney for the trustee in bankruptcy, and that it was error to refuse to do so. We think, however, that the court was correct in this ruling, as this is a matter which will no doubt be properly taken care of when the trustee in bankruptcy makes his final report.

The decree is therefore affirmed on the direct appeal and reversed on the cross-appeal in the respects indicated.

HARPER *v.* BETTS.

Opinion delivered July 9, 1928.

Ivie C. Spencer and *Cooley, Adams & Fuhr,* for appellant.

Dudley & Dudley, for appellee.

HUMPHREYS, J. The only question involved on this appeal is whether an administrator and the surety on his bond are liable for funds of the estate deposited by the administrator in his representative capacity for safe-keeping, in a bank which afterwards failed, but of good repute and apparently solvent when the deposit was made, until he could obtain an order of court with reference to the disposition thereof.

This suit originated in the probate court of Craighead County, by petition of appellee for an accounting, settlement and discharge of T. J. Harper, the adminis-

trator of the estate of Roy Betts, deceased. Appellee was the only heir of her son, Roy Betts, who died April 22, 1926. T. J. Harper was a friend of the family, and distantly related to appellee by marriage. During the continued and last illness of Roy Betts, Harper paid the premiums on a life insurance policy, which he carried in the Metropolitan Life Insurance Company, for over a year, amounting to a total of $16.50. On account of the friendship, relationship and the illiteracy and bodily infirmities of appellee, Harper administered upon Roy Betts' estate when he died. The insurance policy constituted the only asset of the estate. Harper filed with his application for letters of administration a bond in the penal sum of $1,000, signed by himself and the United States Fidelity and Guaranty Company as surety. Immediately after obtaining letters of administration he collected $564.75 upon the policy from the life insurance company, and, after deducting $16.50 which he had advanced as premiums and $34.50 as expenses of the administration, he deposited the balance, amounting to $508.95, in the First National Bank of Jonesboro, in his representative capacity. At the time the bank was a going concern, in which he was carrying his individual account, and was apparently solvent. In eighteen days after he made the deposit, said bank failed, and was closed by the Banking Department, and is still in the process of liquidation through a receiver. Since the failure a 20 per cent. dividend has been declared, which was paid appellee, by and with the consent of the administrator. The United States Fidelity and Guaranty Company was made a party to the proceeding in the probate court.

The administrator and his surety interposed the defense that the insurance money was deposited in said bank, in good faith, by the administrator for safekeeping until disposition could be made of same under an order of the court, and that, within three weeks after making the deposit, the bank failed and was taken over by the Banking Department for liquidation. The admin-

istrator's bond was executed in accordance with the requirements of § 23 of Crawford & Moses' Digest. Among the undertakings and guaranties in the bond, the administrator agreed and the surety guaranteed that said administrator would make just and true accounts, and would make due and proper settlements thereof, from time to time, according to law, or the lawful order, sentence or decree of any court having competent jurisdiction of the subject-matter.

Upon a trial of the cause in the probate court, and circuit court on appeal, judgments were rendered against appellants for the amount collected on the insurance policy, less the amount advanced by Harper for premiums on the policy and the necessary expenses of the administration.

An appeal has been duly prosecuted to this court from the judgment of the circuit court.

The facts are undisputed, and are substantially as stated above. The trial court rendered judgment upon the theory that an administrator is responsible for all moneys received by him in such capacity, absolutely and in all events. The effect of the decision of the trial court was to make administrators of estates and their sureties insurers or absolute guarantors of any and all properties and moneys which may come into their hands in their representative capacities.

The undertaking of administrators and their bondsmen is to faithfully administer the estate and cause to be made just and true accounts and to make due and proper settlements thereof, from time to time, according to law, or the lawful order, sentence or decree of any court having jurisdiction of the parties and subject-matter. There is no statute in this State which requires administrators to deposit funds of an estate for safe-keeping until disposition can be made thereof under orders of court, and no statute prohibiting them from doing so. It would certainly be an imprudent and hazardous undertaking for administrators to keep upon their persons or in private hiding places funds belonging to

an estate, and unjust and inequitable to require them to deposit the funds belonging to an estate in banks at their own or their bondsmen's peril. Such a rule would impose harsh and unreasonable responsibilities upon administrators, and prevent prudent business men from assuming such responsibilities. The law has worked out a rule applicable to situations of this kind which is equitable and just and aptly expressed in 11 Am. & Eng. Ency. Law, pp. 947-949. It is as follows, omitting unimportant parts:

"As a general rule, there is no absolute requirement of law that funds of the estate shall be deposited in a bank or other repository where money is usually placed for safekeeping, but the duty of the personal representative in such matters is governed by the rule that he must exercise the care and prudence that ordinarily prudent men exercise in regard to their own affairs; and this is the measure of his responsibility if he fails to deposit the funds of the estate in a safe place. * * * If any executor or an administrator, in his representative capacity, deposits funds of the estate in a bank in good standing, and nothing occurs to indicate that the affairs of the bank are in such condition as would lead a reasonably prudent man to withdraw the funds, he is not liable for the loss thereof, though resulting from the subsequent failure of the bank. * * * The consent of the beneficiaries to the deposit will relieve the personal representative from liability for loss."

The same rule is expressed as follows in 11 R. C. L., 158:

"It is an accepted principle in most jurisdictions that an executor or administrator who deposits the money of the estate, in good faith, in a solvent bank of good repute, to trust account and not to his own account or credit, is not liable for the loss of such money through the subsequent insolvency or failure of the bank."

The same rule is expressed in the following language in 24 C. J., 50:

"It is proper for the executor or administrator, for the purpose of safely keeping the funds of the estate during administration, to deposit the same in a bank, and indeed, under some statutes, the representative is required, or the court is empowered to order him, to do so. If the funds are so deposited and due care is used in selecting the depository, the representative is not necessarily responsible for a loss resulting from the subsequent failure of the bank, the test being whether he has exercised such care as men of common prudence ordinarily exercise in their own affairs."

The rule thus expressed is sustained by a unanimity of both Federal and State authorities. We think the facts in the instant case bring it within the rule thus announced. The undertaking by appellants was to administer the estate in accordance with the law, and the law does not exact unreasonable things. The undisputed facts show that Harper exercised such care as a man of common prudence ordinarily exercises in his own affairs in making a deposit of the fund in his official capacity for safekeeping in the First National Bank of Jonesboro. He met the test required by the rule, and he and his bondsmen should have been acquitted of liability on the bond. He and his bondsmen sufficiently accounted for the fund by showing that it was deposited for safekeeping, immediately upon its receipt, in a bank which was a going concern and apparently solvent, and so regarded in the community, and which failed and was closed by the Banking Department within a short time after the deposit was made.

On account of the error indicated the judgment is reversed, and the cause is remanded with instructions for further proceedings not inconsistent with this opinion.

SMITH and KIRBY, JJ., dissent.

SCHOOL DISTRICTS NOS. 41 ET AL. *v.* POPE COUNTY BOARD OF EDUCATION.

Opinion delivered July 9, 1928.

Hays, Priddy & Rorex and *Robert Bailey,* for appellant.

Ward & Caudle, for appellee.

KIRBY, J. This appeal is from a judgment of affirmance by the circuit court of the action of the county board of education of Pope County, consolidating certain school districts in said county, the three causes being instituted separately and consolidated for a hearing by the board of education. The proceedings were instituted under the authority of act 144 of the Acts of 1927, and no question is raised challenging the regularity of the procedure.

The board of education dissolved the districts upon proof of the record of attendance, made before the act was passed, during the school year ending June 30, 1927. Appellants insist that the board was without authority, under the provisions of act 144 of 1927, enacted without the emergency clause, to dissolve the districts upon proof of the record of the average daily attendance below the

requirements of said act, made before it became effective, and as shown by the record of attendance for the school year ending June 30, 1927, and this contention must be sustained.

Section 1 of said act provides: "The county board of education of any county shall have the discretionary power to dissolve any school district whose length of school term shall not be one hundred twenty days in any school year, or whose average daily attendance does not exceed fifteen pupils, and attach the territory so dissolved to adjacent school district or districts * * *."

The act was approved on the 16th day of March, 1927, but contained no emergency clause, and did not go into effect until 90 days after the adjournment of the Legislature on March 12, 1927, or until June 12, 1927. *Arkansas Tax Commission* v. *Moore,* 103 Ark. 48, 145 S. W. 199; *St. Louis, Iron Mountain & Sou. Railway Co.* v. *Roddy,* 110 Ark. 161, 161 S. W. 156.

"A statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively." *Fayetteville B. & L. Assn.* v. *Bowlin,* 63 Ark. 576, 39 S. W. 1047; *Black* v. *School District,* 106 Ark. 572, 173 S. W. 1104. Certainly it was not the intention of the Legislature to give this law a retroactive effect, there being no expression of an intention therein indicating that its operation should be other than prospective, and it accordingly furnished no authority for dissolution of the districts because of the too small daily attendance of pupils before the law became effective, and the court erred in holding otherwise.

Appellee insists that the appeal was not properly taken from the decision or order of the board of education abolishing the districts, to the circuit court, because no affidavit for appeal, in accordance with the terms of act 144 of 1927, providing therefor, is shown in the transcript. This question was not raised in the circuit court, however, by objection or any motion to dismiss the appeal, and must be held to have been waived by the

appearance of appellee therein and the trial of the cause. *Wulff* v. *Davis,* 108 Ark. 291, 157 S. W. 384; *Ark. Brick & Tile Co.* v. *Crabtree,* 172 Ark. 752, 290 S. W. 361.

The judgment is accordingly reversed, and the cause remanded to the circuit court, with directions to reverse the order of the county board of education abolishing and consolidating the said districts, and for any further necessary procedure according to law and not inconsistent with this opinion.

VITAGRAPH, INCORPORATED, *v.* WATSON.

Opinion delivered July 9, 1928.

I. J. Friedman and *Cochran & Arnett,* for appellant.

George A. Hall, for appellee.

HUMPHREYS, J. Appellant brought suit against appellees in the circuit court of Logan County, Northern District, to recover $1,275 on account of an alleged failure and refusal to accept and exhibit in the Strand Theater at Paris, Arkansas, certain photoplays or copyrighted motion picture productions, which appellees

agreed in writing to rent and exhibit at certain prices fixed in the contract for each photoplay or motion picture production.

Appellees interposed the defense that it purchased the exclusive right or license to exhibit the photoplays or copyrighted motion picture productions from appellant, and that, after accepting, exhibiting and paying for some of them, appellant breached or violated the contract by leasing to N. K. McGuggin of Paris, Arkansas, owner of the Joie Theater, the right and authority to exhibit the same photoplays or copyrighted motion picture productions in the town of Paris, and by way of cross-complaint alleged that they were damaged in the sum of $1,000. The allegations of the cross-complaint were denied by appellant.

The cause was submitted on the pleadings, testimony introduced by the respective parties and instructions of the court, which resulted in a verdict in favor of appellees in the original suit and against them in the cross-complaint. A consequent judgment was rendered that appellants take nothing on their suit, from which an appeal has been duly prosecuted to this court.

Before submitting the issues of the alleged breach of the contract by the respective parties to the jury for determination, the court found and adjudged that the "direction to the salesmen" which appeared at the foot of the contract was a part of the contract, and construed it to mean a rental of the exclusive right by appellant to appellees to exhibit said photoplays or copyrighted motion picture productions. Appellant objected, and excepted to the ruling of the court in this respect, and contends for a reversal of the judgment on account of such ruling. The directions to the salesmen appearing at the foot of the contract are as follows:

"Directions to salesmen: While you have every right to trade among prospective customers to obtain the best offer possible for your products, after you have selected a particular exhibitor whose offer you believe

to be the best obtainable and have taken a written application from such exhibitor, forward the application to the office of your exchange, and make no further effort to sell the same service to any other exhibitor until the application has been duly rejected, accepted or withdrawn, in accordance with its terms.''

The contract was a printed contract prepared by appellant, and must be construed most strongly against it. We think it a part of the contract, and that the purport and effect thereof was to rent or lease the exclusive right to the particular exhibitor selected to exhibit the photoplay or copyrighted motion picture productions. Its only purpose in being printed at the foot of the contract was to convey the impression to prospective customers that the particular one selected to exhibit the picture should have the exclusive right to do so. If such was not its purpose, the directions to salesmen could have been given privately, either in person or by letter.

The issue of whether the contract was breached and by whom was submitted to the jury under correct instructions, and, as there was a conflict in the evidence on the issue, appellants are bound by the verdict of the jury.

No error appearing, the judgment is affirmed.

MILNER *v.* STANDARD VENEER COMPANY.

Opinion delivered July 9, 1928.

M. P. Huddleston, for appellant.

Jeff Bratton, for appellee.

HUMPHREYS, J. This is an appeal from an instructed verdict and consequent judgment dismissing appellant's complaint for damages on account of an injury received while off-bearing veneering from a lathe, through the alleged negligence of appellee, his employer, in failing to exercise care to furnish appellant a safe place in which, and safe machinery with which, to work; and failing to warn him in such way that he might comprehend the latent dangers incident to the discharge of his duties.

The verdict was instructed upon the theory that the undisputed testimony reflected that appellee was not negligent in either respect. The only question therefore presented by the appeal is whether there is any substantial testimony in the record tending to prove the alleged grounds of negligence.

Appellant could neither read nor write, but was otherwise intelligent. He was seventeen years old at the time of the injury, and had been working for a year and six weeks in the capacity of off-bearing veneering from a lathe operated by cogs attached to an iron shaft with set-screws which passed through the shaft so as to hold the cogs in place. He had only worked steadily at this particular machine for about six weeks, but had worked at one of similar make for a year in Jonesboro.

The machine at which he was working when injured was known as the Coe lathe machine. The Coe lathe machine which was in use by appellee at its mill was standard machinery, without defects, and in use by many veneering mills. It had an iron hood entirely covering the cogs and set-screws, which were attached to the shaft, in every direction and downward one-half way of the shaft, or to the center thereof, so as to prevent contact with the cogs or set-screws from above or on the sides. The only way one could come in contact with or be injured by the cogs and set-screws was from underneath, or below the shaft. According to the testimony of witnesses experienced in the use of the machinery, the cogs and set-screws were sufficiently guarded by the iron hood to prevent any injury which could be reasonably anticipated by workmen engaged in off-bearing veneering from or in operating the lathe. The covered cogs and set-screws were eighteen inches from where appellant stood to take the veneering as it came from the lathe and remove same. The machinery was in operation, and, while waiting for the veneering to come out, appellant stepped back and leaned against the machinery in some way, so that his overalls were caught underneath the shaft and hood by the cogs and set-screws, pulling him backward and injuring his hip. The workman operating the machine ran and cut the overalls off the boy, thereby saving his life. Notices were posted all around in the mill not to lean against the machinery, but it was not shown that any one read the notice to appellant. Appellant and the boy working across the table in front of him testified that the foreman had never told them not to lean against the machinery and had not informed him that the cogs and set-screws were under the hood, and to keep away from them. Appellant also testified that he did not know that the cogs and set-screws were under the hood. The foreman testified that he had never warned appellant of the danger on account of the cogs and set-screws, but

claimed to have warned all of the employees generally not to lean against the machinery. This was denied by appellant.

The law imposes a duty upon masters to exercise reasonable care and diligence to provide their employees, adults and minors, with a safe place in which to work, and also to warn inexperienced minors, although intelligent, of dangers incident to the operation of machinery with which they are to work, which are known by the master, or which may reasonably be anticipated by him. A majority of the court is of opinion that appellee exercised ordinary care and diligence in furnishing appellant a safe place in which, and safe machinery with which, to work. The machinery was of standard make, and the cogs and set-screws were covered in every direction with an iron hood which came down to the center of the shaft. This furnished ample protection to employees against any dangers which might be reasonably anticipated. A majority of the court is also of opinion that, on account of the intelligence and experience of the appellant, no duty rested upon appellee to warn him against danger on account of the cogs and set-screws which it could not anticipate itself, on account of having sufficiently covered up the danger.

Mr. Justice MEHAFFY and the writer are of opinion that a latent or hidden danger existed in the operation of the machinery, which appellee should have anticipated and which appellant should have been made to comprehend by explanation and warning on account of his minority, his ignorance of the existence of the cogs and set-screws, and his limited experience.

No error appearing, the judgment is affirmed.

OATES *v.* HAYNIE.

Opinion delivered July 9, 1928.

W. R. Morrow and *H. B. Stubblefield,* for appellant.

Carmichael & Hendricks and *Taylor Roberts,* for appellee.

HUMPHREYS, J. Appellant, a taxpayer of Pulaski County, brought suit for himself and other taxpayers against appellee, sheriff and collector of said county, to require him to pay over to the county treasurer, on the first and fifteenth days of each month, and within two days thereafter, all funds in his hands belonging to said county, or to the public road funds or public school fund, or poll-tax fund, or any moneys collected by him and belonging to said county or any district in said county, in accordance with § 6 of act No. 163 of the Acts of the General Assembly for the State of Arkansas, Acts 1927, p. 580, alleging that said collector had failed and refused to pay over to the county treasurer the public funds collected by him, as provided in said act.

Appellee filed an answer, denying that he had failed to pay over to the county treasurer on the days required

all funds in his hands belonging to said county or to the other various public funds, but that his failure to do so was on account of it being a physical impossibility for him to make a complete settlement with the county treasurer and pay over to him all the funds to the credit of the various political subdivisions every two weeks and within two days thereafter; and alleging that the statute, so far as applicable to him, is arbitrary, unreasonable, unworkable and impossible to perform; also alleging that the proper credit of the funds received from the tax collectors involved intricate questions of accounting in bookkeeping, which make it impossible to comply literally with the statute at the times fixed; that the additional expense to the county required to ascertain the exact amount due each political subdivision would exceed by far the amount of interest that would be earned which the county would derive from the amounts if paid in promptly and at fixed times.

A demurrer was filed by appellant to the answer of appellee, which was overruled by the court, whereupon appellant refused to amend his complaint, and elected to stand on his demurrer. The court then dismissed appellant's complaint for the want of equity, from which is this appeal.

It will be observed that there is nothing in the pleadings alleging the exact manner in which settlements and payments had been made. The clear inference is that settlements and payments had been made, but not in literal compliance with the requirements of the statute. Appellant construes the statute to mean that the settlements must be complete, reflecting the exact amount due each political subdivision, and that payments must be made of the full amount due each political subdivision at the times stated, and bases his contention for a reversal of the judgment on such construction of the statute. Appellee argues that, if appellant's construction of the statute is correct, then the statute, as applicable to him, is arbitrary, unreasonable, unworkable, and impossible to perform.

We do not agree with the construction placed upon the statute by appellant. The purpose of the statute was to require the collectors of the various counties in the State to make early settlement with the respective county treasurers, so the treasurers, in turn, could deposit the various taxes in the county's depositories, in order that interest might be obtained on the various county funds. Section 6 of the act does not require that complete settlements be made before the money shall be paid over by the collector to the treasurer. It requires that all funds due the respective political subdivisions shall be paid over by the collector, at stated times, to the treasurer. If the statute required that full, complete and final settlement should be made between the collector and treasurer as often as the statute requires, it would perhaps be unworkable in counties where very large amounts were being continuously collected for each political subdivision. It would be entirely practical for the collector to approximately estimate the amount he collected and had in his hands for each political subdivision twice a month, or once a month when he was actually engaged in a canvass over the county in the collection of the funds. The statute does not mean that the amounts due each political subdivision shall be paid until there is a complete settlement between the collector and treasurer showing the exact amount due each political subdivision. As stated above, the statute does not refer to settlements at all. Pending these settlements, it would be entirely feasible and practicable for the collector to pay over approximately the amount due each, based upon estimates. The section of the statute involved reads as follows:

"The county and probate clerk, circuit clerk, sheriff and collector of each county in the State of Arkansas are hereby required to pay over to the county treasurer of each county, on the first and fifteenth days of each month and within two days thereafter, all funds in each of their hands belonging to said county, or to the public road fund, or public school fund, or poll-tax fund, or any moneys collected by them and belonging to said county or

any district in said county, that by law is required to be paid in the county treasury, whether taxes, fines or any moneys that are collected for any purpose by law and belonging to said county; provided, that the sheriff or collector of said county, when on his annual canvass over said county for the purpose of collecting taxes, may pay into the treasury of his county only on the first day of each month, or within two days thereafter, all county, school, road tax, or other funds belonging to said county or any district thereof, until said canvass shall have been completed."

Since the pleadings do not reflect any intentional or willful failure or neglect to pay over the funds as far as practicable, at the times specified in the statute, we think it was entirely proper for the court to dismiss the complaint for the want of equity. We think it fairly inferable from the pleadings that the collector has been paying funds over as rapidly as practicable under all the circumstances, and, if he has been doing so, there is no just complaint, and could be none on the part of the taxpayers.

No error appearing, the decree is affirmed.

MOORE *v.* ROGERS WHOLESALE GROCERY COMPANY.

Opinion delivered July 9, 1928.

J. W. Grabiel and *John Mayes*, for appellant.

Blansett & Combs, John W. Nance and *Daily & Woods,* for appellees.

KIRBY, J. Appellees brought separate actions against appellant, M. W. Moore, J. L. Moore and the Fayetteville Grocery Company, alleging that the Moores were engaged in the retail grocery business in Fayetteville, under the name and style of Fayetteville Grocery Company, but that appellant, M. W. Moore, was the sole owner of said business. The suits were based upon open accounts for goods and merchandise sold and delivered to the Fayetteville Grocery Company, the account of the Rogers Company being $1,978.27, that of the Ozark Company $1,019.44, that of the Reynolds-Davis Company $310.64, and that of W. J. Echols & Company $744.63. On a consolidated trial of said cases the jury found for the respective appellees in the following sums: $842.70; $434.27; $132.32, and $317.19. Thereupon the appellees filed a motion for judgment in the amounts claimed, notwithstanding the verdict, which the court sustained, and entered judgment for each of the appellees in the respective sums hereinbefore stated, constituting the amount of their verified, itemized statements of account.

Appellant filed separate identical answers to each complaint as follows: "This answering defendant denies that the plaintiff, at any time or on any occasion,

sold and delivered to him any goods, wares or merchandise for which it has not been paid; denies that he is indebted to the plaintiff upon the account stated in the sum of $1,978.27 (in the case of Rogers Company) or for any other sum; denies that this answering defendant is indebted to said plaintiffs in any amount for any cause whatever, either for principal or for interest, and therefore prays that the plaintiff may take no judgment against him," etc.

As heretofore stated, all the cases were consolidated for trial, over appellant's objection. His defense to each of the actions was the same, that he was not interested in the Fayetteville Grocery Company, was not the owner thereof, and could not be held for its accounts.

It is first contended for a reversal of the case that the court erred in consolidating these cases for purposes of trial. There was no error in this regard. This procedure was authorized by § 1081, C. & M. Digest, and by many decisions of this court cited in the Digest under the above section. The court specifically instructed the jury that each appellee would have to make out its own case, and, in effect, told them that they could not find for one appellee merely because one or more of the other appellees might, in their judgment, be entitled to a verdict. If appellant had desired any additional instructions more specifically telling the jury that it could not consider the testimony of one appellee in reaching a verdict in the other cases, he should have done so.

It is next insisted that the court erred in giving certain instructions, and in refusing certain others requested by appellant, for the reason that there is no allegation in the several complaints that appellant held himself out to be, or represented himself to be, the owner of the Fayetteville Grocery Company, or that he was estopped by reason of any statement or act on his part from denying his ownership. We think appellant is wrong in this contention. These suits were brought against him as the owner of this store. Under such

allegation, they would be permitted to prove any fact tending to show ownership on his denial thereof. He did deny ownership, and they thereupon were permitted to prove a lot of facts and circumstances tending to show that he held himself out as such owner. The question which was submitted to the jury was whether appellant was the owner of this store, or had so conducted himself or held himself out to others as to lead them to believe he was the owner, and, upon such belief, they extended credit to them. In *Herman Kahn* v. *Bowden,* 80 Ark. 23, on page 30, 96 S. W. 126, Ann. Cas. 132, it is said:

"A person who holds himself out as a partner of a firm is estopped to deny such representation not only as to those to whom the representation was directly made, but as to all others who had knowledge of such holding out and, in reliance thereon, sold goods to the firm, provided they exercised due diligence in ascertaining the facts. The cases go even further, and hold that, if one have knowledge that he is being held out to the world as a partner and fails to contradict the report, he may become liable to those crediting the firm on that account. *Campbell* v. *Hastings,* 29 Ark. 513; *Fletcher* v. *Pullen,* 70 Md. 205, 16 A. 887, 14 Am. St. Rep. 355. It follows therefore, for much stronger reasons, that, if the party himself puts out the report that he is a partner, he will be liable to all those selling goods to the firm on the faith and credit of such report."

It was not necessary therefore for appellees to allege in their complaints that appellant held himself out or represented himself to be the owner of the store.

Complaint is also made of error in the admission of testimony with reference to the respective accounts of Reynolds-Davis Co. and the Echols Company. Appellant did not question the correctness of the accounts filed with the complaints. They were itemized and sworn to. He therefore could not have been prejudiced by this testimony.

Complaint is also made of certain other witnesses who testified regarding their knowledge and informa-

tion concerning appellant's ownership of this store. This testimony was competent, and properly admitted.

It is finally insisted that the court erred in granting the motion of appellees for judgment notwithstanding the verdict. In this respect we think appellant is correct, and in this regard this case is ruled by the recent case of *Fulbright* v. *Phipps,* 176 Ark. 356, 3 S. W. (2d.) 49.

If therefore appellees will enter a remittitur within fifteen days down to the amount found due them respectively by the jury, the case will be affirmed, otherwise it is reversed, and remanded for a new trial.

LASATER *v.* WESTERN CLAY DRAINAGE DISTRICT.

Opinion delivered July 9, 1928.

Oliver & Oliver, for appellant.

D. Hopson and *Charles D. Frierson*, for appellee.

KIRBY, J., (after stating the facts). It is insisted by appellants that the clause in the contract providing for the payment of $10 per day for all the time required for the completion of the contract after the expiration of the three years allowed therefor is a provision for a penalty, and not for liquidated or stipulated damages, and this contention must be sustained. In determining this question, the intention of the parties to the contract is controlling. In 17 C. J. 935, § 34, it is said: "As a broad general rule, the intention of the parties will control as to whether a provision in a contract is for a penalty or for liquidated damages." The primary rule in the construction of contracts requires the court to ascertain and give effect, where possible, to the mutual intention of the parties. 13 C. J. 521, § 484; *Roach* v. *St. Francis Levee Dist.*, 168 Ark. 364, 269 S. W. 986; *English* v. *Shelby*, 116 Ark. 212, 172 S. W. 817; *Life Assn.* v. *Minehart*, 72 Ark. 631, 83 S. W. 323.

Here, in the first section of the contract, it is required that the work shall be done "under penalty expressed in a bond bearing even date with these presents and hereto attached." The bond itself provides it is given "in the penal sum of $25,000," and is conditioned that the contractor shall carry out the contract and perform all covenants contained therein, and "shall indem-

nify and save harmless the said Western Clay Drainage District from and against *all damages* which it may sustain by reason of liens for labor or materials, etc.; * * * and if the said Clay County Dredge Company shall pay to the said Western Clay Drainage District all sums of money, damages or cost and expenses which it may be compelled to pay or which it may sustain by reason of the failure of the said dredge company to in every particular comply with and carry out each and every covenant and agreement contained in said contract, * * * and if the said Clay County Dredge Company shall pay all laborers, mechanics, materialmen, and persons who may have supplied provisions, goods or material of any kind, all just debts due said persons, or to any person to whom any part of such work may have been let by the said Clay County Dredge Company, then this obligation shall be null and void, otherwise to remain in full force and effect." The bond provides for the payment of all damages the district could suffer or sustain from a breach of the contract by Brown, and for failure in every particular to carry out each and every covenant and agreement.

From a proper construction of the contract and bond, which must be read together, it appears that provision is made and the bond answerable for all actual compensatory damages that could result to the drainage district from the failure of the contractor to carry out his contract or complete the work in accordance with its terms. The directors themselves, on June 3, 1918, by resolution recited that the contract and bond provided that the contractor shall pay "a penalty of $10 per day" from the date set for the completion of the work until such work is completed and accepted by the engineer. The resolution required the contractor and his bondsmen to be notified by letter from the secretary "that the penalty provided for will be exacted," and that, if the contractor can show any cause "why said penalty should not be exacted," the board would hear

him, etc. On October 9, 1918, another resolution was passed, reciting that the property holders were being damaged by delay, and, unless the contractor proceeded, the contract would be relet, and "the district would hold him and his bondsmen for all damages, * * * and ask the penalties therein provided for in your contract, and any action taken by the board shall not be construed as relieving you and your bondsmen of the penalties provided for in your contract for the completion of the work." On May 29, 1917, a resolution was passed by the board, reciting that two-thirds of the time for the completion of the work had expired and it was not one-half done, and requiring that Brown be notified "that, if said work is not completed within the time provided in the contract, the *penalty therein provided, of $10 per day*, will be exacted."

It thus appears that the appellees, by the nomination of this $10 per day provision in the contract as a penalty, and by their construction of the contract and bond expressed in formal resolutions of the board, designating it as a penalty, have given the contract a practical construction, which is entitled to great weight in determining its proper construction. Then, too, it may be inferred that the contract and bond were prepared by appellee's engineer and approved by its directors, and any doubt about its meaning is to be resolved against the party preparing it. 13 C. J. 546, § 517; *Gauss* v. *Orr*, 46 Ark. 129; *Kahn* v. *Metz*, 88 Ark. 363, 114 S. W. 911; *Edgar Lumber Co.* v. *Cornie Stave Co.*, 95 Ark. 449, 130 S. W. 452; *Haynes* v. *Masonic Benefit Co.*, 98 Ark. 421, 130 S. W. 452; *Koepple* v. *Nat. Wagon Stock Co.*, 104 Ark. 466, 149 S. W. 75; *Humphreys* v. *Ft. Smith, etc. Co.*, 71 Ark. 152, 71 S. W. 662; *Watkins Med. Co.* v. *Williams*, 124 Ark. 539, 187 S. W. 653; *Arlington Hotel Co.* v. *Rector*, 124 Ark. 90, 186 S. W. 622; *Hastings Ind. Co.* v. *Copeland*, 114 Ark. 415, 169 S. W. 1185; *Clark* v. *Watkins Med. Co.*, 115 Ark. 166, 171 S. W. 136; *Ford* v. *Fix*, 112 Ark. 1, 164 S. W. 726.

The court is of opinion that, when the contract is tested by these rules, the provision therein for the payment of the $10 per day for each day's delay in the completion of the work after the date fixed therefor was intended as a penalty, in effect a security for its performance, and must be treated as such, and not as a provision for liquidated damages, as erroneously held by the trial court. Since there was no proof of actual damages sustained by the district because of the delay in the completion of the improvement after the term allowed therefor, no deduction should have been made from the amount shown and conceded to be due the contractor for the work done in its construction. It was conceded that the appellants were entitled to recover for the right-of-way cleared and afterwards abandoned, as found by the special master, the sum of $350, with 6 per cent. interest from January 1, 1917, and that the correct amount of the retained percentage was $12,244.62, which appellants were entitled to recover, with 6 per cent. interest from January 1, 1924, unless the appellee was entitled to recover an amount on its cross-complaint, to be deducted therefrom. Since the appellant was entitled to recover the amounts indicated, and appellee was not entitled to a recovery on its cross-complaint of any amount, the court should not have required appellant to pay any of the costs of the suit.

The decree will be reversed, and the cause will be remanded with directions to enter a decree for appellant for the said amount of the retained percentage, and the amount conceded to be due for clearing the right-of-way not used, and for costs, and all necessary further proceedings in accordance with the principles of equity and not inconsistent with this opinion. It is so ordered.

HOME BUILDING & SAVINGS ASSOCIATION *v.* REDDING.

Opinion delivered July 9, 1928.

John D. Arbuckle, for appellant.

Frank S. Quinn and *Elmer L. Lincoln*, for appellee.

KIRBY, J., (after stating the facts). The Citizens' Association on its cross-appeal insists that the court erred in using the legal rate of 6 per cent. interest instead of the contract rate of 10 per cent. interest in determining the amount due it under its mortgage, and the contention must be sustained. In *Gate City B. & L. Assn.* v. *Frisby, ante,* p. 252, the court laid down the rule for determining the present value of anticipated payments in the foreclosure of a mortgage given by borrowers of building and loan associations, holding that the contract rate of interest should govern in estimating the present

value of the principal and unmatured installments, and this case is ruled by the decision therein. The decree on the cross-appeal must be reversed, and remanded with directions to determine the amount due by calculation of the present value of the principal notes and unmatured installments at the contract rate of 10 per cent. interest and for a foreclosure and sale of the property to satisfy the judgment.

Appellant insists that the court erred in refusing to grant a rescission of the contract of sale or exchange of property to the plaintiffs and also in refusing to decree a lien in appellant's favor upon the Webber Place Addition property, which was conveyed to Dewberry in the sale or trade with Redding, and upon the balance of the notes given by Redding for the purchase money.

In answer to the first contention, it will suffice to say that no appeal was taken by the Reddings from the decree refusing to grant them a rescission of the contract of exchange of the properties, and we cannot agree with appellant in its second contention that the court erred in not decreeing its claim a lien upon the Webber Place Addition property, which Dewberry received in the exchange from Mr. Redding, and upon the balance due on the purchase money notes given in such exchange.

Appellant does not allege that it paid any debt or discharged any obligation of Dewberry's, and rests its claim entirely upon the mortgage for relief, and insists upon a foreclosure thereof, and has no right to subrogation. 25 R. C. L., § 1, p. 1312. The proceeding upon appellant's part was for a foreclosure of its mortgage, and there was no allegation of any fraud perpetrated by Dewberry in procuring the loan that entitled appellant to the relief it insists upon here. *Alberson* v. *Klanke, ante,* p. 288.

There was no evidence whatever tending to show that the money procured from the appellant association by Dewberry had been used in the purchase of either of the pieces of property included in the trade or exchange, nor that any beneficial interest therein was

obtained by Dewberry through fraud practiced upon appellant company, nor, as already said, was there any allegation of any such fact, and the court did not err in refusing to fix a lien under appellant's mortgage against the property conveyed by the Reddings to Dewberry in exchange for the Witherspoon Addition property. No constructive trust, that could be enforced, arose by operation of law from this transaction in favor of appellant entitling it to subject the exchanged property to the payment of its claim under the mortgage, and the decree dismissing appellant's complaint for want of equity must be affirmed. It is so ordered.

JOHNSON COUNTY *v.* HARTMAN.

Opinion delivered July 9, 1928.

W. J. Morrow, for appellant.

J. J. Montgomery, for appellee.

MEHAFFY, J. The appellees brought separate suits in the Johnson Chancery Court for an injunction against Fred Russell, as sheriff of Johnson County, Arkansas, to prevent him from paying to the appellant, Johnson

County, any of the three-mill road tax and the $3 per capita road tax collected by said sheriff in the respective towns and city of Clarksville, and asked that the sheriff be required to pay to each of the appellees the amount of all road taxes collected in the corporate limits, less his commission.

The appellant, Johnson County, filed an intervention and a demurrer in each of the suits. The cases were consolidated, and one decree rendered. The court overruled the demurrers, and entered a decree dismissing the intervention for want of equity, and enjoined the sheriff from paying the road tax fund or any part thereof collected in said city and towns to Johnson County, and ordered and directed him to pay to the treasurer of Hartman $315.51, to the treasurer of Lamar $378.80, to the treasurer of Coal Hill $449.16, and to the city of Clarksville, a city of the second class, $2,204.34.

The appellant contends that act 219 of the Special Acts of the Legislature of 1921 was repealed by act 81 of the Acts of 1927. Act 219 of 1921 is "An act to grant to cities and incorporated towns in Johnson County the per capita and road tax collected within such cities and incorporated towns"; and act 81 of 1927 is "An act to appropriate 50 per cent. of the road tax collected on real and personal properties situated in the cities of the second class for improvement of the streets in such cities."

Section 1 of act 81 of 1927 reads as follows:

"That 50 per cent. of all the road tax collected by the tax collector in any county in this State, by reason of the three-mill road tax now levied by law on all property, both real and personal, situated in the corporate limits of every city of the second class in such counties, shall be by the collector paid over to the treasurer of every such city of the second class affected, and placed to the credit of the street funds of such cities of the second class, to be used exclusively in improving the streets thereof."

It will be observed that act 81 does not make any provision for appropriating the per capita tax in any county and does not make any provision for the appropriation of the road tax except in cities of the second class. It has no reference to incorporated towns. Act 81 of 1927 does not therefore repeal act 219 of the Acts of 1921 as to the per capita tax in cities of the second class, but does repeal act 219 as to the road tax collected in cities of the second class in Johnson County. Act 81 of 1927 does not repeal act 219 of 1921 as to the incorporated towns. Appellees insist, however, that § 3 of act 81 makes it plain that the Legislature did not intend to repeal any special law then in force governing the division of the road tax in towns and cities. Said section reads 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"; but act 219 does not govern the division of road taxes in any sense. It specially provides that all of the road tax collected in cities and towns shall be expended in the city and town, and act 81 is a general act applying to every city of the second class in every county in the State. It covers the entire subject of road tax in cities of the second class, but it does not make any provision for the per capita tax nor any provision for any tax except in cities of the second class.

It is insisted that the repeal of statutes by implication is not favored in law, and courts will not hold to a repeal if they can find reasonable grounds to hold to the contrary. Appellees earnestly insist that act 81 of 1927 does not repeal act 219 of 1921, and they call our attention to numerous authorities supporting the contention that repeals by implication are not favored. We think, however, this question was settled in the case of *State* v. *White,* 170 Ark. 880, 281 S. W. 678, where the court said:

"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 two statutes, and also where 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 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; *Conway* v. *Summers,* 176 Ark. 796, 4 S. W. (2d.) 19.

There is certainly irreconcilable repugnance between act 81 of 1927 and act 219 of 1921 as to the road tax in cities of the second class, and therefore the later law repeals the former. It is also true that the Legislature took up the whole subject of road tax in cities of the second class in every county of Arkansas, and it evidently intended act 81 of 1927 as a substitute, so far as the road tax in cities of the second class is concerned. This court has said that this may be done, although there may be

in the old law provisions not embraced in the new. In this case there is a provision in the old law as to incorporated towns and also a provision as to the per capita tax, and neither of these provisions is in the new law, but the new law does cover the whole subject of road tax in cities of the second class. There is no repeal of the 1921 law as applied to incorporated towns.

The decree of the chancellor will therefore be affirmed as to the town of Hartman, the town of Lamar and the town of Coal Hill, and will be reversed and remanded as to the city of Clarksville, with directions to enter a decree requiring the payment of only one-half of the road tax collected within the city of Clarksville to said city.

PFEIFFER *v.* MISSOURI STATE LIFE INSURANCE COMPANY.

Opinion delivered July 9, 1928.

Morris & Barron, for appellant.

Allen May and *Rose, Hemingway, Cantrell & Loughborough*, for appellee.

MEHAFFY, J. Appellee and M. E. Singleton, trustee, filed suit in the Lonoke Chancery Court against appellant and others for $40,000. S. C. Pfeiffer and Angie M. Pfeiffer had executed promissory notes for the above amount, and, to secure the payment of said notes, the makers of said notes had executed a mortgage. Appellee asked judgment against S. C. Pfeiffer and Angie M. Pfeiffer in the sum of $39,056.13 and interest, and asked that said judgment be declared a first lien on the property described in the mortgage, and, if said judgment was not paid in a short time, to be fixed by the court, that the property be sold, etc.

S. C. Pfeiffer died before the trial, and the suit was revived against Will S. Pfeiffer, administrator. The administrator and Angie M. Pfeiffer sought to set-off against the mortgage debt the amount they alleged to be due the estate from the insurance company on a policy on the life of S. C. Pfeiffer, deceased. Angie M. Pfeiffer filed no separate answer. The trial court held that the policy had lapsed, and that there was therefore nothing due on the policy. Counsel for the insurance company prepared a decree of foreclosure, which contained a provision for personal judgment against Angie M. Pfeiffer, but this decree was not approved by the attorneys for Mrs. Pfeiffer, because it contained a provision for personal judgment against her. The attorney for Mrs. Pfeiffer wrote and mailed to the attorney for the insurance company the following letter:

"June 2, 1926.

"Hon. G. B. Rose, Attorney,
"Care of Rose, Hemingway, Cantrell & Loughborough,
"Little Rock, Arkansas.

"Re: Missouri State Life v. Pfeiffer.

"Dear Judge: I am returning precedent for the decree in the above entitled case unapproved, because it provides for a judgment against the administrator and Mrs. Angie M. Pfeiffer. The complaint, in my opinion, does not justify a judgment against the administrator, because it is not supported by the statutory affidavit.

"I did not think your client insisted on a judgment against Mrs. Pfeiffer. This question was not raised, but I took it as a matter of course, since your client paid her one insurance policy without mentioning her indebtedness to it, that no contention would be made for a judgment against her. I do not think there is any doubt but what she signed the mortgage and notes for the purpose of releasing her dower and homestead interest.

"Mrs. Pfeiffer has some little property, probably $3,000 or $4,000, which she received on insurance which Mr. Pfeiffer carried on his life. Your client could, if it desired, deprive her of what little her husband left her. However I am sure that neither you nor your client intended to take an advantage of her by providing for a judgment against her in the decree.

"If you will modify the precedent to the extent as suggested herein, I will approve it.

"Very truly yours,

"GEM:HN"

The attorney for Mrs. Pfeiffer received from the attorney for the insurance company, in reply, the following letter:

"Little Rock, Arkansas, June 7, 1926.

"Mr. Geo. E. Morris,
"England, Arkansas.

"Re: Missouri Life v. Pfeiffer.

"Dear sir: The plaintiff has consented to the change in the decree suggested by you. We inclose the original, prepared in St. Louis, with the alteration, and a clean copy of it, so that you may compare the two and find that it is correctly copied. Please O. K. the copy and return it to us, and we will get Judge White to order it to be entered.

"You can fix the time that is to elapse before advertising at any period not exceeding sixty days. We observe that it is 20 days in the decree, and you may want a longer time. Please insert the allowance in the blanks.

"Very truly yours,

"Rose, Hemingway & Loughborough,

"GBR:E G.B.R."

The complaint filed by the insurance company was made an exhibit to the testimony of G. E. Morris, attorney for Mrs. Pfeiffer, which showed that a personal judgment against Mrs. Pfeiffer was asked in the foreclosure suit. After the agreement of the attorneys, a decree was entered foreclosing the lien, and no judgment was entered against Mrs. Pfeiffer. An appeal was taken from that part of the decree disallowing a set-off against the mortgage debt of the amount alleged to be due on insurance policy. The opinion on this question is reported in 174 Ark. 783, 297 S. W. 847. Before the case was decided in this court, the land was sold under the decree of the chancery court, and the insurance company was required to pay the amount due on insurance policy to the administrator. The lands, having been sold, could not be returned.

In October, 1927, appellee and others filed in the chancery court a supplemental complaint, alleging a deficiency, the lands not having been sold for enough to pay the mortgage debt. They asked judgment against Mrs. Pfeiffer for the deficiency, $8,826.47, alleging that she signed the notes and mortgage and therefore became liable for the amount. The insurance company asked that her one-third of the insurance collected be applied to the payment of the indebtedness.

It is the contention of appellant that the matter sought to be litigated in this suit was litigated or could have been litigated in the former trial, and is therefore *res judicata*. The appellee, however, contends that our statute, § 6242 of Crawford & Moses' Digest, is purely permissive, and does not exclude the ancient practice of first selling the property and then asking for a deficiency judgment, and argues that the right to such a judgment has been upheld at least twice by this court, and cites the case of *Birnie* v. *Main,* 29 Ark. 591, and *Bank of Eudora* v. *Ross,* 168 Ark. 755, 271 S. W. 703. These cases hold that the mortgagee is entitled to have a personal judgment in the first instance. To the same effect is the holding in the case of *McCormick* v. *Daggett,* 162 Ark. 16, 257 S. W. 358.

Whether appellee was entitled to select either remedy or to choose which remedy it would adopt, is unimportant in this case. It did adopt the statutory method of procedure, and, having done this, it could have litigated the question of appellant's liability in that suit, if in fact it did not do so. The complaint in the original suit asked for a personal judgment against appellant. It was, under the pleadings, entitled to a personal judgment against her. Her attorney refused to agree to the decree for a judgment against her, and appellee's attorney thereupon agreed to take a decree of foreclosure without taking any personal judgment against appellant. The letters of attorneys, set out above, do not indicate an agreement merely to postpone taking judgment against her, but they indicate an agreement to waive the right to judgment against her. The appellant would not agree to a judgment against herself. What steps she would have taken or what course she would have pursued if the agreement had not been made, is not disclosed. She might have resisted the foreclosure, or she might have appealed, or she might have procured bidders for the property at the foreclosure sale in order to protect herself. At any rate, it was an agreement the parties had a right to make. *Birnie* v. *Main,* 29 Ark. 591.

"By agreement of the parties, a foreclosure may amount to a full satisfaction of the mortgage debt, without regard to the value of the property. In a suit to cancel a judgment rendered for the balance of a debt after foreclosure of a mortgage, the mortgagor alleged an agreement that he should turn over the land to the mortgagee in full payment, but that, being unable to make a good title because of pending suits against him, an amicable foreclosure was had, and the judgment for the excess was left unsatisfied, by neglect or oversight. It was held that, the evidence being doubtful on this point, the fact that no attempt to enforce the judgment was made for seventeen years would turn the scale in the mortgagor's favor. The agreement to give up without contest all the land covered by the mortgage, in satisfac-

tion of the debt, was a good and sufficient consideration for the agreement to release the mortgagor from personal liability." Jones on Mortgages, vol. 2 (Eighth edition), § 1214; *United States Savings Bank* v. *Pittman,* 80 Fla. 423, 86 So. 567, 19 R. C. L. 669; *Cooper* v. *Phillips,* 157 Ark. 525, 249 S. W. 12.

We think the agreement between the parties constituted a waiver of the right to a personal judgment against Mrs. Pfeiffer. Appellee was entitled to have the question of personal liability of Mrs. Pfeiffer settled in the original suit, and, if it were not settled by the agreement, it was an issue in the case, and could have been settled, and it is therefore *res judicata. McDaniel* v. *Richards,* 141 Ark. 453, 217 S. W. 478; *Gaither* v. *Campbell,* 94 Ark. 529, 126 S. W. 1061; *Taylor* v. *Taylor,* 153 Ark. 206, 240 S. W. 6.

The conclusion we have reached makes it unnecessary to discuss the other question discussed by counsel.

The decree on cross-appeal will be affirmed, and the decree on appeal will be reversed, and the case remanded with directions to dismiss. It is so ordered.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY *v.* OZARK WHITE LIME COMPANY.

Opinion delivered July 9, 1928.

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

Pearson & Pearson, for appellee.

McHaney, J. Appellee shipped a carload of lime from its kilns at Johnson, Arkansas, consigned to the Spurrier Lumber Company, Okmulgee, Oklahoma, over appellant's line of railroad, on or about the 11th day of April, 1927, of the value of $321, for which bill of lading was issued. Appellant accepted said shipment, and undertook to deliver the same to the consignee. Said car of lime was taken to the town of McBride, Oklahoma, where it was placed upon a sidetrack about three feet lower than the main line, and where it remained until it was destroyed, on or about the 18th day of April, 1927, by coming in contact with the flood waters from Grand River, near said town, and was burned. It was delayed at McBride, in the first instance, on account of a landslide which covered the tracks west of McBride, so that the train could not proceed.

On account of the excessive rains falling in the month of April of that year, and general flood conditions, the Arkansas River and this particular stream were very high, and the backwaters therefrom flooded the tracks near McBride. On the day this car of lime was

destroyed, appellant had an engine available to move this car off the sidetrack to the higher ground of the main line, but did not do so. This engine was used to go west across the flooded area and remove some cars from a spur-track that was about to be flooded, but did not move the car of lime. Appellee brought this action to recover the value of the lime destroyed, and recovered a judgment therefor in the sum of $321.

The first assignment of error urged for our consideration is that appellee failed to establish actionable negligence, that appellant was not negligent in any particular, but, on the contrary, the proof showed that the proximate cause of the loss was an act of God. It is true that it is an elementary rule that a carrier is not liable for loss caused solely by the act of God. It is also true that a flood, unprecedented, as this was shown to be, constitutes an act of God. As said by this court in *St. L. I. M. & S. R. Co.* v. *Wood*, 99 Ark. 363, 138 S. W. 461: "The undisputed evidence shows that appellant could not perform its contract to transport the cattle to Kansas City because of an act of God. The flood that washed away appellant's track was an act of God within the exception to the carrier's liability as an insurer of freight in his hands for transportation."

But, on the contrary, it is equally well settled and elementary that, in order for a carrier to be excused from its liability as an insurer by reason of destruction of the goods by an act of God, the act of God must be the sole and proximate cause of the injury. Where the damage is occasioned by the concurring force of the carrier's negligence, and from other causes for which the carrier is not responsible, including the act of God, the carrier is still liable in damages if its negligence is one of the proximate causes of the injury.

In *St. L. S. W. Ry. Co.* v. *Mackey,* 95 Ark. 297-301, 129 S. W. 78, it is said: "The act of God which excuses must be not only the proximate cause, but the sole cause. And where the act of God is the cause of the injury, but the act of the party so mingles with it as to be also an

efficient and cooperating cause, the party will still be responsible." *Johnson* v. *Mo. Pac. Rd. Co.,* 167 Ark. 660, 269 S. W. 67.

Bearing these rules in mind, we are of the opinion that the act of God was not the sole and only proximate cause of the destruction of this car of lime. Appellant placed it on the sidetrack, some three or four feet lower than its main line tracks, four or five days before it was destroyed. During all this time rains were falling and the flood was rising, gradually but continuously. There was no sudden and unexpected rise in the Grand River. The heavy rains had caused the landslide which obstructed the tracks, and, at the time the car was set on the sidetrack, the backwaters from Grand River were near the track, and continued gradually to rise until it covered the sidetrack to such a depth that it flooded the lime, thereby causing it to slack, heat, and be destroyed; and, even though the tracks at this point had never been flooded before, and that the high waters on this occasion were unprecedented, still it cannot be said as a matter of law that it was such a contingency that appellant could not have foreseen and anticipated, by the exercise of ordinary care, foresight and judgment.

As above stated, on the afternoon of the destruction of this car appellant had an engine present, and could have moved this car to higher ground, but neglected to do so.

In *Lamar Mfg. Co.* v. *St. L. S. F. R. Co.,* 117 Mo. App. 453, 93 S. W. 851, it is said:

"In the exercise of reasonable care, of which negligence is the antonym, human foresight and prudence cannot foresee and guard against the sudden, unheralded, and overwhelmingly powerful outbursts of natural forces, and because neither time, place, nor destructive power of such visitation may be anticipated, people cannot be expected to act with reference to them, and therefore negligence which, by chance, places person or property within destructive reach, should not be deemed a cooperative cause of injury. * * * But, when an extraordinary

natural disturbance gives warning of the time and path of its approach, and of its general magnitude and power, they (such as common carriers) whose business places them in charge of the safety of persons and of property of others, are charged with the duty of exercising care commensurate with the exigencies of the situation, to protect those whom they serve against injury from the approaching danger. A breach of such duty is negligence, and, if injury results, must be regarded as approximate, and not a remote cause of the injury."

We therefore hold against appellant on this contention.

The next assignment of error is that the title to the shipment had passed to the consignee, and that the consignor had no right of action against appellant for the loss of the goods. There is no evidnce in the record to justify this assignment. Appellee testified that he was the owner of the goods. It was not tried in the circuit court on this theory, and the question was not raised there. It is presented here for the first time. We have examined the evidence, and find it sufficient to show that the car of lime was the property of appellee.

It is next contended that the court erred in the giving and refusing to give certain instructions. We do not set them out here, as no useful purpose could be served thereby. We have examined the instructions given and those refused, and find that the court fully and fairly instructed the jury in accordance with the principles of law heretofore announced in this opinion.

It is finally insisted that the court erred in admitting the following testimony, over appellant's objection, by witness Gulley:

"Q. Mr. Gulley, a juror was asking a question awhile ago, Mr. Guinn, I believe, about, if this car had been on the main line, would it have burned, would the water have got to the lime? A. Right opposite where the car stood there at McBride? Q. Yes sir. A. No sir. Q. You say that it would not have? Go ahead now. A. The water would not have got to the lime in the car if it had

been on the main line opposite where it was sitting on the spur."

There was no error in admitting this testimony. Its purpose was to show that, by slight effort and diligence on its part, appellant could have moved the car from its sidetrack to its main line, just opposite where it stood, and have saved it from destruction. It was not the expression of a conclusion, but was a statement of a fact within the knowledge of the witness, to the effect that the high water did not get over the main line tracks at the point opposite to where the car was stored sufficiently high to have destroyed the lime.

We find no error, and the judgment is affirmed.

METCALF *v.* JELKS.

Opinion delivered July 9, 1928.

Ernest Neill, for appellant.

Coleman & Reeder, for appellee.

McHaney, J. Appellant, Charles D. Metcalf, was, until it closed its doors and was taken over for liquidation by the Bank Commissioner in May, 1927, cashier of the Union Bank & Trust Company of Batesville, Arkansas. He was indebted to the bank at that time in the sum of $3,050 in his own name and $3,000 in the name of his wife and son. He was also indebted to the appellees in the sum of $1,232, as security for which they held 40 shares of the capital stock of said bank. The bank held no security for its debts. The debt to appellees being due, they demanded payment or additional security, the security held by them being worthless after the failure of the said bank. They asked for a mortgage on a part of his home place, but he declined to give it to them, and told them he had promised to let the bank have that, if necessary. His home place consisted of valuable real estate and improvements in the city of Batesville, the extent thereof being in excess of the constitutional limit for an urban homestead, a strip of ground 66x92 feet in size being in excess of the one-quarter acre, together with the improvements, to which he was entitled as a homestead exempt from execution under the law. Not getting any satisfaction about the payment of their indebtedness or security therefor, they sued out a writ of attachment, and caused same to be levied on this strip of ground on the 21st day of June, 1927, and alleged as a ground therefor that said appellant had sold, conveyed and otherwise disposed of a material part of his

property, and was about to sell, convey and otherwise dispose of his property with the fraudulent intent to cheat, hinder and delay his creditors in the collection of their just debts and demands. The appellees later amended their affidavit for attachment by stating that, since the issuance thereof, appellant Metcalf had executed and delivered a certain deed of trust, which constituted a conveyance or disposition of his property in fraud of creditors, and in law constituted a sale, conveyance or disposition of his property with the fraudulent intent to cheat, hinder and delay his creditors in the collection of their just debts and demands.

On July 20, 1927, appellant Metcalf and his wife executed a deed of trust covering the entire home place, including the strip of ground attached by appellees, to the Bank Commissioner to secure the indebtedness to the Union Bank & Trust Company above mentioned, in the sum of $6,050. Thereafter, in July, 1927, the Bank Commissioner sold and assigned all the assets of the Union Bank & Trust Company to appellant, North Arkansas Bank, including the notes and deed of trust of appellant Metcalf. Thereafter appellant North Arkansas Bank intervened in the attachment suit, setting up its mortgage and notes, in which it denied that Metcalf had sold, conveyed or otherwise disposed of his property, or a material portion thereof, or that he was about to do so, with the fraudulent intent to cheat, hinder and delay his creditors, and alleged that the attachment was wrongfully issued. Appellant Metcalf admitted the indebtedness to appellees, but denied that they had any ground of attachment. The case was tried to the court without a jury on the issues upon the attachment, and the court, after hearing the evidence, rendered judgment against Metcalf for the amount sued for, and sustained the attachment.

The only question necessary for our determination on this appeal is the correctness of the court's judgment in sustaining the attachment. The indebtedness was

admitted. It appears that all the property covered by the deed of trust now held by appellant North Arkansas Bank constituted the homestead of appellant Metcalf, with the exception of the strip of ground attached by appellee. It appears that appellant had no other property except his home place, a small sum of money coming to him from the sale of the water and light plant, and some worthless stock in the Union Bank & Trust Company. It further appears that appellant's homestead was worth approximately $12,000, and that he was indebted to the extent of $8,000 or $10,000. He was therefore insolvent, his homestead not being subject to execution and not being taken into consideration. Appellant North Arkansas Bank holds a valid mortgage on his homestead, which covers all improvements, which appears to be amply sufficient to cover his indebtedness to it. The court found that the attachment properly issued, and sustained it. If therefore there is any substantial evidence in the record to support the finding of the court that a ground for attachment existed, it is binding on this court on appeal.

In *Blass* v. *Lee,* 55 Ark. 329, 18 S. W. 186, Judge MANSFIELD, speaking for the court, said:

"The issue formed by the counter-affidavit of the defendant, denying the existence of the ground on which the attachment was obtained, presented for decision but one question, and that was whether the defendant, at the time the attachment issued, was 'about to sell, convey or otherwise dispose of her property with the fraudulent intent to cheat, hinder or delay' her creditors, as stated in the affidavit of the plaintiffs. In trying this issue, no declaration of law was made or refused, and the court is therefore presumed to have acted upon correct views of the legal principles applicable to the facts. The finding of the trial judge is as conclusive as if it were the verdict of a jury, and there is no such lack of evidence to support it as would justify us in setting it aside."

It is the proper practice for the court to determine this question, instead of submitting it to a jury. *Von Berg* v. *Goodman*, 85 Ark. 605, 109 S. W. 1006. However, no question is raised here regarding the failure of the court to submit the question to a jury. We are of the opinion that the court was justified in sustaining the attachment. Appellant Metcalf told the appellees he was under obligation to let the bank have his home place; that he would use the "water and light money" to pay other bills, and that they had their security, which consisted of the shares of stock in the defunct bank. He attempted to sell his home to the witness Hunter, and Metcalf himself admits that he was trying to sell it, but he says he was going to sell it for the purpose of paying his debts. It was amply sufficient to pay off all his debts.

"It is true," as is said in *Farris* v. *Gross*, 75 Ark. 391, 87 S. W. 633, 5 Ann. Cas. 616, "that the sale of property by an insolvent debtor in the usual course of trade is not ground for attachment; but when it can be shown that such sale was made for the fraudulent purpose of converting the property into money, so as to place it beyond the reach of creditors by execution or other process, it does constitute ground for attachment." And the latter is true, even though made in the usual course of trade and business. But a sale of his homestead in this instance would not be in the usual course of business. Metcalf was not a dealer in real estate, nor was he engaged in the business of buying and selling real estate. The major part of the value of his home place was his homestead, and, if he desired to devote it to the payment of all his debts, he could have conveyed it to a trustee for the purpose of sale and paying his debts, for which it was amply sufficient. But, instead of doing this, he attempted to convey it to secure the bank alone, and at a time, too, after the attachment had issued and the lien thereof attached. The necessary effect of this deed of trust on his home place was to put beyond the reach of appellees a means of collecting their debt. A person is presumed to intend the necessary and natural consequences of his voluntary

act. Speaking of the question of intent, under the head of Attachment, 6 C. J. 58 lays down the rule as follows:

"The burden of showing a fraudulent intent upon the part of the debtor rests on the attaching creditor; but the question of when it was established, so as to justify the granting of a warrant or attachment, must depend largely upon the particular facts and circumstances of each case. It is not necessary that such intention should be positively proved, as it may be inferred from the acts and conduct of the party, by an application of the rule that a person is presumed to intend the necessary and natural consequences of his voluntary acts."

In *Winter* v. *Kirby,* 68 Ark. 471, 60 S. W. 34 this court said:

"The principle that every one is presumed to know the law may be a fiction only, but it is a fiction necessary to be kept up. Otherwise all government would be subverted in the futile efforts to execute its mandates. The kindred principle that every one is presumed to intend the consequences of his own acts is equally as important for its purposes."

Therefore when Metcalf executed the deed of trust on his property to the Bank Commissioner to secure his indebtedness to the Union Bank & Trust Company, he attempted to do an act that would necessarily hinder and delay appellees in the collection of their debt. True, the hindering of one's creditors from collecting their debts is not of itself sufficient to render the sale fraudulent, but only when accompanied by the intent to hinder and delay. And, while Metcalf testified that he had no intent to hinder and delay his creditors, he is presumed to intend the necessary consequences of his act, under the rule above announced.

Another rule established by this court is that the testimony of a party to an action, who is interested in the result, will not be regarded as undisputed in determining the legal sufficiency of the evidence. *K. C. S. R. Co.* v. *Cockrell,* 169 Ark. 698, 277 S. W. 7; *Gish* v. *Scantland,* 151 Ark. 594, 237 S. W. 98.

So, while Metcalf testified positively that he did not intend to hinder or delay his creditors, it cannot be taken as uncontradicted. When all the facts and circumstances in the case are considered, we cannot say that there was no substantial evidence on which the circuit court based its finding and judgment on the attachment.

Affirmed.

TROUT *v.* STATE.

Opinion delivered September 24, 1928.

W. L. Parker and *Duke Frederick,* for appellant.

H. W. Applegate, Attorney General, and *Walter L. Pope,* Assistant, for appellee.

HART, C. J. The principal ground relied upon by appellant for a reversal of the judgment is that the court erred in not sustaining a demurrer to the indictment. The indictment charges that the defendant "unlawfully and feloniously did make and manufacture, and was unlawfully and feloniously interested, directly or indirectly, in the making and manufacturing of ardent, vinous, malt, spirituous, alcoholic or fermented liquors, against the peace and dignity of the State of Arkansas." The court overruled the demurrer of appellant to the indictment.

The textwriters lay down the general rule that an indictment must not charge the accused disjunctively, so as to leave it uncertain what is relied on as the accusation against him. Hence it has been held that an indictment alleging the sale of "spirituous or intoxicating liquor" without license is bad for uncertainty, and insufficient to sustain a judgment. The general rule is that, where a statute makes it a crime to do any one of several things mentioned disjunctively, all of which are punished alike, the whole may be charged conjunctively as a single offense. Disjunctive allegations render a judgment of conviction invalid. The reason is that the accused is entitled to know certainly with what offense he is charged and to have the offense so charged that, upon acquittal or conviction, he may plead the same in bar of a subsequent prosecution for the same offense and establish his plea by the production of the former record. *Clifford* v. *State,* 29 Wis. 327; *Commonwealth* v. *Grey,* 2 Gray (Mass.) 501, 61 Am. Dec. 476; Joyce on Intoxicating Liquors, par. 646; Woollen and Thornton on Laws on Intoxicating Liquors, vol. 2, § 852; and 31 C. J. p. 663.

This court has recognized and approved the general rule. In *Thompson* v. *State,* 37 Ark. 408, the court held that an indictment charging that the "defendant did sell or give away whiskey under an act making it an offense to sell or give away whiskey," is bad for uncertainty; but that the charge that he "did sell and give away whiskey," is good. It also held that the charge that the defendant "sold whiskey or brandy" was bad, but that a charge that he "sold whiskey and brandy" was good.

Therefore the court erred in refusing to sustain the demurrer to the indictment. The Attorney General correctly confessed error on this branch of the case.

It is also earnestly insisted by counsel for the appellant that the evidence is not legally sufficient to support the verdict. In this connection we do not agree with counsel. A witness for the State testified that in

February, 1928, he saw appellant making intoxicating liquor at a still about three-fourths of a mile east of where he lived, in Polk County, Arkansas. It is true that the defendant denied owning or operating a still, and also introduced witnesses who testified that his own reputation was good, and that the reputation of the prosecuting witness for truth and morality was bad. The jury, however, was the judge of the credibility of the witnesses, and, under our settled rules of practice, we are not at liberty to set aside the verdict of a jury founded on evidence of a substantive character.

For the reason above given the judgment will be reversed, and the cause will be remanded with directions to sustain the demurrer to the indictment, and for further proceedings according to law.

KIRBY, J., dissents.

MCCAULEY *v.* STATE.

Opinion delivered September 24, 1928.

H. W. Applegate, Attorney General, and *Effie Combs,* Assistant, for appellee.

HART, C. J. The first assignment of error relied upon by appellant is that the court erred in refusing to excuse certain jurors for cause. We do not agree with counsel for appellant in this contention. One of the jurors in question was of the regular panel, and testified positively that, while he had heard that case discussed, the discussion was not by any person who purported to know the facts. He stated that he could disregard the opinion then formed by him and try the case solely on the law and testimony introduced at the trial. Another juror was asked if he was not a member of the chamber of commerce, the check of which the defendant was charged with raising. He answered that he did not remember whether he had a membership in his own name. He stated that, while he had read an account of the charge against the defendant in a newspaper, he did not remember anything about it, and could try the defendant solely upon the law and testimony introduced at the trial.

The testimony was legally sufficient to support the verdict. According to the evidence for the State, appellant was employed by the Pine Bluff Chamber of Commerce, and was given a check for $37.50, signed by the secretary and countersigned by the president of the organization, in payment of his salary for one-half of a month. Appellant raised this check to $75, and cashed it. Appellant admitted that he raised the check, but gave as an excuse for so doing that he was suddenly called away from town to the bedside of a sick relative, and that in the past the secretary of the chamber of commerce had made him a payment of his wages in advance. Hence we hold that this assignment of error was not well taken.

The next assignment of error is that the court erred in overruling a demurrer to the indictment. We do not deem it necessary to set out the indictment. In plain

and unmistakable language the indictment charges the appellant with the crime of forgery by raising a check given him for $37.50 by the Pine Bluff Chamber of Commerce, as a part of his salary for the month of July, 1927, to $75.

The most serious assignment of error relates to the admission of evidence. The court allowed testimony to go to the jury to the effect that, along about the same time of the transaction in question, the appellant had a shortage of $628.50 in the Pine Bluff Retail Credit Men's Association, and this shortage was due to the fact that appellant had raised checks given him by said association. There was no reversible error in the admission of this testimony. The defendant admitted raising the check in question, and sought to mitigate or excuse his action by showing that he did not intend to defraud the chamber of commerce. This court has held that evidence in a forgery case tending to prove that, about a month after the defendant cashed the check in controversy, he attempted to cash a second forged check, was competent as bearing on the question of motive or intent. *McCoy* v. *State,* 161 Ark. 658, 257 S. W. 386; and *Howard* v. *State,* 72 Ark. 586, 82 S. W. 196. As sustaining the same principle, see also *Hall* v. *State,* 161 Ark. 453, 257 S. W. 61; and *Bernhardt* v. *State,* 169 Ark. 567, 275 S. W. 909.

Therefore the judgment will be affirmed

BELL AND SWAIN *v.* STATE.

Opinion delivered September 24, 1928.

W. J. Lanier and *G. B. Knott*, for appellant.

H. W. Applegate, Attorney General, and *Walter L. Pope*, Assistant, for appellee.

HART, C. J. Robert Bell and Grady Swain were indicted, tried before a jury, and convicted of murder in the first degree. They were sentenced to death, and have duly prosecuted an appeal to this court.

Two assignments of error are pressed upon us for a reversal of the judgment. In the first place, it is earnestly insisted that the confessions introduced in evidence were obtained by the officers who had the defendants in charge by whipping them. In the second place, it is insisted that the evidence is not legally sufficient to warrant the verdict. In making this contention, counsel for the appellants urge upon us that there is no independent evidence to show that the crime of murder as charged in the indictment was committed by any one.

The indictment charged the defendants with murder in the first degree by drowning Julius McCollum in Cut-off Bayou, in St. Francis County, Arkansas. Julius

McCollum was a white boy, past eleven years of age, weighed about seventy-five pounds, and was strong for his age. He was drowned in Cutoff Bayou, in St. Francis County, Arkansas, late in the afternoon of December 29, 1927. Some days later the body of Elbert Thomas, colored, nineteen years of age, was found in the bayou near where the body of Julius McCollum had been recovered. Thomas was a one-eyed negro, and weighed about 180 pounds, and was strong and vigorous. The place where these bodies were found was about 200 yards from the front of a country store owned and operated by the father of Julius McCollum. On the afternoon in question, Robert Bell, a negro boy of medium stature and weight, eighteen years old, and Grady Swain, a negro boy fourteen years of age, and of medium stature, were at the store in question. Julius McCollum and Elbert Thomas were also there. When Julius failed to return home that evening, a search was made for him, and his body was found in the bayou about nine o'clock that evening, by his uncle. When Julius left home that morning he had on his leather boots. After he went to his father's store he pulled off his leather boots and put on some gum boots, which he was wearing when last seen that day. When his body was recovered he had no boots or socks on. Later the gum boots which he had been wearing were found in the bayou near where his body had been found. Later a pair of socks was also found in the bayou, which the mother of Julius McCollum said looked like the socks he was wearing on the day he was drowned. The body of Elbert Thomas was found eighteen or twenty feet out in the bayou, in deeper water than that in which the body of Julius McCollum was found. The body of Julius McCollum was found seven or eight feet below a boat, back of a stump, the bank sloped gradually, and the boat was untied. The boat was at the place where it usually was, at the end of a path leading from the store to the bayou. One end of the boat was not in the water. There was a seat in the end of the boat which was in the water, and

there was a big muddy track on the seat. The boat was wet all over, and had about six inches of water in it. There were no bruises or scratches on the bodies of either of the drowned boys. There was nothing in their appearance to indicate that there had been a struggle when they were drowned.

A witness for the State testified that, about nine-thirty o'clock on the night the boys were drowned, after the body of Julius McCollum had been recovered, Robert Bell told him that he had drowned Elbert Thomas and that Grady Swain had drowned Julius McCollum. Both boys were drowned at the same time. After Grady Swain and Robert Bell had been arrested and were in the custody of the officers, a confession was obtained from each of them. Evidence was adduced by the defendants tending to show that these confessions were obtained by severely whipping them. The officers admitted whipping the defendants, but denied that they did so to obtain the confessions. They claimed that they whipped them because they were impudent to them, and said that the confessions were free and voluntary. For the reason that we have reached the conclusion that the evidence is not legally sufficient to support the verdict, it will not be necessary to decide whether or not the confessions were extorted from the defendants by whipping them. In this connection, however, we again call attention to the fact that this court is committed to the rule that confessions used in evidence against defendants must be free and voluntary, and they must not be extorted from them by whipping them or by any inquisitorial method. *Greenwood* v. *State,* 107 Ark. 568, 156 S. W. 427; and *Dewein* v. *State,* 114 Ark. 472, 170 S. W. 582.

The reason we must decide whether the evidence is legally sufficient to support the verdict is that the record shows that Robert Bell voluntarily made a confession to a witness introduced by the State on the night of the day the boys were drowned, and before the defendants had been charged with drowning the boys. The confessions to the officers, which it is claimed were extorted

from the defendants, were made afterwards. This court has held that, where a confession was once voluntarily made, the fact that appellant afterwards repeated the confession under duress does not destroy or lessen the effect of the voluntary confession. *Lind* v. *State,* 137 Ark. 92, 207 S. W. 47.

This brings us to a consideration of the question of whether the evidence was legally sufficient to warrant a verdict of guilty. Counsel for appellants rely upon the well settled rule in this State that, under § 3182 of our statutes, to warrant a conviction upon a confession not made in open court there must be independent evidence to show that the offense was actually committed by some one. This court has uniformly held that, under our statute, to warrant a conviction from an extrajudicial confession of the accused, there must be independent evidence to establish that the crime has been actually perpetrated by some one. *Melton* v. *State,* 43 Ark. 367; *Greenwood* v. *State,* 107 Ark. 568, 156 S. W. 427; *Patterson* v. *State,* 140 Ark. 236, 215 S. W. 629; and *Standridge* v. *State,* 169 Ark. 294, 275 S. W. 336.

It is earnestly insisted by counsel for appellants that, outside of the confessions of appellants, which were not made in open court, there is no evidence sufficient to show that Julius McCollum and Elbert Thomas were drowned by any one. Appellants were witnesses in their own behalf, and denied their guilt. It is the theory of their counsel that the muddy track on the end of the boat was that of Elbert Thomas, and that he slipped and fell into the water, and that Julius McCollum jumped in the water to rescue him, and that they were drowned. Whether this theory is correct or not, after a careful consideration of all the testimony in the record, viewed in the light of the surrounding circumstances, we have reached the conclusion that, outside of the confessions of appellants, there is no evidence legally sufficient to show that Julius McCollum and Elbert Thomas were drowned by any one. Counsel for the State point to the fact that the boat was wet and that there was about

six inches of water in it at the time Julius McCollum's body was found on the night of the day he was drowned. His body was found about nine o'clock that night. The boat in question was used in going to and fro across the bayou, and there was a negro schoolhouse where school was in session at the time the drowning occurred. It may have been that the water was put in the boat by these negro children returning from school, while playing in the boat as they crossed the bayou. In any event, the fact that there was water in the boat and that one end of it rested on the bank is not sufficient to show that Julius McCollum and Elbert Thomas were drowned by any one. Another circumstance relied upon by the State to show that the boys were drowned by some one is that the rubber boots of Julius McCollum had been pulled off. In the first place, it may be said that, if the boys had been drowned by the defendants, or some one else, there would seem to have been no reason for the perpetrators of the crime to have pulled off the rubber boots of Julius McCollum. It may be that the little fellow jumped into the bayou in an effort to save Elbert Thomas from drowning, and kicked off his boots as he jumped in. At any rate, these circumstances are not in themselves sufficient to show that Julius McCollum and Elbert Thomas were drowned by any one. There were no marks of violence on the bodies of either Julius McCollum or Elbert Thomas when they were recovered, and nothing from their clothes or bodily appearance indicated that they had been in a struggle before their death. Elbert Thomas was much stouter than either of the boys charged with the commission of the crime. Julius McCollum was also a strong, active young boy. It is not likely that they could have been drowned by the defendants without some kind of a struggle. A careful review of all the testimony, in the light of the attendant circumstances, impels us to reach the conclusion that there was no independent evidence that any one drowned Julius McCollum and Elbert Thomas.

Hence, under the settled law of this State, the evidence was not legally sufficient to warrant a verdict of guilty. Therefore the judgment will be reversed, and the cause remanded for a new trial.

WRIGHT *v.* STATE.

Opinion delivered September 24, 1928.

Gravette & Alexander, for appellant.

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

KIRBY, J. This appeal is from a conviction for robbery by appellants of one H. G. Price, who operated a billiard hall and lunch room in the town of Manila.

It appears from the record that Price closed his place of business on the night of the robbery after 12 o'clock, and, when he arrived in front of his dwelling house and started to get out of his car, he was held up and robbed of $50 in bills and from $7 to $10 in change,

about 12:30 at night. There were two of the robbers, and he had previously seen the defendants, appellants, together in front of his place of business about an hour before the robbery, and he recognized and positively identified appellant Wright as the man who "held the gun on him" while he rifled his pockets, and said the other man was about the size of Jolliff. It was further stated that the defendants had admitted at the sheriff's office, while in jail, that they had done the job, and the testimony shows that they had been seen together by a number of persons on the night of the robbery. They relied for their defense upon an alibi.

It is insisted for reversal that the verdict is in conflict with the evidence, that the court erred in giving a particular clause of instruction No. 10, relative to the defense of alibi, over appellant's objection, and in not granting the motion for a new trial because of newly discovered evidence.

It is the province of the jury to pass upon the conflicts in and the weight of the testimony, and, the court having correctly instructed them on that point, and there being evidence to support the verdict, the fact that the testimony is conflicting and that the verdict may even appear to be contrary to the preponderane of the testimony, furnishes no ground for reversal. *Tiner* v. *State,* 109 Ark. 138, 158 S. W. 1087; *West* v. *State,* 150 Ark. 555, 234 S. W. 997; *Melton* v. *State,* 165 Ark. 448, 264 S. W. 965; *Evans* v. *State,* 165 Ark. 424, 264 S. W. 933; and *Hyde* v. *State,* 168 Ark. 580, 271 S. W. 330.

Neither was it an invasion of the province of the jury by the court, as claimed, in the giving in its instruction relating to the defense of an alibi, the following clause, objected to by the defendants:

"But the jury should scrutinize the testimony of the witnesses to see if some of them may not be mistaken as to dates and times when they saw the defendants, and it is proper for the jury to consider lapse of time since such occurrence happened, and whether the witnesses are likely, after such lapse of time, to be accurate

as to the precise time or hour that they saw the defendants on the night that the robbery occurred. In other words, in arriving at your conclusion on this point, the jury should consider whether it may not be true that the defendants were present at the time of the robbery, and that some of the witnesses are honestly mistaken as to the exact time they saw the defendants that night."

The instruction does not tell the jury that they should scrutinize the testimony of defendant's witnesses only, as claimed, and is not an incorrect declaration of the law relating to the defense of an alibi as has heretofore been held by this court. *Ware* v. *State,* 59 Ark. 379, 27 S. W. 485; *Reyburn* v. *State,* 69 Ark. 177, 63 S. W. 356.

No error was committed in refusing to grant the motion for a new trial because of newly discovered evidence. Appellants did not claim, at the time the certain witnesses were introduced, whose testimony they desire now to contradict by evidence alleged to be newly discovered, that they were surprised on account of their introduction, nor did they ask for any time to be granted them or a continuance of the cause for the purpose of rebutting the statements of these witnesses, and there was no sufficient showing of diligence used in procuring this testimony, and no good reason was shown for not producing at least one of the witnesses, who was known to the defendants to have been present at the time when the occurrence testified to by the certain witnesses took place. Then, too, its effect was for impeachment largely of the statements of other witnesses. *Newton* v. *State,* 37 Ark. 333; *Ward* v. *State,* 85 Ark. 179, 107 S. W. 677; *Ary* v. *State,* 104 Ark. 212, 148 S. W. 1032; *Osborn* v. *State,* 96 Ark. 400, 132 S. W. 210; and *Young* v. *State,* 99 Ark. 407, 138 S. W. 475.

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

BAKER *v.* STATE.

Opinion delivered September 24, 1928.

[redacted]

Duty & Duty, for appellant.

H. W. Applegate, Attorney General, and *Walter L. Pope,* Assistant, for appellee.

SMITH, J. Appellant was indicted and sentenced under a special plea entered by him for violating § 7437, C. & M. Digest. The indictment charged that appellant "did unlawfully and feloniously possess and have in his possession one Ford touring car, the motor and serial number of which had been mutilated to such an extent that same could not be read."

After a demurrer to this indictment had been filed by appellant and overruled by the court, appellant filed

a special written plea, which recited that appellant had in his possession a Ford touring car, with the motor number thereon mutilated to such an extent that same could not be read, but that he did not do so knowingly or willfully, and that he did not know that the motor number on said motor vehicle was mutilated.

The trial court construed this special plea to be a plea of guilty, and sentenced appellant to a year's imprisonment in the penitentiary. After filing a motion in arrest of the judgment, appellant, without filing a motion for a new trial, prepared and filed a bill of exceptions, and has duly prosecuted this appeal.

The relevant portions of § 7437, C. & M. Digest, under which appellant was sentenced, read as follows: "It shall be unlawful for any person * * * to have in its possession an automobile * * * the motor and serial number of which have been mutilated to the extent that same cannot be read * * *."

Section 7439, C. & M. Digest, provides that any person violating § 7437 shall be guilty of a felony and, upon conviction, be imprisoned in the State Penitentiary not less than one nor more than five years.

It is first insisted that § 7437, C. & M. Digest, is unconstitutional, if construed to apply to one having possession of an automobile the motor and serial number of which have been mutilated to the extent that the same cannot be read, without knowledge of that fact.

We have held against this contention in the cases of *Ogburn* v. *State,* 168 Ark. 396, 270 S. W. 945; and *Hall* v. *State,* 171 Ark. 787, 286 S. W. 1026. See also vol. 3 Cyclopedia of Automobile Law (Blashfield), page 2824, chapter "Changing, Concealing or Removal of Engine Numbers or Identification Marks," and cases cited in the notes to that text.

It is next insisted that appellant's plea was not a plea of guilty, for the reason that he did not admit that the serial number of the car had been mutilated so that it could not be read, but had admitted only that the motor number thereof had been so mutilated.

This contention requires us to determine whether it is essential that both the motor and serial number be mutilated, or whether a mutilation of either constitutes a violation of the statute.

Our own cases of *Ogburn* v. *State* and *Hall* v. *State, supra,* as well as cases from other jurisdictions construing similar statutes, have said that the purpose of legislation of this character is to prevent the defacing of distinguishing numbers which preserve the identity of motor vehicles. These numbers may be that of the motor, or of the car itself, and legislation in other States makes it unlawful to mutilate any trade-mark, distinguishing or identification number or serial mark or number; while our statute, so far as it is applicable to the facts of this case, makes unlawful the act of one who mutilates the "motor and serial number" so that the same cannot be read.

This statute must be strictly construed as against appellant and liberally in his favor, and, when so construed, we think the legislative intent was to impose the penalty of § 7439, C. & M. Digest, only on one who mutilated both the motor number and the serial number of a car, or possesses a car so mutilated. Either number, if unmutilated, would furnish the means of identification which the statute intended should be preserved.

Any other construction of the statute would require that the word "and" be read to mean "or," which would, of course, be a liberal construction of the statute against appellant, rather than a strict construction in his favor.

In the very recent case of *Beasley* v. *Parnell, ante,* p. 912, we had occasion to consider when and under what circumstances the words "and" and "or" should be construed as having been used interchangeably. It was there said:

"Counsel invoke the well known rule that 'or' may be construed to mean 'and,' or *vice versa,* in order to harmonize the provisions of a statute or to carry out the manifest intent of the Legislature. The court would not be justified in making the proposed substitution

unless the whole context of the statute requires, plainly and beyond question, that it be done in order to give effect to the intention of the Legislature. The reason is that, where words have a settled legal meaning, it is dangerous to conjecture that they were used in other than their legal signification." (Citing authorities).

We do not think that the word "and," as used in § 7437, C. & M. Digest, should be read as meaning "or," to carry out the manifest intent of the Legislature, which, as we have said, was to prevent the destruction of the means by which the identity of automobiles might be preserved, as this identity could be preserved as well by the motor number as by the serial number of the car.

We conclude therefore that appellant's plea was not a plea of guilty.

The Attorney General concurs in the construction of the statute which we have announced, but asserts that appellant is in no position to insist that his plea was not an unrestricted plea of guilty, for the reason that appellant did not file a motion for a new trial.

We think, however, that the error of the court in construing appellant's written plea, which was duly filed, as an unrestricted plea of guilty, is an error which is apparent from the face of the record, and in such cases a motion for a new trial is not necessary. *Burns* v. *Harrington,* 162 Ark. 162, 257 S. W. 729; *Anthony* v. *Sills,* 111 Ark. 468, 164 S. W. 117; *Ford* v. *State,* 100 Ark. 515, 140 S. W. 734; *Independence County* v. *Tomlinson,* 95 Ark. 565, 125 S. W. 423; *Hare* v. *Shaw,* 84 Ark. 32, 104 S. W. 931, 120 A. S. R. 17; *Badgett* v. *Jordan,* 32 Ark. 154.

The judgment of the court below must therefore be reversed and the cause remanded.

Similar records are presented in cases Nos. 3488, 3489, and 3490, and the judgments in those cases must also be reversed, and the causes remanded. It is so ordered.

CAZORT *v.* BAHNER.

Opinion delivered September 24, 1928.

[redacted]

J. C. & Wm. J. Clark, Frauenthal & Johnson and *Coulter & Coulter*, for appellant.

R. W. Robins, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the court erred in holding him not entitled to recover an interest in the profits derived from the sale of the leases taken in the name of appellee during his employment. Appellant knew, when the contract of employment was executed, the kind of business Bahner was engaged in and that he had been taking oil and gas leases in 1915 and 1916 in Faulkner County, and is now claiming an interest in leases on 3,000 acres of land taken by Bahner in 1916, before his employment.

The terms of the written contract, the only one made between the parties, are plain and unambiguous. It recites the business engaged in and being operated by Bahner, and that Cazort "has agreed and engaged to work for Bahner for the term beginning on the day of its execution (January 18, 1917) and ending on December 31, 1917, doing such work as is incident to the business of said Bahner & Company, and the com-

pensation of the said W. S. Cazort shall be forty-five per cent. of the net cash commissions of the said Bahner & Company," after deducting certain commissions and expenses for the operation of the abstract business and the loan and insurance agency, and "all the salaries of other employees of Bahner & Company, and after all other expenses of said business of Bahner & Company have been paid." It further provides that the contract may be terminated by either party upon giving 30 days' written notice, and, in the event of its termination, that the compensation paid Cazort "for the time he worked shall be forty-five per cent. of the net cash earnings of the above described business of Bahner & Company for the time the said W. S. Cazort has worked, first deducting the expenses as above set forth." In other words, the contract fixes the amount of compensation to be paid to Cazort specifically, the method for arriving at it, and provides upon its termination that he shall be paid the fixed per cent. of the net cash earnings of the business for the time he worked. It is certainly, as between the parties, no more than a contract of employment, providing for appellant's compensation or salary a certain fixed amount of the net profits of the business during the time of his employment, and did not create a partnership between them. He was, notwithstanding he participated in the profits by being paid his compensation therefrom, but an agent or employee of the appellee in the performance of the services for which he was employed. *Hazard* v. *Hazard,* 1 Story, 371; 22 A. & E. Enc. Law (2 ed.) p. 32; *Haycock* v. *Williams,* 54 Ark. 384, 16 S. W. 3; *Christian* v. *Crocker,* 25 Ark. 327; *Clark* v. *Emery,* 58 W. Va. 637, 52 S. E. 770, 5 L. R. A. (N. S.) 503.

It is not contended that appellant advanced any money for the procuring of the leases, nor that he was not paid in accordance with the terms of the contract all the compensation out of the profits of the business realized during the time of his employment and before he terminated the contract, as he had the right to do.

Neither is it contended that the leases were sold or disposed of before he terminated his contract of employment, and the undisputed testimony shows, in fact, that any money realized from the disposition of the leases long after he terminated his contract was made or realized without any service whatever rendered by him in connection therewith. No profit was derived from the disposition or assignment of the leases which appellant helped to procure during the time of his employment, the disposition thereof having been made long after the termination of his contract. Certainly he could be entitled to no compensation or division of any profits for the disposition of the Howard-Johnson leases, which he did not help to procure and which were not disposed of until long after his employment had been terminated. The testimony shows that he received as his compensation the stipulated percentage of the profits derived from the business during the time of his employment, including commissions on the sales of real estate, regardless of whether the lands were listed for sale before he was employed.

It follows that the court did not err in holding the plaintiff, appellant, not entitled to any interest in the money or profits derived from the sale of the leases made after appellant's contract of employment was ended. The decree is accordingly affirmed.

JOHNSON *v.* STATE.

Opinion delivered September 24, 1928.

C. T. Carpenter, for appellant.

H. W. Applegate, Attorney General, and *Effie Combs,* Assistant, for appellee.

KIRBY, J. Appellant prosecutes this appeal from a judgment of conviction for selling intoxicating liquors, and has abandoned all assignments of error save one—that the court erred in permitting the introduction of incompetent testimony.

Indictment was returned on the 29th day of November, 1927, and charged the sale to have been made on the 26th day of July, 1927.

Two witnesses testified that they purchased a pint of whiskey from appellant on the 26th day of July, and the sheriff was allowed to testify, over objections, that he had made a search of the defendant's premises since he was arrested for the sale of the whiskey, and found six pints of liquor and a number of large containers in his house, on September 17, 1927.

The court overruled the objection to the introduction of this testimony, stating: "The jury will determine whether it sheds light on the kind and character of business he was engaged in."

This testimony was admissible as tending to throw light upon the transaction and the kind and character of business that appellant was engaged in, and the court's statement that the jury would determine this matter was sufficient to prevent the jury's consideration of the testimony for any other purpose. Sections 3019 and 3013, par. 2, C. & M. Digest; *Casteel* v. *State,* 151 Ark. 69, 235 S. W. 386; *Tong* v. *State,* 169 Ark. 708, 276 S. W. 1004; *Lynn* v. *State,* 169 Ark. 680, 277 S. W. 19; *Taylor* v. *State,* 169 Ark. 589, 276 S. W. 577.

The testimony is sufficient to support the verdict, and the judgment is affirmed.

McCoy *v.* State.

Opinion delivered September 24, 1928.

I. J. Matheny and *Coleman & Reeder,* for appellant.

H. W. Applegate, Attorney General, and *Walter L. Pope,* Assistant, for appellee.

Mehaffy, J. Appellant was convicted of the crime of manufacturing liquor, and prosecutes this appeal to reverse the judgment of conviction.

Charles Houston, marshal of Batesville, and W. A. Landreth, a deputy sheriff, went to appellant's house to arrest some persons they thought were engaged in a crap game, but did not find any one shooting craps. While there, they looked through the house and found a twelve-gallon jar behind the stove, and looked into it and found what they thought was home-brew or something in the process of making.

Houston testified that appellant said: "If you had just waited a little while I would have had it bottled." He made no statement about who made it. They took the jar to the mayor's office, and kept it there a day or two and then poured it out. No one tasted it, and no one testified that it was intoxicating or that it contained alcohol. They thought from the smell it was intoxicating.

Landreth testified to substantially the same facts as Houston, except he thought appellant said he made it. This in the jar appeared to be the same as home brew that witness had seen. Landreth did not know whether it was intoxicating or not. It is true that Dr. Woodward said, on direct examination, that it was intoxicating, but he said he did not taste it and did not test it. He

said it smelled like home brew, and he judged it contained alcohol from its odor. He would not swear that it was intoxicating, but thought it was.

These officers took the home brew, or whatever it was, kept it a day or two, and could have tested it and determined whether it was home brew and whether it was intoxicating liquor, but they did not do this.

Appellant is charged with the manufacture of intoxicating liquor. The nearest approach to any testimony that the appellant manufactured it is the statement of Mr. Landreth, who said that he thought that the appellant said he made it, and Mr. Houston, who was present with Mr. Landreth, testified that appellant said nothing about who made it. Appellant did say, however, that they came too soon; if they had waited a little while he would have had it bottled. This is all the testimony there is in the record tending to show that appellant manufactured it. And, while this would probably be sufficient to submit to the jury the question of whether he did manufacture it, still we think the testimony is insufficient to show that it was the kind of liquor the manufacture of which is prohibited by the statute.

The statute prohibits the manufacturing of alcoholic, ardent, vinous, malt, fermented, spirituous and intoxicating liquors. All of these terms in the statute, alcohol, ardent, fermented, and spirituous, are used to designate the intoxicants the manufacture of which the statute prohibits. The term "liquor" used in the statute means intoxicating liquor. The evil sought to be remedied by the statute is the manufacture of intoxicating liquors, and the burden is on the State to show that the appellant manufactured the kind of liquor mentioned in the statute.

The Alabama court has said: "But, if it contains elements and ingredients in such proportion or in such form as to bring it within one of the general clauses named in the law, then it is prohibited; otherwise, not. In other words, the term 'alcoholic liquors,' as used in

the law, does not necessarily include every article or compound which contains alcohol. On the other hand, it does embrace all articles which contain alcohol or malt in such proportions or form or state, which are or may be used as an intoxicating beverage, no matter what it is called, or what else it contains, or for what other purpose it was intended or is used, or for which it may be used, and although the vendor or disposer did not know it contained such ingredients or could be so used as an intoxicating beverage, unless the law expressly so excepts such article or such disposition." *Marks* v. *State,* 159 Ala. 71, 48 Sou. 864, 133 A. S. R. 20.

In the case of *Sheridan* v. *State,* 159 Ark. 604, 252 S. W. 579, two deputy constables went to the house where Sheridan lived and found 75 or 80 pints of beer and a lot of empty bottles. The empty bottles appeared to have contained some kind of home brew. On cross-examination one of the witnesses testified that all of the liquor found by them appeared to be some kind of home brew. Both of them said they did not know whether the liquor contained any per cent. of alcohol.

The court in that case said that the liquor found on the premises was called beer, but that it appeared from the evidence to have been some kind of home brew, and the witnesses did not know whether it contained any alcohol or not. The court further said: "The burden of proof was upon the State to show the guilt of the defendant, and it devolved upon it to show that the liquor came within the kind enumerated above. Having failed to show that the home brew found on the premises of Harry Moore contained any per cent. of alcohol, a material ingredient of the offense was not proved."

We think the statement of the court in *France* v. *State,* 68 Ark. 529, 60 S. W. 236, is applicable to the facts in this case. The court there said: "The defendant may be guilty; a jury of his county have found that he is, and the circumstances are suspicious. But a consideration of the evidence has convinced a majority of the judges that it is too slight to support the verdict, and

that it would be safer to submit the facts to another jury."

This court also said in a recent case: "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." *Yeager* v. *State,* 176 Ark. 725, 3 S. W. (2d.) 977; *Halford* v. *State,* 173 Ark. 989, 294 S. W. 33.

We have concluded that the evidence is insufficient to support the verdict of conviction, and the case is therefore reversed, and remanded for a new trial.

LACY *v.* STATE.

Opinion delivered September 24, 1928.

Coleman & Reeder and *S. M. Casey,* for appellant.

H. W. Applegate, Attorney General, and *Walter L. Pope,* Assistant, for appellee.

McHaney, J. Appellant was indicted at the October term, 1927, of the Independence Circuit Court for the crime of assault with intent to kill one Kent Davidson, by shooting him with a pistol. At the April term of said court, six months later, after both parties had announced ready for trial, this indictment was quashed on motion of the State, and the matter again referred to the grand jury, then in session, and another indictment, charging the same offense, was shortly thereafter, on the same day, returned. The first indictment omitted to charge that the offense was committed "with the felonious intent then and there to kill and murder the said Kent Davidson," which the second indictment properly covered.

Appellant was called upon to answer the second indictment, shortly after its return, on the same day, and moved the court for a continuance on account of the shortness of the time intervening between the finding and return of the second indictment and the calling of his case for trial, which was alleged to be 30 minutes, and for that reason he was not ready or prepared for trial, and was entitled to a reasonable time in which to prepare for trial; that the first indictment did not charge an offense against the law; that, without his knowledge or consent, the first indictment was quashed and a new indictment returned within 30 minutes; and that he was not prepared for trial. His motion for continuance was overruled. He was tried, convicted, and sentenced to 5 years in the penitentiary. He seeks a reversal on the following grounds:

1. That the court erred in overruling his motion for a continuance or a postponement of his trial to another day of the same term. The court did not err in this regard. His motion stated no legal ground for either a continuance or a postponement. Motions for continuance rest in the sound discretion of the trial court, and the settled rule is that this court will not reverse on this ground unless an abuse of such discretion is shown. No such abuse of discretion is shown. The case had been

pending for six months, and appellant well knew that he was charged with the same offense alleged in the second indictment. In the opinion of the learned prosecuting attorney, it was deemed best to amend the first indictment in the manner heretofore stated by charging the intent. Whether this was necessary or otherwise we are not called upon to decide. He does not allege any statutory ground for a continuance, and we therefore hold that the court did not commit reversible error in this regard.

2. That the verdict and judgment are against the law and the evidence. Counsel for appellant concede the well established rule of this court that it will not reverse cases on conflicting evidence, that is, where there is any substantial evidence to support the verdict, but say that the accomplice, Leland Sexton, has not been corroborated sufficiently. The facts are that Kent Davidson was paying court to Miss Madeline Barnes, and, on the night of the unfortunate assault upon him, was calling upon her in her home. Appellant and Sexton, at appellant's suggestion, went to the Barnes home to scare him and have some fun out of him—perhaps to run him away from the young lady's home. The exact manner in which they expected to scare him or have some fun out of him is not shown. But the fact remains that they went to the Barnes home, armed with a pistol, taken from appellant on his arrest the next day, loaded with cartridges which were too long for the cylinder and the bullets of which had been cut off to permit the cylinder to revolve, exactly like the bullet taken from Davidson's head, and which is admitted to be the same pistol used to inflict the injury on Davidson. Sexton says appellant fired the shot. Appellant says Sexton fired the shot. Sexton, being an accomplice, must be corroborated by other evidence.

Kent Davidson testified that appellant and Sexton came to the Barnes home, made a noise on the outside, and that he went out to see what it was all about; that he recognized them, although he thought both had robes

and masks on, and Sexton said: "Hey, Buddie, you go home in about 30 minutes, and be darn sure you stay there when you get there." A short time thereafter he heard the noise again, and saw his mule going across the field. He went out again, caught the mule, and tied it up again. In a few minutes he again heard the noise outside, and went out to see what they wanted to do. As he walked around the house both Sexton and appellant came toward him. Sexton hit him over the head with something, and caught him by his tie. He tried to push Sexton away, and appellant walked up to his side, and he was shot. He does not know who fired the shot, and does not remember anything thereafter until nine days later, when he became conscious in the hospital. He was shot in the right eye, which was destroyed, and the bullet was removed from the top of his head. He had known appellant all his life. They were boy friends. There was no enmity existing between them, to his knowledge. This is sufficient corroboration of Sexton's testimony to the effect that, at appellant's request, he went with him to the Barnes home to scare Davidson and have some fun out of him, and, in attempting to do so, he and Davidson got into a fight, and that, as they did so, appellant came up to his side and shot Davidson. See *Middleton* v. *State*, 162 Ark. 530, 258 S. W. 995.

3. That the court erred in refusing to give his requested instruction No. 9, as follows:

"Unless you find from the evidence, beyond a reasonable doubt, that defendant and Sexton went to the place where Davidson was for the purpose of doing him bodily harm or injuring him, then defendant would not be guilty, if Sexton later shot Davidson without the knowledge or encouragement of the defendant."

The court did not err in this regard. We have examined all the instructions given, and find that they fully cover the case, moreover, the above instruction is not the law. If appellant and Sexton entered into a conspiracy to go to the Barnes home on an unlawful mission, which is conceded, and the act of one of them, proceeding

according to the common plan, terminated in a criminal result, both would be liable, although not the particular result intended. *Boone* v. *State,* 176 Ark. 1003, 5 S. W. (2d.) 322. Therefore the above instruction did not correctly state the law in requiring the jury to find that they went to the Barnes home for the purpose of doing Davidson bodily harm or injuring him.

Having examined all the errors assigned and finding them not sustained, the judgment must be affirmed.

IVES *v.* IVES.

Opinion delivered October 1, 1928.

[redacted]

R. W. Wilson, T. J. Moher, Sam T. Poe, Tom Poe and *McDonald Poe*, for appellant.

Peyton D. Moncrief, A. G. Meehan and *John W. Moncrief*, for appellee.

HART, C. J., (after stating the facts). This suit is based upon § 70 of Crawford & Moses' Digest, which gives the executor or administrator of any fraudulent grantor, who, by deed, shall have conveyed an interest in land with intent to defraud his creditors in the collection of their just demands, the right to apply to a court of chancery to have the same set aside for the use and benefit of the heirs-at-law of the fraudulent grantor. This statute has been construed to change the common law to the extent of allowing the fraudulent deed to be set aside for the benefit of the heirs-at-law of the deceased. *Moore* v. *Waldstein*, 74 Ark. 273, 85 S. W. 416; *Johnson* v. *Johnson*, 106 Ark. 9, 152 S. W. 1017; *Deniston* v. *Phillips*, 121 Ark. 550, 180 S. W. 911; *Davis* v. *Davis*, 142 Ark. 311, 218 S. W. 827; and *Murphy* v. *Murphy*, 165 Ark. 246, 262 S. W. 677.

Counsel for the plaintiff seek to reverse the decree on the ground that the Anderson Engine & Foundry Company was an existing creditor, and that there was a conclusive presumption of fraud when A. H. Ives conveyed his property to his children without paying that claim. They invoke the well-settled rule in equity that

conveyances made to near relatives of an embarrassed debtor are looked upon with suspicion; and, when they are voluntary, they are *prima facie* fraudulent; and, when the embarrassment of the debtor proceeds to financial wreck, they are conclusively presumed to be fraudulent as to existing creditors. *Wilks* v. *Vaughan,* 73 Ark. 174, 83 S. W. 913; *Home Life & Accident Co.* v. *Schichtl,* 172 Ark. 31, 287 S. W. 769; and *Gavin* v. *Scott,* 172 Ark. 234, 288 S. W. 391.

In the two cases last cited it was held that there is no conclusive presumption of fraud as to existing creditors, where a grantor executed a voluntary conveyance, if he was not at the time insolvent.

The record shows that the Anderson Engine & Foundry Company obtained a judgment against A. H. Ives and B. B. Ives. While there was a joint liability in the premises, B. B. Ives had purchased the machinery, and A. H. Ives had signed his note. The record shows that the principal part of the property of A. H. Ives was conveyed by him to his son, B. B. Ives. Hence there is nothing in the record to show that the creditor was at all hindered or delayed in the collection of its debts. It could have levied upon the land or personal property because the bulk of it was conveyed by A. H. Ives to B. B. Ives. Being the joint liability of A. H. Ives and B. B. Ives, in the very nature of things a conveyance by A. H. Ives to B. B. Ives could not hinder a creditor of A. H. Ives and B. B. Ives jointly in the collection of his debt.

Besides that, the statute upon which this suit is based was passed for the benefit of the heirs-at-law of a decedent. Now A. H. Ives had given nearly all his property to two of his children, who are named defendants in the action. They both resisted the present suit, and R. L. Ives, having no interest whatever in the property, had no right to maintain the action. It will be noted that the creditors are not parties to the action and are not seeking to set aside the conveyances as being fraudulent. The record shows that the Anderson Engine & Foundry Company was the principal creditor of the

estate. The other claims probated did not amount to a hundred dollars. Under these circumstances R. L. Ives, having no interest in his father's estate, could not maintain the action for the benefit of his brother and sister, who were the other heirs-at-law of A. H. Ives, and who alone had any interest in his estate, against their will in the matter.

R. L. Ives cannot maintain the suit in his own name, because the overwhelming proof shows that A. H. Ives was a man of strong mind and character, and knew what he was about when he conveyed his property to his children. In a will which he had executed some years before he expressly stated that he had given his oldest son, R. L. Ives, his share of the estate, and therefore had only made a small provision for him in his will. The record in this case shows that A. H. Ives executed the deeds in question because he wanted to settle his estate in his lifetime. Whether he had divided his property equally and justly between his children makes no difference. He had a right to prefer one to another. The evidence shows clearly and unmistakably that he was of sound mind when he made the conveyances, and under these circumstances R. L. Ives could not set them aside as having been procured by undue influence.

Therefore the decree will be affirmed.

BROWN *v.* ARKANSAS CENTRAL POWER COMPANY.

Opinion delivered October 1, 1928.

Charles S. Harley and *W. R. Donham,* for appellant.

Elmer Schoggen and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

SMITH, J. On March 1, 1925, appellants brought separate suits against the appellee power company to recover damages to compensate the losses sustained by them through the negligent operation of appellee's power plant. The causes were consolidated, and demurrers to the complaints were sustained and the causes dismissed upon the ground that they were barred by the statute of limitations.

Upon the appeal from this judgment it was held that the trial court erred in sustaining the demurrers. *Brown* v. *Arkansas Central Power Co.,* 174 Ark. 177, 294 S. W. 709. The opinion on the former appeal copied *in extenso* the material allegations of the complaints, and need not be repeated here.

Upon the remand of the consolidated cases there was a trial before a jury, under instructions conforming to the opinion on the former appeal, and a verdict and judgment for the defendant power company, from which is this appeal.

It was shown by the undisputed evidence that the construction of the power plant was completed in 1920, and that it was constructed for the use of slack or soft coal, and was operated as constructed. To provide the necessary draft, a smokestack 278 feet high was erected as a part of the plant. The undisputed testimony also shows that, from the completion of the original con-

struction, there was thrown off from the coal and slack consumed in generating steam, soot, cinders and ashes, which fell upon plaintiff's property and greatly damaged it.

At the request of the plaintiffs the court directed the jury as follows:

"3. You are instructed that if you find from a preponderance of the evidence that the defendant caused the plaintiff to suffer damage from the operation of its plant within three years prior to the date of the filing of the complaint herein, plaintiff's cause of action is not barred by the statute of limitations, unless you further find that the construction and operation of said plant was such that damage must necessarily result in such manner that the certainty, nature and extent of the damage could have been reasonably estimated and ascertained at the time of its construction and the beginning of operations. In other words, if it was known merely that damage was probable, or that, even though some damage was certain, the nature and extent of that damage could not be reasonably known and fairly estimated, but would be only speculative and conjectural, then the statute of limitation was not set in motion until injury occurred, and in such case there may be as many successive recoveries as there are injuries."

As we have said, this instruction conforms to the law as declared in the opinion on the former appeal.

Certain real estate agents testified that the damage to plaintiffs' property was such that it could have been estimated and ascertained at the time of the completion of appellee's plant, and, if this be true, the right of the plaintiffs to sue for damages commenced at that time, and the statute of limitations was then set in motion, and its running for three years operated to bar the plaintiffs' right to sue for the damages which might have been ascertained and recovered when the plant was first put in operation.

There would therefore be no difficulty about affirming the judgment from which this appeal comes, under

the finding of the jury, except for the assignment of error relating to the exclusion of certain offered testimony. This testimony was to the effect that the power company might have used natural gas or hard coal, which would not produce so many cinders, or might have installed spark and cinder arresters, smoke consumers, or other well-known equipment, which would, at least, have minimized the damage.

The insistence is that this testimony, if admitted, would or might have shown that the damage to plaintiffs' property was temporary and recurrent, and not permanent and original, and that a continuing cause of action therefore existed, which could be maintained at any time when an injury was inflicted.

The undisputed testimony, however, shows that the power plant was constructed at a very great cost to consume soft and slack coal, and to use gas or other fuel would require a reconstruction of the plant. From the beginning the plant was operated by using soft and slack coal, without spark arresters or smoke consumers, and the jury has found, under the instructions quoted above, submitting that issue, that there was inflicted upon plaintiffs a damage which could have been ascertained and estimated and fully compensated at the time the injury first occurred.

The case of *Dayton* v. *Asheville,* 185 N. C. 12, 115 S. E. 827, presented the question here under consideration. In that case a city had built an incinerator, from which ashes and grease were blown and cast upon plaintiff's property. It was there said that for an irregular, intermittent and variable trespass, if the city were liable for such a tort at all, the plaintiff would be entitled to recover any and all such damages as have accrued within the three years next immediately preceding the commencement of the action, but that where the injury is permanent, constant, and continuing in its nature, the cause of action accrues and the statute of limitations begins to run in such cases from the time the first substantial injury is sustained or when the first appreciable damage is done.

We think the jury in the instant case was warranted in finding that appellee's power plant as constructed and operated inflicted an original and permanent injury, which might have been ascertained and compensated when the first appreciable damage was done; and, as more than three years had expired after that time before the institution of the suits, the jury was warranted in finding that the causes of action were barred.

Appellants requested the court to give an instruction numbered 6, which reads as follows: "You are instructed that the fact that the defendant may have obtained a franchise from the city of Little Rock authorizing the construction of its light plant in no way avails it anything as a defense in this case."

This instruction correctly declares an abstract proposition of law, but we think no error was committed in refusing to give it, as it was not contended that the fact that appellee had a franchise to construct and operate its light plant availed it anything as a defense in this suit.

The controlling question in the case, and the one upon which the verdict of the jury was based, was whether the plaintiffs' cause of action was barred by the statute of limitations, and the jury was told to find for the plaintiffs unless the causes were barred by the statute of limitations. There is not involved in this case any question about the right of the city, in the exercise of its police power, to regulate the power company's plant.

We discover no error in the record, so the judgment of the court below must be affirmed, and it is so ordered.

KENNEDY *v.* QUINN.

Opinion delivered October 1, 1928.

Charles W. Mehaffy, Cul L. Pearce and *John E. Miller*, for appellant.

Sam Costen and *Wils Davis*, for appellee.

SMITH, J. Under the will of W. P. Miller, who died in 1904, Sue E. Quinn took a life estate in valuable property in Mississippi County, Arkansas. The Miller will provided that, upon the death of the life tenant, the property should be sold and the proceeds of sale divided among the heirs of the testator named in the will. The life tenant married appellant, H. B. Kennedy, and lived with him as his wife until her death, which occurred August 26, 1922.

After the death of Mrs. Kennedy the heirs named in the Miller will filed a partition suit praying that the property be sold for partition.

After her marriage Mrs. Kennedy removed with her husband to White County, where she acquired title in her own name to lands in that county.

Upon the death of Mrs. Kennedy, her surviving husband filed an alleged will of his wife for probate in White County. In a contest over the probate of this will it was found that the execution of the will had been procured by undue influence, and that judgment was affirmed

on the appeal to this court. *Kennedy* v. *Quinn,* 166 Ark. 509, 266 S. W. 462.

Thereafter Kennedy filed for probate in White County a prior will which his wife had executed, and probate of this will was resisted by appellees, who are the heirs-at-law of Mrs. Kennedy. This last-mentioned will gave all the testatrix's property to Kennedy, except certain bequests of money to the testatrix's brother and sisters and certain nephews and nieces.

Kennedy and an executor who had been appointed under Mrs. Kennedy's will first offered for probate, filed an answer and cross-complaint in the Mississippi County case, in which it was alleged that Kennedy was the owner of all the property of which his wife died seized under the provisions of the will first offered for probate.

In the answer and cross-complaint the executor alleged that Kennedy was entitled to a part of the rent for the year 1922 (the year in which Mrs. Kennedy died), proportioned as the statute provides, and that the executor was entitled to recover the amount of certain improvement taxes paid by Mrs. Kennedy and the value of certain improvements made by her on the Mississippi County lands, and it was prayed that the amount of the improvement taxes and the value of the improvements be declared a lien on those lands.

With the estate of Mrs. Kennedy thus involved in litigation, the litigants, on April 7, 1925, entered into a written contract which contained, among others, the following recitals, after referring to the above litigation:

It is agreed between the parties hereto that all differences between the parties be settled in the following manner: (1) An unimportant provision relating to an oil lease in White County; (2) assigns to the heirs certain jewelry, which was described, and certain bank stock; (3) provides that Kennedy should surrender to J. W. Quinn, a brother of Mrs. Kennedy, the note of the said Quinn to the order of Mrs. Kennedy for a thousand dollars; (4) the heirs agreed to execute and deliver to Kennedy a quitclaim deed for all the real estate owned

by Mrs. Kennedy at the time of her death in White County; (5) "In the case of J. W. Quinn *et al* versus H. B. Kennedy *et al.*, now pending in the chancery court, Osceola District, Mississippi County, Arkansas, there is to be entered a decree by the chancellor dismissing the intervention or pleading of H. B. Kennedy and Bankers' Trust Company, or any administrator who might intervene, and the court to decree a construction of the will of William P. Miller free from any interest that might be claimed by H. B. Kennedy. (6) The case now pending in the probate court of White County, Arkansas, for the probation of the will of Mrs. Sue E. Kennedy, is to be settled by appropriate order of the probate court in proper form to carry out the true tenor of this agreement, and, if desired by counsel for J. W. Quinn, H. B. Kennedy will consent for the probate court to hold against the probation of the will. (7) J. W. Quinn, Mrs. Mary Paschall and Mrs. Alice Mulkey will pay to H. B. Kennedy in cash the sum of $2,250. (8) J. W. Quinn, Mrs. Mary Paschall and Mrs. Alice Mulkey shall have all real estate owned by Sue E. Kennedy in Mississippi County, Arkansas, at the time of her death, and H. B. Kennedy shall have all of the real estate owned by the said Sue E. Kennedy in White County, Arkansas, and in addition thereto all personal property owned by the said Sue E. Kennedy at the time of her death, except the seventy-five shares of the capital stock of the Citizens' Bank of Osceola, Arkansas, and the jewelry mentioned and set forth in paragraph 2 hereof, and the note of J. W. Quinn mentioned in paragraph 3 hereof."

Pursuant to the terms of this settlement, the chancery court of Mississippi County, on June 6, 1925, entered a decree reciting that "the defendants confessed the justness of the claim of plaintiffs, and announced their willingness that judgment be entered herein against them and in favor of the plaintiffs, dismissing the answer of the defendant H. B. Kennedy, and the answer and cross-complaint of defendant Bankers' Trust Company, executor."

After directing a sale of the lands for partition, the decree concluded with this recital: "but this decree shall not be given a construction that will in any way conflict with or impair the right of H. B. Kennedy under a contract heretofore entered into between said Kennedy and J. W. Quinn (*et al.*) for the purpose of fixing the rights of said Kennedy in the estate of Sue Kennedy, deceased."

Thereafter, on November 10, 1926, Kennedy brought this suit, alleging that, under the terms of the contract of settlement, he was given all the personal property owned by his wife at the time of her death, except the jewelry and bank stock given the heirs by that settlement. As a part of the personal property owned by his wife at her death, Kennedy claims the proportionate part of the rent for the year 1922 which his wife's estate would have been entitled to, and, in addition, the value of the improvements made by Mrs. Kennedy, and the improvement taxes paid by her on the lands comprising her life estate.

It is the contention of Kennedy that the concluding clause of the decree above quoted reserved to him the right to maintain this suit, and expressly excluded that cause of action from the operation of the decree which would otherwise have precluded the maintenance of this suit.

In a written opinion, which was made a part of the decree from which this appeal comes, the chancellor held against appellant's present contention, and decreed that the decree of June 6, 1925, was conclusive of the present litigation. The chancellor states in his opinion that he so held because the compromise agreement, upon which the decree of June 6, 1925, was based, recited that the express purpose of the compromise was to end and settle the then pending litigation, and, if the present suit may be maintained, the contract failed to accomplish its declared purpose. The opinion of the chancellor calls attention to the fact that the answer and cross-complaint of the executor of Mrs. Kennedy sued for the very items

upon which the instant suit is based, and that this cross-complaint was dismissed. The opinion of the chancellor recites that, if there had been any intention to reserve from the operation of the decree the right to sue for the value of the improvements and the improvement taxes and the proportionate part of the rents, the cross-complaint would have been dismissed without prejudice or would have been reserved for future determination, but that neither was done.

We concur in this interpretation of the decree of June 6, 1925, as the subject-matter of the instant litigation was expressly raised by the pleadings of the executor in the case compromised and settled, and the reservation by Kennedy "of fixing the rights of said Kennedy in the estate of Sue Kennedy, deceased," must be construed as referring to parts of the estate of Mrs. Kennedy not involved in the Mississippi County litigation.

The decree is therefore affirmed.

LACKEY *v.* LACKEY.

Opinion delivered October 1, 1928.

W. R. F. Paine, for appellant.

John E. Miller, for appellee.

SMITH, J. Appellant, Sam L. Lackey, and appellee were married in March, 1924, and lived together as husband and wife until March, 1927, when they were separated, and appellee brought suit against appellant, her husband, for alimony. She alleged that her husband had failed to support her, had been unkind to her in many

ways, had cursed and abused her, and had refused her permission to visit her children by a former marriage when they were ill, or to provide transportation for that purpose.

In an amended complaint appellee alleged that her husband owned about four hundred acres of land, and had by fraud induced her to execute a deed conveying title to this land to appellant's children by a former marriage. These children were made parties, and it was prayed that this deed be canceled. She prayed also for a division of appellant's personal property.

Appellant and his children filed an answer, in which it was denied that the execution of the deed from appellant and appellee to appellant's children had been procured by fraud. Appellant prayed that the suit to cancel the deed and for alimony be dismissed. Appellant did not pray that a divorce be granted him, but he offered testimony tending to show that he was entitled to a divorce, and the testimony was taken as if that relief had been prayed.

The testimony is to the effect that friction arose between the two families, and appellant's children left their father's house, and some of appellee's children also departed, and most of the trouble between appellant and appellee arose over the children who remained in appellant's home.

The chancellor denied a decree of divorce to either party, although he made a permanent allowance to appellee of $10 per month. The deed which appellant and appellee had executed to appellant's children was canceled as having been executed in fraud of appellee's marital rights, except as to a forty-acre tract which had been conveyed by the children to an innocent purchaser.

From this decree both parties have appealed. Appellant insists that the testimony shows that he is entitled to a divorce, and that the testimony did not warrant the finding that the execution of the deed to his children had been procured by fraud. Appellee insists that she should have a substantial allowance as alimony, in the

assessment of which the value of all of appellant's property, both real and personal, should be taken into account, and that a decree should be granted her.

We do not set out the testimony relating to the marital infelicities of the parties. It clearly appears that neither has any affection for the other, but it does not appear that either has any statutory ground for divorce.

Appellee admitted executing the deed in question, but she testified that she did so because appellant had told her that the deed conveyed only two 80-acre tracts of land to appellant's eldest daughter, and that these two 80-acre tracts were not a part of the homestead. The deed was not to the eldest daughter, but was to all of appellant's children, and described all the land owned by appellant. We are not asked to cancel this deed except as to the two 80-acre tracts to the eldest daughter, but the prayer of appellee is that the deed be canceled in its entirety.

The testimony on the part of appellant is to the effect that appellee was fully advised as to the nature of the deed, which she admitted signing, and that no imposition was practiced upon her.

We concur in the action of the court below in canceling this deed. Appellee was deceived as to the land conveyed, but, as we have said, there is no contention on the part of appellant, or any of his children, that the deed is valid as a conveyance of two 80-acre tracts only, and it would not effectuate the intention of appellant to uphold the deed as a conveyance to a part of the land to one of his children only, as he does not contend that it was his intention to execute such a deed.

The representation that the deed conveyed only two 80s, when in fact it described all of appellant's land, was a fraud upon appellee's marital rights, and this fraud invalidates the deed.

The monthly allowance of $10 which the court ordered appellant to pay appellee is so modest and incon-

siderable that he can have no just ground to complain thereat.

Upon a consideration of the testimony in its entirety we discover no reason for disturbing the chancellor's finding, and the decree will therefore be affirmed, and it is so ordered.

[redacted]

EVANS *v.* STATE.

Opinion delivered October 1, 1928.

[redacted]

Dudley & Dudley, for appellant.

H. W. Applegate, Attorney General, and *Effie Combs,* Assistant, for appellee.

KIRBY, J. This appeal is prosecuted from a judgment of conviction for the sale of intoxicating liquor.

It is complained that the venue of the offense was not sufficiently alleged or proved; that incompetent testimony was permitted to be introduced; and that the evidence is not sufficient to support the verdict.

The indictment recites that "the grand jury of Jonesboro, Western District, Craighead County, Arkansas, * * * accuses the defendant, Maude Evans, of the crime of selling intoxicating liquor, * * * the said Maude Evans * * * in the district, county and State aforesaid, on the 28th day of July, 1927," etc.

W. J. Shipp testified that he was "an undercover man" for the sheriff's office, and bought a pint of liquor from appellant "about the 15th day of July, at her home on East Washington Street, in Jonesboro, paying her $3 therefor." He said there was a woman, Mary Miller, near where he was boarding, who was drinking, and he asked her about buying some liquor, and she told him where he could get it from appellant, and gave him a note to her which read: "Please send one pint with this fellow. He all right. Mary."

Witness stated that he had been to appellant's house before and took the note down there, gave it to appellant, who went out into another room and talked with a negro man, telling him to get the liquor. He got the pint of liquor, and brought it back and gave it to appellant, who delivered it to witness upon his paying her three one-dollar bills therefor. He stated that he picked up the Mary Miller note while she was out, and attached it to the bottle containing the liquor, which was produced in court before the jury, with the note accompanying it. Said also that he went to Mississippi County, where he next worked, and being asked, "This was last September?" answered "No sir; last August."

The sheriff was permitted to testify that he had had several complaints about liquor being sold at appellant's house, and, during the time he was in office, had searched the house twice and found liquor and many bottles and containers, with a small amount of liquor in some of them.

The court, in overruling the objection to this testimony, stated it could be considered by the jury in shedding light on the kind and character of business defendant might be engaged in, etc.

Appellant denied having sold any liquor to witness Shipp, that any was delivered to him at her house, and that she received any money from him therefor.

It appears that the act dividing Craighead County into judicial districts provides that the districts shall be called the "Jonesboro District" and the "Lake City District;" that the circuit court held in the county seat shall have original and exclusive jurisdiction over the "Jonesboro District," etc., and shall be styled "the circuit court for the county of Craighead for the Jonesboro District." The venue was sufficiently alleged and proved. The indictment was returned by the grand jury of Jonesboro, Western District, Craighead County, Arkansas, and the word "Western" was merely descriptive and surplusage, and did not render its meaning less definite or certain, nor invalidate it. *Ballentine* v. *State,* 48 Ark. 45, 2 S. W. 340; *Moose* v. *State,* 49 Ark. 499, 5 S. W. 885; *K. C. Sou. Ry. Co.* v. *State,* 90 Ark. 349, 119 S. W. 288.

The testimony shows the liquor was purchased at the home of appellant on East Washington Street, in Jonesboro, and proves the venue, since the court takes judicial notice of the boundaries of counties, judicial districts, and cities, in the State. *Lyman* v. *State,* 90 Ark. 596, 119 S. W. 1116; *Cox* v. *State,* 68 Ark. 462, 60 S. W. 27; *King* v. *State,* 110 Ark. 595, 162 S. W. 1087.

No error was committed in allowing the introduction of the note relative to the purchase of the liquor stated by witness Shipp to have been written by Mary Miller

and delivered to appellant. Witness Shipp testified that Mary Miller gave him the note, and his testimony that he delivered it to appellant was not disputed. The matter testified about was within witness' knowledge, and it was not hearsay nor incompetent. Neither was error committed in permitting the introduction of the sheriff's testimony of the searchings of appellant's house and the finding of liquor therein during any time within the term of three years before the finding of the indictment, the court having told the jury the only purpose for which it could be considered. *Casteel* v. *State,* 151 Ark. 69, 235 S. W. 386.

It is true no witness testified that the liquor sold by appellant was intoxicating, but witness Shipp testified that he bought liquor of appellant, that appellant sold him the pint of liquor and received the $3 in payment therefor. The sheriff testified that liquor had been discovered in appellant's house upon the searches made by him of the premises, and that complaints had been made to him that liquor was being sold there, and the pint of liquor itself was introduced in evidence before the jury for its inspection and examination, and the jury, using its ordinary common-sense, was warranted, under the circumstances, in finding that the liquor sold was intoxicating. *Kinnane* v. *State,* 106 Ark. 337, 153 S. W. 264; *Johnson* v. *State,* 152 Ark. 218, 238 S. W. 23; *Griffin* v. *State,* 169 Ark. 342, 275 S. W. 665.

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

COLONIAL SUPPLY COMPANY *v.* KOESTER.

Opinion delivered October 1, 1928.

[redacted]

[redacted]

Woods & Greenhaw and *Lashley & Rambo,* for appellant.

Shouse & Rowland, for appellee.

KIRBY, J., (after stating the facts). Appellant, the Colonial Supply Company, insists that its mortgage constitutes a first and prior lien against the lands, and that the court erred in not so holding and decreeing a foreclosure thereof. Appellant makes no real contention that the finding that Jennings was the owner of

the lands in controversy after their conveyance to him by Bartles and Sitton and at the time of the execution of the deed to Koester and the decree is not contrary to the preponderance of the testimony.

It is earnestly urged, however, notwithstanding this finding of fact, that, since Bartles, on the date of the execution of the notes and mortgage to the Colonial Supply Company, on May 29, 1923, was the owner and holder of two mortgages covering the lands in controversy, executed by Jennings and wife to him on March 17, 1920, the first securing the payment of the sum of $18,000 and the second for the sum of $5,200 with interest, Bartles' mortgage to it operated as an assignment of the mortgages by Jennings to Bartles and constituted a lien or charge against the whole interest of Bartles in and to the lands, consisting of his entire title, either legal or equitable, under the mortgages given by Jennings. This contention cannot be sustained, however.

It appears from the record that Jennings, at the time of these transactions, was the legal owner of the lands and was in possession thereof, and had been since 1914, and that Koester had obtained all the interest owned by Jennings through regular deeds of conveyance. Bartles made no attempt to include or transfer any indebtedness owed by Jennings to him, secured by the mortgage on the lands, and the mortgage from Bartles to appellant company recites that a mortgage upon the lands in favor of Bartles was owned by the Union National Bank of Bartlesville, to which the mortgage of appellant was made subject. This was notice to appellant that Bartles was not the owner of the lands and that there was an obligation outstanding secured by mortgage. Appellant insists that its mortgage from Bartles operated as an equitable assignment of the mortgages from Jennings to Bartles, and cites authorities claimed to be in support of the proposition, including our cases, *Kline* v. *Ragland,* 47 Ark. 111, 14 S. W. 474; *Turman* v. *Sanford,* 69 Ark. 95, 61 S. W. 167.

In the Turman case the court construed our statute, now § 1498, C. & M. Digest, providing that, if a person shall convey any real estate by deed purporting to convey the same in fee simple absolute, and shall not at the time have the legal estate, but afterwards acquires it, the after-acquired estate, legal or equitable, shall pass immediately to the grantee, and the conveyance shall be as valid as if such estate had been in the grantor at the time of the conveyance; holding that the interest of a mortgagee under his mortgage before foreclosure had no such estate as would pass by the statute to a grantee to whom he had conveyed the land prior to his mortgage, saying: "For the mortgagee, before the foreclosure, is neither at law nor in equity the real owner of the land. The legal title, it is true, passes to him by the mortgage, but he holds it for the protection of his debt, and for that purpose only. * * * The statute only purports to pass real estate, but, if only the legal title in the mortgagee passed, it would be worthless; for the legal title can be used by the mortgagee only to collect his debt, and without the debt it would avail nothing." This, in fact, is a holding that the appellant could have acquired no interest, lien on or estate in the land mortgaged to it by Bartles, the mortgagee of the lands owned by Jennings.

It is not claimed or intimated that the debts owed by Jennings to Bartles and secured by a mortgage from Jennings, the owner of the land, were transferred to appellant company or that there was any intention to make such transaction. Neither can there be any question of deception practiced upon appellant in the making of such mortgage. The mortgage itself recites the mortgage from Jennings to Bartles securing the $18,000 note and interest was an incumbrance on the lands, and that the lien had been assigned to the Union National Bank of Bartlesville. This shows, as the chancellor found, that there was no intention to convey or acquire any interest Bartles might have held in the lands by reason of Jennings' mortgage, which was recited as an incumbrance. Bartles could have transferred his lien

or interest under the mortgage in the lands by a transfer or delivery of the notes secured thereby to appellant company, but there could be no equitable transfer of any such interest by his mortgage of the lands to appellant company, which especially recited that the debts secured by the mortgage from Jennings to Bartles had already been transferred to another party. In other words, the mortgage from Bartles to appellant company could not operate as an equitable assignment of his interest in the lands under the Jennings mortgage, since said mortgage was recited as an incumbrance against the lands, the lien of which had already been transferred to another bank, as stated therein. The title of appellee was superior to any claim of appellant company under its mortgage, which constituted a cloud on his title, which he was entitled to have removed by cancellation of said mortgage to appellant, and the chancellor committed no error in so holding.

The decree is accordingly affirmed.

CLEMENTS *v.* CITIZENS' BANK OF BOONEVILLE.

Opinion delivered October 1, 1928.

I. J. Friedman and *John D. Arbuckle,* for appellant.

W. L. Kincannon and *Evans & Evans,* for appellee.

MEHAFFY, J. This suit was begun in the Logan Circuit Court by Charles Clements, appellant, to recover from the Citizens' Bank of Booneville and Charles X. Williams, cashier, on the following contract:

"To Charles Clements,
248 Boyleston St.,
Boston, Mass.

"We, the Citizens' Bank, guarantee the payment of a sum not to exceed $1,000 (one thousand dollars) payment for monument Clements No. 60772, purchased by the Booneville Marble and Granite Works of Booneville, Arkansas, on the following conditions: That the monument be cut strictly in accordance with the blue-print approved by the said Booneville Marble and Granite Works and submitted to the above Chas. Clements for the execution of the same. Further, that this amount shall cover all expenses connected with the purchase of material of which the monument is to be cut, also the material for a marker ordered this date. All monument and marker to be loaded on cars at Boston, Massachusetts.

"The Citizens' Bank undertakes that the purchase price for this work is not due until a period of sixty days from date of invoice with bill of lading.

"Citizens' Bank,
"By Chas. X. Williams, Cashier."

The case was appealed to this court, and is reported in 172 Ark. 1023, 291 S. W. 439.

It is unnecessary to set out the testimony in detail. The case was tried and submitted to the jury under instructions by the court, and the jury returned a verdict for the Citizens' Bank of Booneville. This court held, when the case was here on appeal before:

"If the contract of guaranty is for the bank's own protection, or is incidental to the transaction of its own business or for its own benefit, it may give a guaranty."

However, unless it is for the bank's protection, or is incidental to the transaction of its own business or for its benefit, it would not have authority to give a guaranty.

It was held on former appeal that § 700 of Crawford & Moses' Digest, prohibiting officers or employees from indorsing, selling, pledging or hypothecating any notes, bonds or any other obligations, etc., until authority was given by the board of directors and a written record made, was applicable to the guaranty in this case, the court holding that there was no reason why the officers of the bank should be prohibited from transacting the business enumerated without getting authority from the board and yet permit the cashier to bind the bank by guaranteeing the debt of another.

The law was settled on the former appeal, and the court submitted the question of the bank's liability under the facts proved to the jury, and there is no objection to the instructions given by the court so far as the liability of the bank is concerned. Appellant's only objection to the instructions is that the court erred in directing a verdict for Williams, the cashier. Therefore the only question for this court, so far as the liability of the bank is concerned, is the question whether there is any substantial evidence to sustain the verdict.

While the circumstances indicate that the officers of the bank had permitted the cashier to manage the affairs of the bank just as he saw proper, yet the question as to whether they had given him the authority mentioned in the statute and made a record of it as required by law, was properly submitted to the jury, and there is substantial evidence to support the verdict, and it is therefore binding on this court.

It is contended, however, by the appellant that the court erred in directing a verdict for Williams, the cashier. The court instructed the jury to return a verdict in favor of the cashier on the theory that the cause

of action against him was barred in three years, and no suit was begun against him until something like four years. As to whether the action was barred against the cashier, depends upon the nature of his liability. When an agent makes a contract for a principal which he has no authority to make, or a contract in excess of his authority, and, because of either not having authority or exceeding his authority, does not bind the principal, he is bound himself. Some courts have held that an action may be maintained against him on the contract on the theory that he intended to bind some one by the contract, and, if he did not bind the principal, he would bind himself. But the great weight of authority is to the effect that, while the agent is liable, he is not liable on the contract. It is said by a text-writer:

"Whether the agent can be held liable upon the contract itself which he has, without authority, assumed to make, is a question which has been much discussed and upon which the cases cannot be entirely reconciled. It would seem, however, that this question is one which must be determined largely by the circumstances of each case. Where the promise is made in the name of a principal who might have authorized it and as his contract, the better opinion is that the agent cannot be held liable upon it, but only in an action based upon the deceit, or upon the contract of warranty or indemnity, even in the case of a written contract, where the assumed relation of agency appears upon the face of it. Some courts have indeed manifested a disposition in this latter case to reject the words referring to the alleged principal as mere surplusage, and to hold the agent liable upon the remainder as upon his own contract. This, however, as has been well said, is rather to make a new contract for the parties than to construe the one which they have made for themselves." Mechem on Agency, 2d edition, vol. 1, 1023-4.

"The proper remedy against an agent by a third party, with whom the agent has dealt, where the agent acts without, or in excess of, his authority, is an action

of assumpsit upon his expressed or implied warranty of authority, or, in a proper case, an action of trespass on the case for fraud and deceit, and in some jurisdictions the latter is held to be the only remedy in such cases." 2 C. J. 892.

"Some of the authorities hold that, in all written contracts, except specialties, if the pretended agent has so worded the instrument as to make it appear that he is acting for or on behalf of another, and not himself—having no authority to do so—he binds himself personally, and will be liable in an action on the contract itself, for the reason that he must have intended to bind some one; and, if he was unauthorized to bind the principal, he is estopped to deny that he intended to bind himself, as in that case no one whatever would be bound. But the objection to this doctrine is that it would require the court to make a new contract for the parties, or one into which they have not themselves entered; and the courts now generally repudiate it. While the decisions are not uniform, the great weight of modern authority is that the agent is not personally bound on the contract itself, and cannot be held liable in an action thereon." *LeRoy* v. *Jacobosky,* 136 N. C. 443, 48 S. E. 796, 67 L. R. A. 977.

In discussing the liability of agents under circumstances like this, the Wisconsin court said:

"This whole doctrine proceeds upon a plain principle of justice; for every person so acting for another, by a natural, if not a necessary, implication, holds himself out as having competent authority to do the act, and he thereby draws the other party into a reciprocal engagement. If he has no such authority, and acts *bona fide,* still he does a wrong to the other party; and, if that wrong produces injury to the latter, owing to his confidence in the truth of an express or implied assertion of authority by the agent, it is perfectly just that he who makes such assertion should be personally responsible for the consequences, rather than that the injury should be borne by the other party who has been misled by it. * * * Later and better considered opinion seems to

be that the liability, when the contract is made in the name of his principal, rests upon implied warranty of authority to make it, and the remedy is by an action for its breach." *Oliver* v. *Morawetz,* 97 Wis. 332, 72 N. W. Rep. 877. And the Supreme Court of Oregon has said:

"Though the agent who has exceeded his authority cannot be sued on the contract itself, as a party thereto, unless it contains apt words to charge him, an action may be maintained against him on his implied promise that he had authority to bind the principal. * * * This promise is not a part of the agreement supposed to have been entered into with the principal, but independent thereof, and tantamount to an implied warranty that, if a third party will enter into a contract with the agent on behalf of his principal, he will indemnify such party against any loss that he may sustain, if it shall be ascertained that he does not possess the measure of authority which he assumes. Such warranty being impliedly given, it cannot be said that in enforcing it the court makes a new contract for the agent and a third party." *Anderson* v. *Adams,* 43 Ore. 621, 74 Pacific Rep. 215.

"As we have seen, the authorities have been conflicting as to whether the agent could be held liable on the instrument, the weight of authority being in the negative." *Haupt* v. *Vint,* 68 W. Va. 657, 70 S. E. 702, 34 L. R. A. (N. S.) 518.

The authorities seem to be unanimous in holding that the agent, under such circumstances, is liable, and almost unanimous in holding that an action cannot be maintained on the contract itself, but on an implied promise on the part of the agent that he has the authority to make the contract. If suit could have been maintained on the contract itself, the cause of action would not have been barred, because it could have been begun any time within five years. But this is a suit on an implied contract not in writing, and it was barred within three years.

We are therefore of the opinion that the court did not err in directing a verdict for Williams, and the judgment of the circuit court is affirmed.

TAYLOR *v.* BANK OF MULBERRY.

Opinion delivered October 1, 1928.

Starbird & Starbird, for appellant.

E. D. Chastain, for appellee.

MEHAFFY, J. The appellee brought suit in the Crawford Chancery Court against J. C. Campbell, R. E. Rogers, E. D. Chastain and Mrs. Kentucky Taylor. It alleged that it had obtained a judgment for $190.14 against J. C. Campbell and J. L. Campbell, wherein Rogers was garnishee, and that Rogers answered, admitting an indebtedness of $200 on a note and mortgage. The note, however, was in an Oklahoma bank.

It was alleged that, at the time of the judgment in the justice court, Campbell was the owner of the note, and that he had afterwards transferred it to Chastain for the purpose of defeating plaintiff's lien thereon. It was further alleged that, at the time plaintiff obtained

judgment against J. C. Campbell, said Campbell was the owner of the east half of the northeast quarter and east half of the southwest quarter of the northeast quarter, section 32, township 11, range 29, Crawford County, Arkansas; and for the purpose of placing it beyond the reach of execution and to cheat and defraud the plaintiff, the said Campbell, without consideration, conveyed said land to Kentucky Taylor; that Mrs. Taylor is the sister of Campbell, and did not know of the conveyance at the time it was made; that the conveyance was void, and made to defraud creditors; that Campbell was insolvent. It alleged that it had no adequate remedy at law, and prayed for a cancellation of the deed, and that the note be required to be brought into court, and for a foreclosure upon the debt to Rogers.

A demurrer to the complaint was filed by Chastain, alleging that the complaint did not state a cause of action as to him. The demurrer was overruled, and both Chastain and Mrs. Taylor filed answers. Chastain claimed to have purchased the note, and filed a cross-complaint seeking to foreclose the mortgage which was given on certain land to secure the payment of the note. There was no statement or suggestion in the pleadings of either of the defendants that the chancery court did not have jurisdiction, but the only demurrer filed with reference to the statements in the complaint were by Chastain, in which he stated that the complaint did not state facts sufficient to constitute a cause of action against him. That the statement in the complaint about the note failed to show that plaintiff had any lien, but admits that the Oklahoma bank held the note. His third ground for demurrer was that the order of the justice of the peace court was without authority. It was never suggested to the trial court that there was any defect in the pleading other than that mentioned by Chastain, and no suggestion to the trial court that that court had no jurisdiction.

Kentucky Taylor filed answer, denying the allegations of the complaint, and alleging that she was Camp-

bell's aunt and not his sister, and that the purchase of the property by her was made in good faith.

Chastain filed separate answer, seeking to collect on the note above mentioned.

The court rendered a decree declaring the sale of the land from Campbell to Mrs. Taylor fraudulent and void, and also decreed that Chastain was entitled to recover his costs from the Bank of Mulberry.

Mrs. Taylor testifies, with reference to the purchase of the land from her nephew, that he owed her for four or five years' board; had been living with her for seventeen years, and he owed at least four years' board. That the understanding was that he would pay for one-fourth of the groceries for his board. She claims to have loaned to Campbell $50 and to have paid him $50, and admitted that she still owed him $190.

The chancellor found that the conveyance of the property was without consideration, and fraudulent and void, and we think that his finding was sustained by the evidence.

The record of the justice of the peace court was introduced, showing a judgment as alleged in the complaint, and the justice of the peace record also showed that execution was issued on the 28th day of September, 1927, and returned the same day, the officer stating in his return that the parties, evidently meaning the parties defendant in the justice of the peace suit, were absent from the State, and no property found. This judgment was against J. L. Campbell and J. C. Campbell.

It is contended by the appellant that there was no allegation in the complaint of insolvency of the joint debtor, J. L. Campbell, and that, for that reason, the demurrer should have been sustained, and, in support of his contention, calls attention to *Euclid Avenue National Bank* v. *Judkins,* 66 Ark. 486, 51 S. W. 632. In that case the court said:

"Now the complaint in this case shows that plaintiff's judgment was against the White Sewing Machine Company and H. R. King, as well as against the defend-

ant Judkins, and there is no allegation that the White Sewing Machine Company and King were sureties merely. They appear as joint principals. The complaint shows that Judkins had no property whatever left in his hands subject to execution, out of which plaintiff's debt could be made by law, but it does not show that the other joint judgment debtors, the White Sewing Machine Company and H. R. King, did not have property subject to execution ample to satisfy plaintiff's debt at law. The complaint did not allege the insolvency of these joint judgment debtors with Judkins. Herein it fails to show any occasion for the interposition of a court of equity. A demurrer was interposed and sustained by the court, and judgment was entered dismissing the complaint, and Judkins appealed."

The court further said in that case: "The obtaining of judgment at law was not necessary, but it was necessary to show the insolvency of all the joint judgment debtors; for, in the absence of such an allegation, or a showing of some other facts calling for equitable relief, it does not appear that a resort to equity is proper."

In the case relied on, the defendant himself demurred to the complaint, and the demurrer was sustained. In the case at bar Mrs. Taylor did not demur; she did not make any objection to the jurisdiction of the court at all, and Chastain, the other defendant, filed a demurrer, but did not contend that the court did not have jurisdiction, but simply relied on the fact that the complaint did not state a cause of action as against him. He was the attorney for Mrs. Taylor as well as for himself, and did not make any objection on the ground that there was no allegation that the other judgment creditor was insolvent.

We think the allegations of the complaint and the statements in the writ are sufficient to make a *prima facie* case and to give the chancery court jurisdiction. The complaint alleged that plaintiff had no adequate remedy at law. The return of the officer shows that all the parties were absent from the State, and there is no

showing anywhere or no claim that the other Campbell had ever had any property. To be sure, the burden is on the plaintiff to allege facts sufficient to show jurisdiction of the chancery court, but we think the facts alleged, together with the execution and return of the officer, which was recited in the complaint, are sufficient to show that it would be perfectly useless to try to collect the money out of the judgment creditors, and was sufficient to show that all of them were insolvent and had left the State, and that J. C. Campbell, who owned a tract of land, had conveyed it to his aunt, Mrs. Taylor, for the purpose of defrauding and hindering plaintiff in the collection of its debt.

The testimony shows that Campbell came down, got his attorney who represented him in the justice of the peace court, who knew all about the judgment against them, knew about the garnishment and about the note, and prepared a deed for Campbell to Mrs. Taylor, and, when the deed was prepared and executed, telephoned to the clerk in order to ascertain whether a transcript of the justice of the peace judgment had been filed in the circuit clerk's office; and, when he learned that it had not, the deed from Campbell to Mrs. Taylor was immediately filed and recorded.

We think the proof was ample to justify the chancellor in finding that the transfer of the property was made for the purpose of defrauding the plaintiff.

The appellant next calls attention to the case of *Davis* v. *Arkansas Fire Ins. Co.*, 63 Ark. 412, 39 S. W. 258. In that case the court held: "It is still necessary to show that the remedy at law is inadequate by showing that the debtor has no other sufficient means from which the claims of the creditor may be satisfied, or showing other facts sufficient to call for the interference of the court of equity."

In the case last referred to, there was no evidence that the remedy at law was inadequate, and no testimony of insolvency, and no showing of other facts sufficient to call for the interference of a court of equity. It is clearly

indicated in the opinion that, if there were other facts shown sufficient to call for the interference of a court of equity, the court would have jurisdiction. And in the case at bar the proof is abundant, not only of the fraudulent transfer, but that all of the parties were nonresidents of the State, and that, under the facts, the plaintiff could have had no adequate remedy at law. But the appellant tried his case without objection in the chancery court; certainly tried the case as to Mrs. Taylor without objection.

This court has many times held that, where there is no request to have a cause transferred, or where there is no objection to the jurisdiction of the court, the party will be held to have waived the right to ask for a trial at law. In other words, although a case might be brought in chancery court that should have been brought in the law court, and where a court of equity, for that reason, had no jurisdiction, still, if the defendant tries the case without objection to the jurisdiction, he cannot object in the appellate court, because he has waived the right to object. See *Hayes* v. *Bishop,* 141 Ark. 155, 216 S. W. 298; *Goodrum* v. *Merchants' & Planters' Bank,* 102 Ark. 326, 174 S. W. 198, Ann. Cas. 1914A, 511.

An adequate remedy at law means a present remedy, and not one that might be exercised at some time in the future. This would not be an adequate remedy. It can hardly be contended that the appellee in this case had an adequate remedy at law, when the officer to whom the execution was given to serve reported that all of them were absent from the State, and no property could be found. See *Little Red River Levee Dist.* v. *Thomas,* 154 Ark. 328, 242 S. W. 552.

Again this court has said: "While the complaint is defective in that it fails to allege specifically that the judgment debtor, Sudie A. Horner, was insolvent, and that therefore the judgment could not have been collected against her, nevertheless such effect must necessarily be implied from the allegation 'that, by the wrongful acts of defendant herein complained of, plaintiff has

been deprived of his right and remedy to collect and receive the benefits of his half of said judgment.' The defect in this particular could and should have been reached by a motion to make more definite and certain, rather than by demurrer. When the complaint is tested solely by its allegations, as it must be, it states a cause of action against the appellee for inducing the clients of appellant to breach their contract with him by selling the judgment to the appellee, in which the appellant had a half interest. The complaint alleges that this was done with the intent of depriving the appellant of the fruits of the litigation and the benefits of his fees earned therein." *Hogue* v. *Sparks,* 146 Ark. 174, 225 S. W. 291.

The decree of the chancellor is correct, and is therefore affirmed, and the decree in favor of Chastain is also affirmed.

LESTER *v.* WALKER.

Opinion delivered October 1, 1928.

E. R. Parham, for appellant.

Owens & Ehrman and *Miles & Taylor,* for appellee.

MEHAFFY, J. The Pulaski County Court entered an order directing the issuing to Gordon Walker warrants

in the sum of $16,576.70, to be made payable on the first day of September, 1929. An appeal was taken from the order of the county court, the petition for appeal alleging that the order was void for a number of reasons, but all of the objections to the order except one have been abandoned.

It was alleged that the county does not own the land on which the proposed jail is being constructed, and that the county was therefore without the authority to make the contract for the construction of the jail on said land.

The circuit court held that the order was valid, and that the county was the owner of the land. The case was tried in the circuit court on an agreed statement of facts, and the appellant in his brief says:

"Consequently, the only issue now before the court is whether or not the property now in dispute is the property of the county. Inasmuch as all other allegations were abandoned by the plaintiff upon the trial of the cause, we do not deem it necessary to set out the pleadings in full. The appellees both filed a reply, or answer to the petition, denying the allegations in plaintiff's petition, and asserted affirmatively that the county was the owner of the property upon which the jail is now being constructed. The issue therefore was properly joined in the court below as to whether or not the county was the owner of the property, and this is the only question before this court for determination."

Since this is the only question to be determined by this court, it is not necessary to set out the pleadings in the case.

Appellant's contention is that the city was without authority to pass the ordinance authorizing the conveyance of the property to the county, for the reason that it had already passed an ordinance, on April 14, 1924, which ordinance is as follows:

"Ordinance number 3476. An ordinance setting aside all city property or property controlled by the city on the river front, and holding same to be beautified and made into public parks, and for other such purposes.

"Be it ordained by the city council of the city of Little Rock:

"Section 1. That hereafter no leases or sales shall be made or extended on any land belonging to or controlled by the city of Little Rock on the river front, and all city lands on the river front shall from this date be held for public parks, to be improved, beautified, and made into parks for the use and benefit of the citizens of Little Rock.

"Section 2. All ordinances and parts of ordinances in conflict with this ordinance are hereby repealed, and this ordinance shall take effect and be in force from and after its passage."

The city of Little Rock owned a tract of land bounded on the north by the Arkansas River, and it is the contention of the appellant that all the land the city owned in that part of the city constituted the river front, or a part of the river front, and that therefore the property in controversy on which the jail is being constructed had already been dedicated to the public, and could not be sold by the city. We think, however, that the river front meant only that tract of land fronting on the river north of the Missouri Pacific railroad; that it was certainly not the intention of the council to make a park of land south of the Missouri Pacific railroad tracks. It had already sold to the county many years ago the land on which the present jail or old jail stands, and had never devoted or dedicated any part of the property south of the railroad tracks to the public. We think it would be unreasonable to hold that that part of the land owned by the city south of the railroad tracks was the river front mentioned in the ordinance; but, whether it was or not, we think the city had a right to sell the property in controversy to Pulaski County, notwithstanding the ordinance set out above had been passed.

It is insisted by the appellant that, when property is once dedicated for the use and benefit of the public for park purposes, the city no longer has authority to cancel or set aside such dedication and convey the property for

other purposes. Appellant relies on Dillon on Municipal Corporations, 5th ed., 3d volume, § 1102, and on 20 R. C. L., 645. The section of Dillon on Municipal Corporations relied on by appellant reads as follows:

"A municipal corporation has no implied or incidental authority to alien or dispose of for its own benefit property dedicated to or held by it in trust for the public use, or to extinguish the public uses in such property, nor is such property subject to the payment of the debts of the municipality."

One of the cases cited under this section is *Beebe* v. *Little Rock,* 68 Ark. 39, 56 S. W. 791. In the opinion in that case will be found a history of the ownership of the land in controversy by the city of Little Rock, as well as the manner in which it was held, and it was not held in trust, but it was held, according to the decision of this court, for general purposes. In that case it was said:

"It may be considered as well settled that municipal authorities cannot sell the streets of the town or city dedicated to the public use, and the reason is, in such case the city or town is a mere trustee for the public, and a trustee cannot dispose of the property of the *cestui que trust,* except by special authority. In *Searcy* v. *Yarnell,* 47 Ark. 269, 1 S. W. 319, this court said: 'A municipal corporation has power to dispose of property held for general convenience, pleasure or profit.' The property there involved was the town's interest in a railroad lying mostly without the corporate limits of the town, and constructed for the purpose of connecting the town with the Iron Mountain railroad, three or four miles away, and that for the general convenience, pleasure and profit of the inhabitants of the town. It was in no wise a necessity in or factor of the municipal government." *Beebe* v. *Little Rock,* 68 Ark. 39, 56 S. W. 791.

We think it will be found that the authorities referred to and the cases cited by them are all dealing with property conveyed to the city in trust for a specific purpose.

The next authority cited by appellant is 20 R. C. L. 645. The authority referred to states:

"As a general rule, property dedicated for use as squares, parks or commons, cannot be sold or leased by the municipality, and the Legislature has no power, as against the dedicators, to authorize such disposal. Where the fee is vested in the public, either by condemnation or otherwise, the Legislature may, as against the public and the property owners in the vicinity, control the use, although the use proposed is inconsistent with the one before designated. * * * The general rule is that municipal corporations possess the incidental or implied right to alienate or dispose of their property, real or personal, of a private nature, unless restrained by charter or statute, but they cannot dispose of property of a public nature, such as a public park or common, in violation of the trust in which it is held; and, although a city takes the title to lands condemned for park purposes, it takes it for the public use as a park, and holds it in trust for that purpose. And, while, if it had taken the title free from such trust, it could sell and convey it away, when and as it chose, receiving the title in trust for an especial public use, it cannot convey without the sanction of the Legislature. But there is a distinction between property purchased for a public park or square and not yet dedicated, and property which is purchased for that purpose and actually dedicated to that use." 20 R. C. L. 645, § 13.

All these authorities refer to property conveyed to a city for a specific use and not to property owned by the city generally. Where property has been dedicated by the owner to a public use and where such property has not been used by the public, and neither the public nor any third person has acquired any rights because of the dedication, the dedication may be revoked.

This court has said: "In the recent case of *Davies* v. *Epstein* (77 Ark. 221, 92 S. W. 19), we approved the generally established doctrine that 'an owner of land, by laying out a town upon it, platting it into blocks and lots intersected by streets and alleys, and selling lots by refer-

ence to the plat, dedicates the streets and alleys to the public use, and such dedication is irrevocable.' It is equally well established that 'merely laying out grounds, or merely platting and surveying them, without actually throwing them open to the public use or actually selling lots with reference to the plat, will not, as a general rule, show a dedication. * * * The revocation may be accomplished either by an affirmative act in recalling it, or by an abandonment of the scheme. The question of abandonment is one of fact, and may be said to occur where the object of the use for which the property is dedicated wholly fails. * * * It follows that, the dedication never having been in any way accepted by the public, and having been revoked by abandonment of the scheme for converting the lands into additions to the adjacent town, the title to the streets, avenues and alleys passed to the owners of abutting platted lots and blocks as grantees of the original dedicators." *Dickinson* v. *Arkansas City Improvement Co.*, 77 Ark. 570, 92 S. W. 21, 113 A. S. R. 170.

In the case at bar the city owned the property, and passed an ordinance to the effect that hereafter the river front would be used as a park, and should not be leased or sold. The property, however, was never used as a park; nothing was done by the public or any third persons because of the passage of this ordinance, and, by an affirmative act of the city in passing the ordinance authorizing the sale of the property to the county, it necessarily repealed the first ordinance and revoked the intended dedication.

"Unless private rights have been attached or unless the property has actually been used as a park, the municipality may revoke." Sections 1086 and 1091, Dillon on Municipal Corporations, vol. 3, 5th edition.

We therefore conclude that, in the first place, the property south of the Missouri Pacific railroad tracks is not a part of the river front; and second, that neither third persons nor the public having exercised any rights, and the municipality itself having done nothing but pass the ordinance, it had the right to revoke it. A municipal

corporation may dispose of its property unless it is held in trust in the same manner that a private individual could dispose of his property. This court has said:

"A municipal corporation may be the owner of two classes of property. One class includes all property essential to, or even convenient for, the proper exercise of municipal functions and corporate power. The other class includes all property held for general convenience, pleasure or profit. * * * Municipal corporations possess the incidental or implied right to alienate or dispose of the property, real or personal, of the corporation, of a private nature, unless restrained by charter or statute." *Fussell* v. *Forrest City,* 145 Ark. 375, 224 S. W. 745.

There is no dispute about the city having owned the land in controversy, and it is conceded that, unless the ordinance dedicating the river front for a park prohibits it from doing so, the city may sell the property. There is a pretty full history of this property and the manner in which it was acquired by the city in the *Little Rock* v. *Jeuryens,* 133 Ark. 126, 202 S. W. 45. Among other things the court said: "It follows, from what we have said, that the city owned the disputed land upon which Jeuryens located, unless it was below the high-water mark. If it were below the high-water mark, it was a part of the bed of the river and belonged to the State. * * * We therefore hold that the land was an extension of Water Street, and belonged to the city as such."

And the court further said in the above case: "The decree of the court below will be reversed, and the cause will be remanded with directions to amend the decree quieting the title of the city against both Jeuryns and the State for the property involved in this litigation."

So there can be no dispute about the title being in the city, and, as we have already said, municipal corporations have the same right to sell property held by them for general purpose that an individual has. We have no statute prohibiting it and nothing in the Constitution that prohibits it. And, since the title to the

property involved was in the city and had never been dedicated to public use, the public had never acquired any rights, no third person had ever acquired any rights, and the city had a right to repeal the ordinance with reference to the river front and to sell the property involved in this suit to the county.

The judgment of the court is therefore affirmed.

HENSON *v.* ARKANSAS STATE LIFE INSURANCE COMPANY.

Opinion delivered October 1, 1928.

Oscar Barnett, for appellant.

Neill Bohlinger, for appellee.

McHANEY, J. Appellant is the mother of Gussie B. Henson, and was named as beneficiary in a sick and accident policy of insurance issued by appellee to said Gussie B. Henson on the 11th day of June, 1927. By the terms of the policy the premiums were due July 1, and on the first of each month thereafter, with five days of grace allowed to pay same. She did not pay the premium due July 1, nor within the five days of grace allowed, and, along early in July, suffered an illness, from which she died on the 26th day of July. The insured not having paid her premium, on July 22 the company wrote her a letter, without any knowledge of her illness, calling her attention to her delinquency in the payment of her premium, in which it said: "Our record shows you are only due for this month's premium, which is only a small amount, and we are going to give you this one more chance to have your insurance put back in force, but you must act at once, and send us your premium before we close our books at the end of the month." This letter

was dated July 21, and was received by the insured on July 22, and the appellant sent the money to appellee on the same day, for which a receipt was issued.

This suit was instituted by appellant to recover $300 for the death of Gussie B. Henson, on the theory that the policy covered loss of life through natural causes. At the conclusion of the testimony the court instructed a verdict for appellee, and the case is here on appeal.

The court did not err in giving a peremptory instruction, for the reason that the policy in question does not cover death except through accidental means. It insured the deceased "against death and disability through sickness and accident to the extent as herein limited and provided." Part 1, § (A) provides for sickness indemnity for $1 per day, "meaning disability caused by sickness which is contracted and begins during the life of this policy, and after it has been maintained in continuous force for not less than thirty days hereinafter, called 'such sickness,' and so long as the renewal premium is paid in advance by the insured," subject to all conditions set out in the policy. Section (B) provides for accident indemnity of $1 per day. Part 2 provides for accident insurance in the sum of $300 for certain specific losses, and continues: "If, within ninety days from the time of an accident, any one of the following specific losses shall result solely from such injury, the company will pay for such loss, in lieu of all other indemnity under this policy, the specified sum shown herein." For loss of life $300, both eyes $300, etc.

There is no provision in the policy, which we have examined carefully, insuring the deceased against death, except through accidental means. Parts 3 and 4 deal wholly with accident indemnity, and part 5 with illness indemnity.

The evidence in this case shows that the insured died from disease, and not because of an accident. The policy not covering death of the insured except by accidental means, creates no liability against appellee for her death, and the court correctly instructed a verdict. Judgment is accordingly affirmed.

HOLT *v.* J. B. HOLT TIRE COMPANY.

Opinion delivered October 1, 1928.

Virgil D. Willis, for appellant.

J. M. Shinn and *Woods & Greenhaw,* for appellee.

McHANEY, J. Appellee instituted this action against appellant before a justice of the peace to recover the sum of $82 on account, and secured judgment against him. Appellant took an appeal to the circuit court, and gave an appeal bond. At the July term, 1927, of the circuit court, on motion of appellant, the case was continued to the January term, 1928, and set for the 16th day of January. Appellant failed to appear on said day, and, on motion of the appellee, his appeal was dismissed. Thereafter, on the 17th day of February, appellant filed his motion for reinstatement, and the memoranda on the judge's docket shows that on the 18th day of February, "the motion to reinstate coming on to be heard,

and the court being fully advised in the premises, doth overrule the same," to which appellant excepted. The transcript also shows that on the same day, February 18, "This cause coming on for trial, comes the plaintiff by his attorney, and the defendant appeared by attorney only, and filed a motion for a continuance herein on the grounds of sickness in the defendant. The court, after hearing the motion and being fully advised, doth overrule said motion, and the appeal in this cause is by the court, upon motion of the plaintiff, herein dismissed; and it appearing to the court that the defendant has entered into an appeal bond with Charles Austin as surety: It is therefore by the court considered, ordered and adjudged that the plaintiff, J. B. Holt Tire Company, have and recover of and from the defendants, W. H. Holt and his bondsman, Charles Austin, the sum of $82, and all costs in this suit laid out and expended, and to include the costs of the circuit court, for which let execution issue."

There was no motion for a new trial, no bill of exceptions, and there is therefore nothing for this court to review except error manifest on the face of the record. We cannot review the action of the circuit court in overruling the motion for continuance recited in the above judgment, for the reason that the affidavit upon which it is based, if there was one, is not brought into the record by bill of exceptions, and for the further reason that there was no motion for a new trial assigning the refusal of the court in this regard as error. *Watts* v. *Cohn,* 40 Ark. 114, and cases cited.

Neither can we review the action of the court in overruling the motion to reinstate the cause for the same reason. We cannot tell from the record what the court had before it when it heard the motion to reinstate, the order stating that, "the court being fully advised in the premises, doth overrule the same." We cannot say from the face of the record that the court erred in overruling the motion to reinstate, as it might have heard evidence or was otherwise advised in the premises.

Appellant also says that the court had no authority to render judgment against him and his bondsmen after dismissing the appeal. Assuming that this is true, which we do not decide, it is not properly before the court, as the record does not disclose any motion of appellant or his bondsman to set aside such judgment or to strike same from the record, nor any motion for a new trial assigning the refusal of the court to do so as error.

We find no error apparent on the face of the record, and the judgment is accordingly affirmed.

CRAWFORD *v.* STATE.

Opinion delivered October 1, 1928.

Lee & Moore and *Ross Mathis*, for appellant.

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

McHaney, J. Appellant was convicted upon a charge of murder in the first degree and sentenced to death for the killing of his mother-in-law, Mrs. Minnie May Chitty, on December 20, 1927. According to the evidence for the State, the killing was wholly unwarranted and unprovoked. The defendant contended that he shot the deceased after a murderous assault made upon him by the deceased with a stick of stovewood, without provocation, and after she had knocked him down and was attempting further to strike him.

His first assignment of error is that the court committed reversible error in its refusal to give his requested instructions Nos. 4 and 6, which are as follows:

Instruction No. 4: "If you find that the deceased made an assault upon the defendant, without fault or carelessness on the part of the defendant, and that the assault was so fierce and violent as apparently to make it (as) dangerous for the defendant to retreat as to stand, then it was not the duty of the defendant to retreat, and he had the right to stand his ground, and, if necessary to save his own life or to prevent a great bodily injury to himself, to slay his assailant."

Instruction No. 6: "If you find from the evidence that the deceased, Mrs. Chitty, made an assault upon the defendant, Dewey Crawford, which was so fierce and violent as to make the defendant believe he was in danger of losing his life or suffering great bodily harm, then you are instructed that the defendant was not bound to retreat, but that he had the right to act in his self-defense until the danger was over."

It is said that, in the cross-examination of appellant, it was attempted to be shown by appellant himself that

he could have retreated without shooting the deceased, and that numerous questions were asked by counsel for the State which tended to ridicule appellant's contention that he could not retreat. The killing was admitted, and appellant interposed the plea of self-defense in justification thereof.

Section 2375, C. & M. Digest, provides: "In ordinary cases of one person killing another in self-defense, it must appear that the danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily injury, the killing of the other was necessary, and it must appear also that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further contest before the mortal blow or injury was given."

The court gave, at appellant's request, instruction No. 2, which, after explaining to the jury the essential difference between murder and manslaughter, says: "It will not be necessary for you to distinguish between the different degrees of murder or between murder and manslaughter, if you find that the defendant acted in self-defense, and killed the deceased after she had made an attack upon him, which was not provoked by him and without fault or carelessness on his part, and if he killed the deceased because of an honest belief, as a reasonable man, that there was an urgent and pressing danger of losing his life or suffering great bodily injury, and shot to protect himself in this belief."

Again the court repeated the same idea at the request of appellant in instructions 11, 12 and 13, instruction No. 13 being as follows: "You are instructed that, in arriving at a decision as to whether or not the defendant, Dewey Crawford, shot the deceased, Mrs. Chitty, in the honest belief that he was about to suffer death or great bodily injury at her hands, and without fault or carelessness on his part, you will try to form in your own mind a picture of the killing and see the circumstances as they appeared before the defendant, and not as they may now appear to you; and if you find from the evidence that the defendant, at the time of the killing, without fault or

carelessness on his part, honestly believed that he was in great danger of losing his life or of suffering great bodily injury at the hands of the deceased, Mrs. Chitty, and shot her in this belief, then you will return a verdict of not guilty, even though you should find now that there was in fact no actual danger of his losing his life or suffering great bodily injury at her hands."

The court fully instructed the jury on presumption of innocence, the burden of proof, and reasonable doubt.

We think there was no error therefore in the refusal to give the above instructions. Instruction No. 4 is subject to the criticism made of a similar instruction in the recent case of *Stoddard* v. *State,* 169 Ark. 602, 276 S. W. 358. However, instruction No. 6 is not subject to the same criticism, and might, under proper circumstances, be a correct declaration of the law on the question of appellant's duty to retreat. The court had already instructed the jury in the language of § 2375, C. & M. Digest, and repeated the matter in the instructions above mentioned at the request of appellant more than once.

Self-defense can only be interposed where the person killed was the assailant, or where the slayer, having brought on the difficulty and being himself the aggressor, had really and in good faith endeavored to withdraw from the contest or controversy before the killing. If the person killed is the assailant, and it appears to the defendant that the danger is so urgent and pressing that it is necessary to kill the assailant in order to prevent his receiving great bodily injury, then he may do so without retreating. But, if he brings on the difficulty himself, is the aggressor, then he must in good faith endeavor to decline any further contest, in other words, retreat or withdraw, before he is entitled to the plea of self-defense, and then only under the same conditions as to the urgent and pressing necessity for killing. Therefore, according to his own statement, appellant was not the aggressor, was not under duty to retreat, and on his own theory of the case was not entitled to either of said instructions in addition to those heretofore mentioned as having been

given. As already stated, the court fully instructed the jury on the law of self-defense, and in language so plain that the jury could not have misunderstood it. We therefore overrule appellant's contention in this regard.

Appellant next insists that the court erred in refusing to give his requested instruction No. 3, as follows:

"You are instructed that, if you find that any statements were made by the deceased in regard to the defendant that might be construed as threats against the defendant, then you would have a right to consider such statements or threats as showing the frame of mind of the defendant and as bearing upon the question of who was the probable aggressor."

The court gave an instruction on the law of threats, stating, in substance, that it was competent for the defendant to show that threats had been made against him; that threats against a person will not justify an assault or the taking of life of a person unless, at the time of the assault or taking the life, the person making the threats does some act indicating that he is about to carry his threats into execution; that they should be considered in determining whether or not he was in such danger as required the exercise of his right of self-defense, But, if they are made, they should be considered only by the jury in determining who was the probable aggressor in the difficulty. Appellant's requested instruction was not correct, for the reason that it did not distinguish between communicated and uncommunicated threats, but applied to all threats generally. It was therefore not a correct declaration of the law as requested, as an uncommunicated threat could not throw any light on the frame of mind of the defendant. No objection or exception was made to the court's charge on threats, and, not having asked a correct instruction thereon, he is in no position to complain.

It is next insisted that it was error for the court to give § 2342, C. & M. Digest, as an instruction, without following it with a statement that the burden of proof on the whole case was on the State, and notwithstanding

§ 2342, it was sufficient if the evidence in behalf of appellant created a reasonable doubt of his guilt. Only a general objection was raised against this instruction, and if appellant thought the court should have added thereto in the manner above indicated, he should have requested the court to do so. As already stated, the court fully instructed the jury on the burden of proof, reasonable doubt, and presumption of innocence, and we therefore overrule appellant's contention in this regard.

It is finally insisted that the verdict of the jury was clearly excessive, as the evidence does not show the elements of murder in the first degree. It is said that the evidence in behalf of the State did not warrant the death penalty. As heretofore stated, the testimony on behalf of the State showed a willful, deliberate and malicious killing, which was entirely unprovoked; that on behalf of the defendant, that he was justified therein. This was a question for the jury, and, under the settled rule of this court, the verdict must stand if supported by any substantial testimony. It is also said that the verdict was dictated by passion and prejudice, but we find nothing in the record to justify this statement. The trial court was present, saw the witnesses on the stand, heard them testify, and was in better position to judge of this matter than this court. By his action in overruling the motion for a new trial, he has said, in effect, that no such condition existed, and we do not feel justified in setting the verdict aside on this ground. We find no error, and the judgment is affirmed.

LAIRD *v.* BYRD.

Opinion delivered October 8, 1928.

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Gaughan & Sifford, for appellant.

Allyn Smith and *W. L. Brown*, for appellee.

HART, C. J., (after stating the facts). It is well settled in this State that one who sells personal property with reservation of title, upon the purchaser's default may either treat the sale as canceled and bring an action of replevin, or treat the sale as absolute and sue for the purchase money. It is equally well settled that the purchaser has the right to pay the balance of the purchase price, so as to prevent the seller from retaking the property. *Culberson* v. *Lakella Iron Works,* 170 Ark. 813, 281 S. W. 373.

The Commercial Investment Trust, by transfer and assignment from Hugh McKenzie, became the owner of the $450 note of Clyde E. Byrd, payable in installments, and also of the conditional sales contract. Byrd made default in the payment of the first two installments of the note, and the Commercial Investment Trust turned the note and contract over to Edward I. Rothbart, an attorney of Chicago, for collection, or for the recovery

of the automobile in default of the payment of the balance due on it. Rothbart, on the ninth day of July, 1926, wrote to Clyde E. Byrd a letter in which he told him that his clients had requested him to take immediate action in the matter, and that the matter would be held in abeyance in his office for the next seven days. This letter was duly received by Byrd, and, before the end of the seven days, he went to the garage of Hugh McKenzie, where he had left the car to be greased and oiled, and demanded his car. He was told by McKenzie that the Commercial Investment Trust had taken possession of the car because of his default in the payment of the two installments of the notes. Byrd tendered to Hugh McKenzie his father's check for $450 for the balance of the purchase price. The check was refused, but was refused by McKenzie because he had already sold the car to F. D. Laird. Byrd then wired the $450 to the Commercial Investment Trust.

The court submitted to the jury the question of whether or not the Commercial Investment Trust had waived its right to retake the car during the seven days' time for extension given by its attorney, Rothbart, and the action of the court in this respect is assigned as error by counsel for appellants. They cite and rely on the principle of law decided in *Cullen-McCurdy Construction Co.* v. *Vulcan Iron Works,* 93 Ark. 342, 124 S. W. 1023, where it was held that it was not within the implied authority of an attorney to compromise his client's cause of action, or to release the defendant from liability, or to shift that liability by accepting the liability of another for that of the defendant. In this connection it may be said that there is no implied power, under a general retainer to an attorney, to grant additional time to a client's debtor. 6 C. J. 659, and cases cited. These cases are based upon the principle that the law of principal and agent applies to the relation of attorney and client where the attorney is acting merely in the capacity of a collector, and that there is no implied power to grant additional time to his client's debtor. Our own case cited

above and those cited in Corpus Juris proceed upon the principle that an attorney cannot give a release or compromise a case without sufficient authority, because that affects his client's right and not merely his remedy. So too, when an extension of time has been granted by an attorney who has merely authority to collect, this might have the effect of discharging a surety of the debtor or of otherwise impairing the rights of his client.

Here greater authority than a mere collection attorney may be implied. As we have already seen, there was a conditional sales contract, and the seller or his assignee had the right to treat the sale as absolute and recover the balance of the purchase price, or to retake the property and claim it as his own, upon default by the purchaser in making the installment payments as provided in the conditional sales contract. It is inferable from the letter written by Rothbart and from his testimony in the case that he had authority to collect the balance of the purchase price or to institute suit for the property itself, in case of default of the payment of the purchase price. Hence we are of the opinion that the court was justified in submitting to the jury whether or not Rothbart did have authority to extend the time of payment for a short period in order to collect the balance of the purchase price. Such action on his part in no sense deprived his client of any material right, and related merely to his control of the remedy given his client under the conditional sales contract. Hence we do not think that the court committed reversible error in submitting this question to the jury, under the circumstances adduced in evidence.

It is next contended that, even though Rothbart had the authority to give the seven days' extension of time for payment, this did not have the effect of waiving the foreclosure, and that the seller still had a right to retake the property because the two installment notes had not been paid when due. This is contrary to the plainest principles of justice. The seller was given the election to treat the sale as absolute and sue for the balance

of the purchase price, or to retake the property upon the default being made by the purchaser in the payment of the past due installment notes and demand for the property. The jury was justified in finding that Byrd had relied upon the seven days' extension of time given him by Rothbart for the Commercial Investment Trust, the holder of the note and the conditional sales contract, and, under the circumstances, it could not treat the non-performance of the contract within the original time as a breach of it. *Johnson* v. *Keaser,* 196 Cal. 686, 239 Pac. 324; *Reinkey* v. *Findley Electric Co.,* 47 Minn. 161, 180 N. W. 236; and *McCaron* v. *Commercial Credit Trust,* 167 Minn. 322, 209 N. W. 15.

It is also insisted that the judgment should be reversed because the tender made by Byrd for the payment of the purchase price was not in cash. This did not make any difference. The tender was not refused because of the check, but because McKenzie claimed that he had already sold the car to Laird. McKenzie waived his right to demand money by objecting to receiving the tender on other grounds. It would have been a vain and idle thing for Byrd to have procured the $450 in money and tendered it to McKenzie when McKenzie was refusing to accept the tender on other grounds. *Harriman* v. *Meyer,* 45 Ark. 40; and *Duffy* v. *O'Donovan,* 46 N. Y. 223.

Finally, it is insisted that Byrd could not maintain the suit against McKenzie because he had already sold and delivered the car to Laird at the time the suit in replevin was brought. The suit of Byrd was predicated upon the wrongdoing of the defendants, and they were all liable in damages for the condition of the car, under the facts found by the jury in the application of the principles of law given by the court. If the Commercial Investment Trust wrongfully converted the car to its own use when Byrd had the right to pay the balance of the purchase price, neither the Commercial Investment Trust nor its agents in the premises can escape liability for its wrongdoing. In the very nature of things

neither McKenzie nor Laird could obtain any better rights than the Commercial Investment Trust. They were in no sense innocent purchasers.

Therefore the judgment will be affirmed.

BURROW *v.* STATE.

Opinion delivered June 11, 1928.

Northcutt, Burrow & Richardson, for appellant.

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

McHaney, J. Appellant was indicted, convicted and sentenced to one year in the penitentiary for the unlawful manufacture of intoxicating liquor. The indictment copied in the transcript was one charging him with manufacturing mash fit for distillation, but on certiorari the correct indictment has been certified to this court.

His first assignment of error for reversal of the judgment of conviction and sentence against him is that the evidence was insufficient to support the verdict and judgment. The rule of law governing this court on this assignment is that, if there is any substantial evidence tending to connect appellant with the commission of the offense charged against him, the verdict of the jury is binding here.

The credibility of the witnesses is a question solely for the jury, as well as the weight and sufficiency of the evidence to convict, if there is any substantial testimony tending to convict. There are so many decisions of this court to that effect that we deem it unnecessary to cite them.

The testimony of Mr. Keck and three other witnesses for the State was sufficient to submit to the jury the question of the guilt or innocence of appellant. He testified that he climbed a tree about 250 or 300 yards away from the house, and saw appellant and others carrying mash from the mash barrel into the house; that two of them would carry the mash while another stood guard, and that they would take it turn about standing guard. Appellant was recognized by Mr. Keck as one of those carrying the mash into the house.

Mr. Keck and the others with him went down to the house, where they arrested appellant and the others, and found a still located in the house, in full operation, with some finished liquor. Appellant refused the officers admission until they had shown him a search warrant, and told them not to pour the mash on the floor. This tended to show possession of the property in which the still was located, as well as the still itself. This was sufficient to take the case to the jury, and its verdict is binding upon this court.

Assignments 2 and 3, that if any offense was committed it was for possessing mash, and that the proof was not responsive to the indictment, pass out of the case, for the reason that the proper indictment has been brought into the record by certiorari, as heretofore stated.

There was no error in the refusal of the court to permit appellant to show that he had had a subpoena issued for two witnesses who were out of the State. No motion for continuance was filed on this account, or, if so, the overruling thereof was not assigned as error. Moreover, the record does not show that such testimony was offered or excluded, and the error, if one, could not be urged on appeal, it having been raised in the motion for new trial for the first time. *Brown* v. *State,* 169 Ark. 324, 274 S. W. 1.

Complaint is also made of the closing argument of the prosecuting attorney; that the women jurors were not properly instructed; and because the jury was not made up according to law. The argument of the prosecuting attorney is not contained in the bill of exceptions, and we cannot tell whether it was erroneous or not. As for the women jurors, the record does not reflect that the court was requested to advise them that their service on the jury was optional. The law provides that it is optional with them, and it is presumed that they knew the law; but perhaps, if appellant had requested the court to so advise the women jurors, it would have done so. Nor does the record reflect any irregularity in the

impaneling of the jury. No objection was made or exceptions saved to the manner of impaneling the jury, and, even though it had been irregularly impaneled, appellant is in no position to complain.

Complaint is also made of the refusal of the court to give instructions 1, 2 and 3 requested by him. We have examined these instructions refused as well as those given by the court, and find that the jury were correctly instructed. Numbers 1 and 2 were argumentative in form, and number 3 was on circumstantial evidence. The State did not rely upon circumstantial evidence wholly, and this court recently held, in the case of *Adams* v. *State,* 176 Ark. 916, 5 S. W. (2d) 946, that, even where the State depends wholly on circumstantial evidence, it is not error to refuse such an instruction, where the court properly instructed upon the weight of the evidence, the burden of proof, and reasonable doubt.

We find no error, and the judgment is affirmed.

KIRKPATRICK *v.* STATE.

Opinion delivered October 8, 1928.

[redacted]

W. D. Brouse, N. A. McDaniel and *W. A. Utley,* for appellant.

H. W. Applegate, Attorney General, and *Walter L. Pope,* Assistant, for appellee.

HART, C. J. John P. Kirkpatrick prosecutes this appeal to reverse a judgment of conviction against him for attempting to induce Gethel Coates to withhold her evidence in the case of State of Arkansas against Lilburn Kirkpatrick, pending in the Saline Circuit Court.

The first assignment of error is that the court erred in not sustaining a demurrer to the indictment. The charging part of the indictment contains the following:

"The said John P. Kirkpatrick, in the county and State aforesaid, on or about the 21st day of November, A. D. 1927, did unlawfully, willfully and corruptly attempt, directly and indirectly, to induce one Gethel Coates to withhold her evidence and to deter her, the said Gethel Coates, from offering or giving evidence in a certain criminal case then pending in the circuit court of Saline County, Arkansas, between the State of Arkansas, plaintiff, and Lilburn Kirkpatrick, defendant," etc.

It is contended that the use of the words "directly and indirectly" in the charging part of the indictment as copied above shows that it was intended to charge two distinct offenses, and that the use of the word "or" between "directly" and "indirectly" renders the indictment void for uncertainty. This contention is based on the general rule that, where a statute enumerates several acts disjunctively, which together or separately constitute the offense, an indictment thereunder, to charge more than one of them, which it may do in the same count, should do so in the conjunctive, and if the disjunctive is used, the indictment will be bad for uncertainty. This general rule was recognized and applied in *Trout* v.

State, ante, p. 1029. In that case it was pointed out that malt, fermented and spirituous liquors might all be intoxicating liquors, but they were different kinds of liquors. Hence a charge of selling vinous, malt and spirituous liquors would be in the conjunctive instead of in the disjunctive. The reason was that the accused was entitled to know which one of the different kinds of liquors he was charged with selling in order that he might be prepared to make his defense and in order that the record of the judgment of conviction or acquittal at that trial might be pleaded upon a subsequent indictment for the same offense.

On the other hand, where but one offense is charged but the several modes provided by the statute by which it may be committed are charged in the disjunctive, the indictment is good. *Holland* v. *State,* 111 Ark. 214, 163 S. W. 781. The reason is that the charge is based upon one offense, and the different modes of committing it provided in the statute are based upon the same transaction. Here the words, "directly or indirectly induce or attempt to induce any witness to absent himself, or avoid a subpoena or other process, or to withhold any evidence," etc., as used in § 2562 of Crawford & Moses' Digest, have the same effect. In the very nature of things, whenever an attempt to induce a witness to withhold her testimony or to change it is made indirectly, it is in the law as if it had been made directly. Therefore we hold this assignment of error is not well taken.

For the same reason the court did not err in refusing to require the State to elect whether it would rely upon proving that the defendant directly or indirectly attempted to induce the witness to change her testimony. The offense charged was an attempt to bribe Gethel Coates in the case of State of Arkansas against Lilburn Kirkpatrick, and but one offense was charged, which might have been committed by directly or indirectly bribing the witness. In other words, the State in proving the offense might show that it was done or that the attempt to bribe was done directly or indirectly, or by

both means. In either event it related to the same transaction and constituted but one offense. To illustrate, it would have been competent to prove that the defendant attempted to induce the witness to withhold her testimony in a given case by making propositions to her mother, and then to have proved that the defendant made the same proposition directly to the witness herself.

It is next insisted that the evidence is not sufficient to support the verdict. The indictment was based upon § 2562 of Crawford & Moses' Digest. Mrs. S. A. Lewallen, mother of Gethel Coates, was the principal witness for the State. According to her testimony, Gethel Coates had a bastard child born to her, and she claimed that Lilburn Kirkpatrick, a son of John P. Kirkpatrick, was the father of the child. According to her testimony, John P. Kirkpatrick asked her to come to see him. He then told her that he wanted her to get Gethel Coates to swear that she had had intercourse with other boys and men, and agreed to pay for that statement the sum of $100, and also to help support the baby as long as he lived. Bill Moore, a witness for the State, also testified that the defendant got him to go to Gethel Coates and tell her, in substance, that he would pay her money if she would keep the case against his son out of court. The defendant said that he would rather give what money the case would cost in court to her. The witness made this communication to Gethel Coates; and she said she did not want anything from the Kirkpatricks, and refused to take the money. According to the testimony of Gethel Coates, her mother and Bill Moore communicated these offers from the defendant to her, and she refused to accept the offers. This evidence was legally sufficient to warrant a conviction. It is true that, according to the testimony of the defendant and his witnesses, he was not guilty; but the jury were the judges of the credibility of the witnesses, and the testimony set out above by the witnesses for the State, if believed by the jury, was sufficient to warrant it in returning a verdict of guilty.

Another assignment of error is that the court erred in holding that the jurors, W. A. Russell and Winn Moore, who had served as jurors in the case of State of Arkansas v. Lilburn Kirkpatrick, were competent jurors in the case at bar. These jurors stated in their examination before the court that they had no bias or prejudice against the defendant. They stated that they had been on the jury in the case against Lilburn Kirkpatrick, but that this fact would not prejudice them in the present trial. The two cases were entirely different offenses, and the fact that the jurors had served in the case of State of Arkansas against Lilburn Kirkpatrick in no sense affected their competency in the case at bar.

Another assignment of error is that the court erred in not allowing the defendant to impeach the witness, Gethel Coates, by showing that she had been a juvenile delinquent, and had been charged with truancy in the defendant's court. The defendant was at the time the county judge of Saline County. This court has held repeatedly that a witness cannot be impeached by proof of specific acts or incidents of bad conduct. *Dean* v. *State,* 130 Ark. 322, 197 S. W. 684; *Mobley* v. *State,* 135 Ark. 457, 205 S. W. 827; *Lockett* v. *State,* 136 Ark. 437, 207 S. W. 55; and *Davis* v. *State,* 150 Ark. 500, 234 S. W. 482.

The next assignment of error is that the court erred in permitting the mother of Gethel Coates to testify that her daughter had told her that Lilburn Kirkpatrick, the son of John P. Kirkpatrick, was the father of her child. Now Lilburn Kirkpatrick had been indicted for carnal abuse, charged to have been committed by having intercourse with Gethel Coates, a girl under the statutory age. As we have already seen, the mother of Gethel was the principal witness for the State. She related on the stand, in detail, the circumstances under which the defendant attempted to induce her to get her daughter to change her testimony in the case of State against Lilburn Kirkpatrick by the payment of money to her by the defendant. It was necessary, in order to under-

stand the effect of her testimony, for the witness to tell that her daughter had told her that Lilburn Kirkpatrick was the father of her child. It appears that she had already testified to that fact, and the offer on the part of the defendant was to induce her to change her testimony by stating that other boys and men had had intercourse with her about the same time, and thereby affect her credibility. Therefore we hold that this assignment of error is not well taken.

We have carefully examined the instructions of the court, and find no reversible error in them.

The last assignment of error is that the court erred in removing the defendant from the office of county judge after the jury had returned a verdict of guilty. The jury returned the following verdict:

"We, the jury, find the defendant guilty as charged, and assess his fine at $5 and his punishment at imprisonment within the county jail for a period of five minutes."

The court also removed the defendant from the office of county judge, under the provisions of § 10336 of Crawford & Moses' Digest. Sections 10335 and 10336 must be read together in order to show upon what the court based its action in removing the defendant from office. The two sections read as follows:

"10335. Suspension on presentment or indictment. Whenever any presentment or indictment shall be filed in any circuit court of this State against any county or township officer, for incompetency, corruption, gross immorality, criminal conduct amounting to a felony, malfeasance, misfeasance or nonfeasance in office, such circuit court shall immediately order that such officer be suspended from his office until such presentment or indictment shall be tried. Provided, such suspension shall not extend beyond the next term after the same shall be filed in such circuit court, unless the cause is continued on the application of the defendant.

"10336. Judgment and proceedings on conviction. Upon conviction of any such officer for any such offense, a part of the sentence of the circuit court having juris-

diction shall be to remove such officer from office, and the clerk of the court, at the close of the term, shall transmit to the Governor a certified transcript of the presentment or indictment, with the judgment of the court thereon, and the vacancy shall be filled as may be prescribed by law at the time the same occurs."

The court relied upon the decision in *Jones* v. *State,* 104 Ark. 261, 149 S. W. 56, Ann. Cas. 1914B, 302. In that case Jones, the constable of Big Rock Township, in Pulaski County, was indicted for murder in the first degree, and was suspended from office under § 10335. His counsel contended that the words "criminal conduct amounting to a felony," as used in the statute, should be held to mean criminal conduct in office amounting to a felony. The court held against that contention, and, in construing the statute, said in effect that the whole context must be considered in arriving at the meaning of the Legislature.

In discussing the question the court said:

"The words 'gross immorality,' immediately preceding the phrase under consideration, refer to individual or personal attributes and habits, as contradistinguished from official misconduct or derelictions. There may be gross immorality in, or upon the part of, an individual during the time he may be holding office, but there cannot be such thing as gross immorality in office.

"The general terms, 'incompetency, malfeasance, misfeasance and nonfeasance,' have reference to official conduct. The term 'corruption' might have reference to acts constituting official corruption, or it might be applied to individual delinquencies not in connection with his office, constituting corruption or dishonesty, as the term is evidently intended to mean."

Continuing, the court said:

"There are no statutes making 'incompetency,' 'corruption,' and 'gross immorality,' as such, indictable offenses. Therefore the Legislature must have intended by the use of these terms that, when any one holding a public office was indicted for any 'criminal conduct

amounting to a felony,' or for any offense which showed him to be corrupt or dishonest, or for any felony or misdemeanor which showed him to be 'grossly immoral,' and which, if proved, in the eyes of the law would render him incompetent to hold office, he should be suspended. In other words, the Legislature did not intend that an officer should perform the functions of his office while he was under presentment or indictment for any criminal conduct which, if proved, amounted to a felony, or that showed that the accused was grossly immoral or corrupt. This is the wise public policy which the Legislature manifestly intended to conserve.''

From the language quoted it is apparent that the court held that the word ''corruption,'' as used in the statute, was intended by the lawmakers to be used in its more comprehensive sense, and not merely as relating to official delinquencies.

According to the definition of the word ''corruption'' in Bouvier's Law Dictionary, it includes bribery; and, as declared by the court in the case just cited and quoted from, in its more comprehensive sense it applies to individual delinquencies not in connection with an office. In short, the court expressly held that the word ''corruption,'' as used in the statute, was intended to be used in its more comprehensive sense as meaning individual as well as official delinquencies.

But it is claimed that the decision of the court on this point was dictum. It is true that the court might have refrained from passing upon the meaning of the word ''corruption,'' as used in the statute; but the language of the court was a proper and reasonable part of the argument upon which the decision of the court was based, and we do not think it should be declared to be dictum merely. It was the deliberate expression of the court upon the meaning which should be given to the whole section when read together in order to ascertain the declared purpose of the Legislature in passing the statute. We call attention to the fact that the court expressly stated that the words, ''gross immorality,''

as used in the statute, could only mean "gross immorality upon the part of the individual during the time he held office," for the reason that there could be no such thing as gross immorality in office. As we have already seen, a person could be corrupt while in office just as well as he could be corrupt in his official duties; and bribery is included in the word "corruption," whether it relates to the official duties of the officer or to his private delinquencies.

It is insisted, however, that this holding of the court in the Jones case has been overruled by later cases relating to the subject. Reliance is placed upon the holding of the court in *Winfrey* v. *State,* 133 Ark. 357, 202 S. W. 23, and in *McClain* v. *Sorrels,* 152 Ark. 321, 238 S. W. 72. In the Winfrey case the court held that an indictment against an officer for transporting liquor did not fall within the statute authorizing a summary judgment of removal. The reason was that the act charged could not be said of itself to amount to "gross immorality" or "corruption." In the McClain case the court said that a single act of drunkenness on a public highway, in violation of statute, does not necessarily involve moral turpitude so as to constitute "gross immorality" within the meaning of the Constitution and statute authorizing the removal of county and township officers for "gross immorality." In neither of these cases is any reference made to the Jones case, and this shows conclusively that there was no express intention on the part of the court to overrule it. We do not think there is any necessary conflict between the Jones case and the Winfrey and McClain cases. A violation of a statute might or might not constitute "gross immorality" or "corruption" according to the circumstances of the case. It might be a violation of a statute that would involve no moral delinquencies whatever. It might require repeated acts to show that an officer was guilty of gross immorality or of corruption by violating the statute. Violation of a statute directed against bribery, however, is necessarily different. If the word "corrup-

tion" includes bribery, then necessarily the conviction of one offense would make the officer guilty or "corruption" if he was convicted of violation of the bribery law. If he was convicted once or many times would relate only to the degree of his guilt.

We find no reversible error in the record, and the judgment will therefore be affirmed.

MEHAFFY, J., dissents from that part of the opinion holding that the court had the power to remove defendant from office.

BLUME *v.* LIGHTLE.

Opinion delivered October 1, 1928.

George J. Crump and *John E. Miller,* for appellant.

Brundidge & Neelly, for appellee.

HART, C. J., (after stating the facts). It is insisted by counsel for appellants that, under the evidence adduced in favor of appellees, appellants were renting

the property from month to month, and that, under the circumstances, they were entitled to thirty days' written notice to terminate the tenancy. *Reece* v. *Leslie,* 105 Ark. 127, 150 S. W. 579. The undisputed evidence shows that appellants did not receive thirty days' written notice to terminate the tenancy, and that there was no agreement between the parties for a less notice. Hence they insist upon a reversal of the judgment.

The circuit court, however, proceeded upon the theory that, under the evidence, the jury might find that appellants had waived the thirty days' written notice which is necessary to the termination of a tenancy from month to month, in the absence of an agreement between the parties for a notice of different time. It is true, as insisted by counsel for appellants, that, in the case of a tenancy from year to year for a term of years, six months' notice is required. *Peel* v. *Lane,* 148 Ark. 79, 229 S. W. 20, and *Jonesboro Trust Co.* v. *Harbaugh,* 155 Ark. 416, 244 S. W. 455. Appellants insisted upon having six months in the present case. Hence the court correctly submitted to the jury the question whether or not they had not waived the thirty days' notice required in a tenancy from month to month by refusing to vacate the premises unless a six months' written notice was given, as is required in a tenancy from year to year.

In *Wood* v. *Davenport,* 156 Ark. 598, 247 S. W. 69, this court held that, where a tenant from month to month, on the sale of the premises asserted the right to hold for a year from the time of his contract, and refused to move until the expiration of that term, there was a disclaimer of the landlord's right to terminate the tenancy, and formal notice was not necessary. The court said:

"The notice of the termination of a lease may be waived by the tenant, and a disclaimer of the landlord's title or the right of the landlord to terminate the lease is sufficient to operate as such waiver. 1 Underhill on Landlord & Tenant, § 131."

In 1 Underhill on Landlord & Tenant, § 125, the author says that the refusal of a tenant to quit on the ground that he is a tenant from year to year waives any formal insufficiency of a notice to terminate a tenancy from month to month. In support of the text the case of *Drey* v. *Doyle,* 28 Mo. App. 249, is cited. In that case it was expressly held that the formal insufficiency of a notice to quit is waived by the tenant's repudiation of the monthly tenancy and his refusal to quit on the ground that he has a tenancy for years in the premises. The court there cited *Boynton* v. *Bodwell,* 113 Mass. 531, to support its holding. There the court had the converse of the proposition, and it was held that, while a notice given by a tenant at will to terminate his tenancy, which fails to state the time when he will quit, is defective, yet, if the landlord does not object to the insufficiency of the notice, when the tenant in fact does deliver to him possession on a subsequent day, the jury are authorized to infer a waiver of the defect.

The same principle controls here. The undisputed evidence shows that appellees gave appellants the privilege of entering into a new lease at $250 per month, which they had been offered by another party, and that they gave appellants a reasonable time in which to consider the proposition and decide upon it. After mature deliberation, appellants decided not to accept a new lease on such terms, and appellees entered into a new lease with another party for $250 per month. They then gave appellants notice to quit the premises on the first day of January, 1928. It is true that the notice was given on December 12, 1927, and that the thirty days' notice required in a tenancy from month to month was not given to appellants, but appellants expressly declined to vacate the premises until they received six months' notice, as is required to terminate a tenancy from year to year. Hence the court was correct in submitting the question of waiver of the insufficiency of the notice to the jury, and the verdict of the jury against appellants is binding upon us upon appeal.

Therefore the judgment will be affirmed.

BANK OF CHARLESTON *v.* HILL.

Opinion delivered October 8, 1928.

[redacted]

T. A. Pettigrew, for appellant.

Dobbs & Young, for appellee.

SMITH, J. The parties to this litigation entered into a stipulation, from which we copy the following facts:

R. B. Clark drew a check on the First State Bank of Keota, Oklahoma, for $575, payable to the order of R. H. Hill, who indorsed the check in blank and deposited it with the Bank of Charleston on February 15, 1927. On the same day the Bank of Charleston sent the check to the Merchants' National Bank of Fort Smith for collection, and on the following day the Fort Smith bank sent the check direct to the First State Bank of Keota for collection, and on the 21st day of February received from the Keota bank a draft for $575, drawn on the First National Bank of Fort Smith, in favor of the Merchants' National Bank of Fort Smith, which draft was presented to the First National Bank on February 21, 1927, during regular banking hours, but was not paid for the reason that the First National Bank had been advised that the Oklahoma bank had failed and had been taken over by

the Bank Commissioner of that State. Clark received from the Oklahoma bank a statement of his account, which showed the payment of the check by the bank, the check being returned to him marked "Paid."

In addition to this agreed statement of facts, Hill testified that he had been a depositor in the Bank of Charleston for twenty-four years, during which time he carried an active account with that institution, and that he was carrying such an account at the time he deposited the check here in question. At the time of making this deposit, and before the check could have been collected in the usual and ordinary course of business, Hill drew checks against his account with the Charleston bank, which would have overdrawn his account but for the $575 credit given him when he made the deposit, but his account was not shown on the books of the bank to have been at any time overdrawn.

Hill brought this suit to recover from the Bank of Charleston the amount of said check after the bank had recharged it to his account, and seeks to maintain this suit upon the theory that the bank received the check as a purchaser, any charge of negligence in the collection of the check against the bank being expressly disclaimed.

The bank defends upon the ground that it received the check in accordance with its usual course of business for collection, to be charged back to the account of the customer if not paid, and its cashier was offered as a witness in support of this defense.

The cashier of the defendant bank was asked if the bank received checks for deposit, to be recharged if not paid, or whether the bank purchased checks from customers, and an objection to the question was sustained by the court.

The cashier was then asked: "I will ask you if the check (sued on) was received by you for the purpose of collection, to be recharged if not collected?" In sustaining an objection to this question the court said: "Let him state what took place, and the jury will determine that."

The witness was then asked if it was the custom of the bank to purchase checks from its customers, and he

answered: "No sir, we don't buy checks. We never bought any checks or drafts. We take them subject to final payment, just like it is stated on the deposit slip." On motion this answer was excluded.

We think this testimony was competent, and that the court erred in excluding it, and this error was accentuated by the following instruction, which was given at the request of the plaintiff depositor:

"1A. You are instructed that, if you find from the testimony that plaintiff, in the ordinary course of business, deposited the check in question with the defendant, and that defendant received said check without reservation or restriction, and credited same as money to the checking account of plaintiff, you will find for the plaintiff the amount in controversy."

It is undisputed that plaintiff deposited the check in question, and that the bank permitted him to draw against the deposit before the collection was made. But this does not prove that the bank had purchased the check. Of course, the bank might have purchased this particular check, and so also it might have received it merely for collection for the account of the depositor, to be recharged to him after the credit therefor had been given, in the event it were not paid. But, if there had been no special agreement in regard to the particular check, the presumption would be that the check had been received pursuant to the banking custom, and it would in such case be proper to show what the custom was.

If the banking custom was to receive checks, in the absence of special agreement, for collection only, to be recharged in the event the collection was not made, although credit for the amount of the check had been given the depositor when the deposit was made, the presumption would be that the parties contracted with reference to this custom.

The court should therefore have permitted the bank to make this proof, and, for the error in excluding this testimony, the judgment must be reversed, and it is so ordered.

BROWN-HINTON WHOLESALE GROCERY COMPANY *v.* WARE & SON.

Opinion delivered October 8, 1928.

W. L. Curtis, for appellant.

SMITH, J. Appellant, a corporation, brought suit against appellees, a copartnership doing a general mercantile business, to recover a balance alleged to be due upon an account for goods, wares and merchandise sold appellees by appellant.

Appellees answered, and alleged that there had been a composition and settlement of the demand whereby they had been discharged from individual liability for the debts of the copartnership. In support of this plea the following testimony was offered.

C. A. Goodwin testified that he was a vice president of a corporation which was one of appellees' largest creditors, and that in February, 1927, he called a meeting of appellees' creditors "to save the creditors any loss." A letter was written to appellant company advising the time and place of this meeting, which was duly held and attended by creditors representing eighty per cent. of the indebtedness due by appellees. At this meeting it

was determined that appellees should execute an assignment of all of their assets, including the accounts due them; that a trustee should take charge of the business and continue it until fall, and collect the accounts, and, until that time, should have the right to purchase such goods as were necessary to continue the business. This assignment was duly executed, and Goodwin was made trustee, and a committee of the creditors was named to advise the trustee in the discharge of his trusteeship.

After this meeting of the creditors and the execution of the assignment, the trustee mailed to appellant and all other creditors the following letter:

"At a creditors' meeting, held in the office of the Williams-Echols Dry Goods Company, March 7, 1927, at which thirty-five creditors were represented, totaling about 80 per cent. of the indebtedness, as shown by their statement, it was decided that the best interest of the creditors would be to appoint a creditors' committee of three, one of which was to act as trustee, to liquidate the above estate, under the direction of the other two members of the creditors' committee, who will advise the trustee the wishes of the creditors. It was also decided to liquidate the estate gradually, as the assets would bring very little at this time if placed on the market at forced sale, as a large part of the assets consist of notes and accounts receivable; that Mr. M. N. Ware, who is manager, thinks a large part can be collected this fall.

"We sent a man today to take a complete inventory of the merchandise, notes, accounts, etc., and as soon as same can be made, we will advise you further. Would like to have a letter from you stating that you will cooperate with the other creditors in making this effort to reach an adjustment of the affairs of G. L. Ware & Son, also send us verified itemized statement of your account."

Appellant sent to the trustee a verified itemized statement of its account. The trustee proceeded to discharge his trust, and, in doing so, bought certain goods from appellant, for which the trustee paid appellant, but it was found that the operating expenses and overhead

costs were so large that the continuation of the trusteeship was not advisable.

Goodwin further testified that, while he was acting as trustee, Mr. Brown, the president of the appellant company, talked with witness about the trusteeship. In the course of this conversation witness told Brown that any bill for goods thereafter bought for the defendant firm would have to be o. k.'d by the trustee. Brown expressed to witness his regret that he did not attend or have a representative present at the creditors' meeting; that he had intended doing so, but had overlooked it.

The trustee determined, upon the advice of his advisers, to sell the assets of the defendant copartnership, and this was done, and from the proceeds of this sale a sum was derived sufficient to pay creditors a dividend of twenty-seven per cent. A check for that amount was sent the appellant company, and returned by it, after which this suit was brought.

The trustee and certain other witnesses testified that there was a custom in the trade vicinity of Fort Smith whereby, when the creditors of an embarrassed debtor took over the assets of the debtor and wound up his business, all creditors participating or agreeing to participate in the equal distribution of the proceeds derived from the receivership were thereafter concluded from prosecuting any proceeding to enforce payment of the unpaid portion of their demand.

Mr. Brown, in rebuttal, testified that he learned that a creditors' meeting would be held, and discussed it with Mr. Ware, of the defendant firm, but that he had never heard of the trusteeship, and that Goodwin told witness he was going to run the business of the debtor firm and would pay its liabilities, and that witness knew of no custom whereby the creditors might take over the assets of a debtor and thereby extinguish their debts after receiving a *pro rata* share of the proceeds of the sale of the debtor's assets, in the absence of an agreement to that effect upon the part of all the creditors, and that his company had not so agreed.

The validity of appellant's demand is not questioned, and it is insisted only that, by participation in the trusteeship, appellant is estopped from demanding anything more than its *pro rata* share of the funds derived from the trusteeship. The question for decision is therefore whether appellant is estopped by its conduct from prosecuting this suit.

The instant case is somewhat similar to that of *Brown Shoe Co.* v. *Stone,* 172 Ark. 1156, 292 S. W. 117. That case arose in the Fort Smith trade territory, as did the instant case, and testimony similar to that in the instant case in regard to the custom of creditors taking over the assets of their debtor was offered.

Such custom, if it exists, can have no binding effect except upon persons who contract with reference to it, as it is in contravention of what would otherwise be the law in this State, as is pointed out in the opinion in the Brown Shoe Company case, *supra.*

The case of *Simmons Hardware Co.* v. *Rhodes,* 7 Fed. Rep. 352, cited in the Brown Shoe Company case, arose in this State, and after a review of the cases in this State which are cited, it was there said:

"An examination of the decisions from the Supreme Court of the State of Arkansas discloses it to be the settled rule of decision in that State that a conditional stipulation in a general assignment for the benefit of creditors, if accepted, shall extinguish and satisfy all liability of the maker of the assignment to creditors, renders such an assignment invalid, because the same tends to hinder, delay, and defraud creditors in the collection of their just debts." (Citing numerous Arkansas cases).

In the Brown Shoe Company case the opinion recites that the testimony showed or that the jury might have found that the particular custom referred to existed; that the parties were aware of it, and contracted with reference to it, and that, after the discharge of the trust by the trustee, the creditor received from the trustee a check which stated on its face that it was in full pay-

ment of the debt due the creditor. Under these facts the court held that the testimony supported a verdict in favor of the debtor.

In the instant case the court, over appellant's objection, charged the jury as follows:

"1. You are instructed that, if the defendants made an assignment for the benefit of their creditors and turned over their property to a trustee for an advisory committee of such creditors for the purpose of extinguishing their debt and to avoid bankruptcy, and that the plaintiff did participate in the assignment by filing its claim with the trustee and by dealing with the trustee, you will find for the defendants."

This instruction is not warranted by the opinion in the Brown Shoe Company case *supra*.

It will be observed that this instruction does not require the jury to find that there was a trade custom, or that appellant was aware of it and had contracted with reference to it.

So far as appellant is concerned, the instruction required only that it "did participate in the assignment by filing its claim with the trustee and by dealing with the trustee" for its debt to be extinguished. Appellant dealt with the trustee after the assignment by selling him goods, and filed its claim with the trustee, but the president of the appellant company testified that this was done without his knowing that he would be expected, in accordance with the alleged local custom, to cancel such portion of his debt as the trustee did not pay.

The instruction is therefore erroneous. Appellant would not be bound by merely filing its claim with the trustee, unless in so doing it thereby assented to accept its *pro rata* share of the proceeds of the trusteeship in full settlement of its claim, and the proof of the custom was competent as tending to show whether, in conforming thereto, appellant had agreed to cancel such portion of its debt as the receiver did not pay.

We do not discuss the conditions under which a local custom, which is not mentioned by the contracting parties,

becomes a part of the contract, on the presumption that the parties contracted with reference to it, as we must assume that, on the retrial, when this question is submitted to the jury, it will be under correct instructions. *Exchange National Bank* v. *Little,* 111 Ark. 263, 164 S. W. 731.

For the error in giving the instruction set out above the judgment must be reversed, and it is so ordered.

FAIR OAKS STAVE COMPANY *v.* CROSS.

Opinion delivered October 8, 1928.

E. L. Westbrooke, Jr., and *E. L. Westbrooke,* for appellant.

Killough & Killough and *Elmo CarlLee,* for appellee.

HART, C. J. Tom Cross, a minor, was killed while operating an equalizer in the stave factory of the Fair Oaks Stave Company, a partnership, and William Cross recovered judgment against said partnership for his son's wrongful death. The Fair Oaks Stave Company denied negligence, and pleaded assumption of risk.

The main reliance of appellants for a reversal of the judgment is that the court erred in not directing a verdict for them. Inasmuch as the correctness of the ruling of the trial court in this respect must be tested by the evidence for appellee when viewed in its most favorable light, we need only abstract the evidence tending to show the negligence of appellants.

On July 7, 1925, Tom Cross, a minor between seventeen and eighteen years of age, was killed while operating an equalizer at the stave factory of appellants. The equalizer consisted of two saws on a single axis, and it was the duty of Tom Cross to cut off the ends of the bolts on these saws as they were delivered to him on small trucks running on iron rails. The track on which the trucks were operated ran up behind the operator and between the two saws in question. The rails were laid on the floor, and there was no stop or bumper at the

end of the track next to the equalizer to keep the trucks from running off the track. The end of the track was between thirty and thirty-six inches from the equalizer. Cross would indicate to the pushers of the trucks when to stop pushing the trucks, and he would then take the bolts from the trucks and cut off the ends by placing the bolts between the two saws. Just before the accident, Cross was standing with his face to the equalizer, after he had finished cutting off the ends of a car of bolts. Two men pushing another car of bolts approached from behind him and pushed the car off of the end of the track, and hit him in the back, which threw him into the saws, where his body was mangled so that he died. The saws were running at the time of the accident, but were stopped immediately afterwards.

Tom Cross had not worked at the equalizer more than a day and a half at the time he was killed. He had worked around stave factories considerably before that time, but had never operated an equalizer. He would have been eighteen years old the following September. He was without experience in operating the equalizer, and had not been warned that there was any danger to him from there not being any bumper at the end of the track to stop the trucks from running off. One witness testified that he had worked around the stave factory for some time, and that he had seen trucks run off the end of the tracks twice before that. Witnesses of the plaintiff testified that it was usual and customary to run the tracks to the side of the equalizer instead of behind the operator and between the saws of the equalizer. Witnesses for the appellants testified that it was the better construction to have the tracks run behind and between the saws of the equalizer.

Two grounds of negligence on the part of the appellants were relied upon for a recovery. In the first place, it is alleged that the track used to carry the trucks of bolts to the equalizer ought to have been on the side of it instead of running directly behind the equalizer and between its two saws. The other ground of negligence

was that the appellants should have put a stop or bumper on the end of the track to keep the trucks from being pushed off the track and against the operator of the saws of the equalizer.

In the first place it is insisted by counsel for appellants that there was no allegation in the complaint of the failure to put a stop or bumper on the end of the track, and that, on this account, the court erred in allowing proof to go to the jury of the negligence of the appellants in this respect. We cannot agree with counsel in this contention. The appellee alleged that the bolts were delivered to the operator of the equalizer by means of small trucks running on iron rails which came up to the rear of the equalizer, and that the rails were so constructed that the trucks operated on them could easily run off the end of the track and strike the operator of the equalizer. This was tantamount to an allegation that the appellants were negligent in not putting a stop or bumper at the end of the track to keep the trucks from running off the track when they were pushed up to the equalizer. Under the circumstances we are of the opinion that the jury was warranted in finding that appellants were guilty of negligence in not either running the track to the side of the equalizer or in not placing a stop or bumper on the end of the rails, if they were run up behind the operator and between the saws of the equalizer. This would have been an inexpensive matter; and if the appellants deemed it best to run the tracks up to the rear and between the saws of the equalizer in order to facilitate the operator in taking the bolts from the trucks for the purpose of sawing off their ends on the saws of the equalizer, it would have been a comparatively simple matter to have placed a stop or bumper on the end of the track so that the trucks could not have been easily pushed off the track. At the least the jury was warranted in finding the appellants guilty of negligence in failing to do this.

It is next insisted that the court should have directed a verdict in favor of appellants because the evidence,

when viewed in the light most favorable to the appellee, shows that Tom Cross assumed the risk of operating the saws of the equalizer. We regard this as a close question; but, when the age and inexperience of Tom Cross is taken into consideration, we cannot say as a matter of law that he assumed the risk. It is true, as held in *Temple Cotton Oil Co.* v. *Skinner,* 176 Ark. 17, 2 S. W. (2d) 676, and numerous other decisions of this court, that an employee assumes all risks naturally and reasonably incident to his service, where the hazards of the service are obvious and within the apprehension of a person of his experience and understanding. This is in application of the well-settled rule in this State that, by his contract of service, a servant agrees to bear the risk of all the ordinary dangers incident thereto, and no recovery can be had for an injury resulting therefrom. Of course the fact that the end of the rails did not have a stop or bumper on them was obvious to the operator of the equalizer, and, if he had been a person of mature years, he would have been deemed, as a matter of law, to have seen and apprehended the danger of operating the equalizer without demanding of his employer that a stop or bumper be placed at the end of the rails over which the trucks containing the bolts were pushed. The evidence shows that Tom Cross had only operated the equalizer a day and a half at the time he was killed, and that no warning had been given him of the danger he might incur. Assumption of risk in the case of young and inexperienced servants is not always predicable from a knowledge of the conditions alone of his working place. In order to say conclusively that there was an intelligent consent on his part to the danger and thereby an assumption of risk by him, the testimony must show that the conditions surrounding him were such that a person of his age and inexperience must be deemed to appreciate the dangers of his work. *Brackett* v. *Queen,* 162 Ark. 524, 258 S. W. 635; and *Hogue* v. *Bundy,* 168 Ark. 879, 271 S. W. 979.

Under the existing circumstances as they appear from the record we are convinced that the testimony was sufficient to warrant the jury in finding the appellants guilty of negligence in failing to properly equip the tracks on which the trucks were run with a stop or bumper, or else running the tracks to the side of the equalizer instead of to the rear and between the saws of the equalizer, and that Cross could not be said, as a matter of law, to have assumed the risk, when we consider his age and inexperience. It is true, as contended by counsel for appellants, that Cross had worked around stave factories before, but it does not appear that he had ever before operated an equalizer, nor could he be said to have, as a matter of law, apprehended the danger of operating an equalizer without there being a stop or bumper at the end of the track, when the track was constructed as in the present case. *Eureka Oil Co.* v. *Mooney,* 173 Ark. 335, 292 S. W. 681; and *Breece-White Mfg. Co.* v. *Green,* 171 Ark. 968, 287 S. W. 173.

In this connection it may be stated that it is earnestly insisted that the court erred in permitting a witness for appellee to say that he had seen a truck run off the track at the same place twice before within a short time before the accident in the case at bar took place. In this contention counsel rely upon that class of cases which tend to show that a declaration of a servant as to how an accident happened cannot be used to show negligence on the part of his master. In the first place, it may be said that the witness who testified to this fact was not one of the servants who were pushing the truck at the time of the accident. He was another servant of the company, who was in no manner responsible for the accident, and who merely happened to see it. His testimony that he had seen a truck pushed off the track twice before within a short time was competent for the purpose of establishing the negligence of the appellants. It tended to show that it was an easy matter to push a truck off of the track where there was no stop or bumper at the end of the track, and appellants were

deemed to have knowledge of this fact, and might thus have reasonably anticipated that just such an accident as did happen was likely to happen.

Complaint is also made by counsel for appellants to some of the instructions given by the court. We do not deem it necessary, however, to set out these instructions nor to discuss each of them in detail. It is sufficient to say that we have carefully considered them, and that the court was governed by the principles of law above announced in giving them.

We find no reversible error in the record, and therefore the judgment will be affirmed.

SWAFFORD *v.* KETCHUM.

Opinion delivered October 8, 1928.

John L. McClellan, for appellant.

D. M. Halbert and *H. B. Means*, for appellee.

HART, C. J., (after stating the facts). The only question argued before us is whether or not our Bulk Sales Law created a lien on the stock of furniture in the hands of Ketchum and Sullivan and made them liable to Swafford to the extent of the value of the goods purchased. Our Bulk Sales Law declares, in effect, that any sale of merchandise in bulk, otherwise than in the ordinary course of trade, shall be void as against the creditors of the seller, unless the purchaser demands and receives

from the seller a written list of the names and addresses of the creditors of the seller, and unless the purchaser shall, at least ten days before taking possession of the stock of merchandise, notify personally or by registered mail every creditor whose name and address is stated in the list. *Prins* v. *American Trust Company,* 169 Ark. 455, 275 S. W. 914.

A preponderance of the evidence in the record shows that Ketchum and Sullivan each purchased the stock of furniture in good faith and without any knowledge that Swafford had any claim against it. When Ketchum purchased an interest in the business he was told there was nothing against it except $165 owing for new furniture, and he paid that claim. He did not know that Swafford claimed to be a creditor. When the business was sold to Sullivan, he was told that no one except Fones Brothers Hardware Company had a claim against the firm. Sullivan paid this claim, and paid the balance of the purchase price to Ketchum. Under these circumstances neither Ketchum nor Sullivan were liable to Swafford. Each of them demanded and received from the seller what purported to be the only creditor of the firm. In *McKelvey* v. *John Schapp & Sons Drug Co.,* 143 Ark. 477, 220 S. W. 827, it was held that, under our Bulk Sales Law, a purchaser of a retail business who in good faith demanded and received a list of creditors from the vendor, is not liable where the latter, either by fraud or inadvertence, omitted the name of a creditor. In that case it was further held that failure of the vendee of a stock of goods to take an inventory of the goods sold in bulk to such vendee in good faith will not render him liable to a creditor of the vendor whose name was not listed. The court said that a reasonable interpretation of the statute is that a purchaser in good faith should not be held liable on account of the omission of the name of a creditor.

In the present case of Ketchum and Sullivan, each had an inventory of the stock of goods made at the time of his purchase. There is nothing to show bad faith on

the part of either one. Each demanded and was given what purported to be the name of the only creditor the firm had. Ketchum paid what was represented to him to be the only claim. Sullivan paid what was represented to him to be the only claim against the firm. The statute therefore affords no protection to Swafford, because Ketchum and Sullivan each acted in good faith in the purchase of the stock of goods, and each was in entire ignorance of the fact that Swafford had a claim against the firm.

In 27 C. J., § 894, p. 887, it is said that the Bulk Sales Law did not render an innocent purchaser for value from an original purchaser liable to creditors of the original seller nor affect his title to the property. Among the cases cited to support the doctrine is *Kelley-Buckley Co.* v. *Cohen,* 195 Mass. 585, 81 N. E. 297. In that case the court said that, while a creditor could avoid a sale because the statute had not been complied with, he must proceed with reasonable diligence and before the rights of intervening parties acting in good faith shall have become fixed. To the same effect see *Prokopovitz* v. *Chimka,* 170 Wis. 190, 174 N. W. 448.

Therefore the decree will be affirmed.

[redacted]

DRAKE *v.* HOWELL.

Opinion delivered October 8, 1928.

[redacted]

Wade Kitchens, for appellant.

McKay & Smith, for appellee.

MEHAFFY, J. Appellant operated a sawmill and garage, and separate books were kept for each business. A. R. Kimball worked for appellant as manager and bookkeeper of the sawmill. On July 10, 1924, appellant rendered the following account to Kimball:

"Glenville, Arkansas, 7-10-24.

"Bal. due A. R. Kimball for labor $940.92, less 5 per cent. gain for the month of June, $44.51.

"W. W. Drake.
"M. D. Paisley.

	$940.72
	600.00
	$340.72
Check	100.00
	$240.72"

It was acquiesced in by Kimball, and therefore became an account stated.

Kimball died, and Ivie E. Howell was appointed administrator, and this suit was brought to collect balance of account due, $240.72.

There is very little dispute about the facts, and we deem it unnecessary to set out the testimony, but will call attention to the part of the testimony relied on by appellant. There is no dispute about the account as stated, about it having been made and signed by appellant and Paisley and delivered to A. R. Kimball, but the appellant testifies that he discovered an error in the books, and, after the account had been delivered to Kimball, called Kimball's attention to the fact that there was an error, and that he had gone over the books, and that there was a balance due appellant.

Numbers of witnesses testified with reference to page 95 of the books, and all of them testified that there were errors on this page and that the change indicated by the errors there would change the account so that there would

be something due appellant. The appellant, however, did not introduce the books nor the whole account, but he contends that the evidence is undisputed that Kimball charged himself with a number of items which were not extended, and then also that it is undisputed that checks aggregating $370, drawn by appellant in favor of Kimball, became mixed in the garage account, and were never charged to Kimball.

Conceding that the testimony shows that these facts, together with the errors pointed out on page 95 of the books, amount to more than plaintiff's claim, this would not justify a reversal of the case.

The court gave the following instruction, requested by the plaintiff:

"You are instructed that the defendant admits that he and the plaintiff's intestate had a settlement of their dealings with each other and adjusted balances on a basis of such settlement, and that, according to said settlement had and agreed to by both the defendant and the plaintiff's intestate, there was due the plaintiff's intestate the sum of $940.92, and that since said settlement so had defendant has paid the plaintiff only $700. You are told that said settlement between the parties is presumed to be correct and must stand, unless fraud or mistake is shown in said settlement, by the preponderance of the evidence."

At the request of the appellant, the court gave the following instruction:

"The jury was instructed by the admission of the defendant, there was an account stated between the plaintiff's intestate, A. R. Kimball, and himself, and you are told that the amount ascertained and agreed to be due by such stated account is conclusive against the defendant, unless it can be shown that some error or mistake had been made, and the burden of proving the error or mistake is on the defendant. If, however, you find from the preponderance of the evidence that there was some error or mistake made, either in addition of items of the account, or a failure to charge the account of said A. R.

Kimball with checks given him by defendant, then you may go behind that settlement, and diminish or lessen the amount of said stated account by such sum as you may believe the defendant entitled, and you will return a verdict into court in accordance with your findings. And if you find that there were any made, and that defendant is entitled to credit therefor, are as much or more than the balance of the account here sued on, then your verdict will be for the defendant."

These instructions, we think, fairly submitted to the jury the questions of fact to be determined in the case. The jury may have reached the conclusion that all these matters were considered when the account was stated. The account stated was *prima facie* correct, and the burden was on appellant to show that there was an error or mistake, and the jury was instructed that, if he had done this, he was entitled to recover. There is no effort on the part of the appellant to show what the checks testified about were given to Kimball for, nor is there any testimony tending to show whether the whole account, if considered, would have shown any errors in the account stated.

Kimball, one of the parties, has, since the account was stated, died, and we do not have his testimony. The jury would have a right to conclude that the checks were accounted for or were given to Kimball to get money for the appellant, since there was no testimony to the contrary and no testimony showing what the checks were given for. The jury would have a right to reach the conclusion that, if the whole account or checks had been introduced in evidence, the settlement between appellant and Kimball would have been shown to be correct. There was no offer made to introduce the books and no offer made to introduce the entire account or to have any examination made of the entire account to show whether or not there were other errors.

M. D. Paisley was the bookkeeper at the time the account was rendered, and did not testify. There was no testimony tending to show how the account rendered

was made, nor of the items, nor how much of the account was considered in making it up. The jury has passed on the checks, under proper instructions, and its verdict is binding on this court where there is any substantial evidence to sustain it, and we think there is substantial evidence upon which to base the verdict in this case. The errors mentioned as existing on page 95 of the record and the checks testified about would have justified an examination of the account and justified testimony as to what the checks were given for, and this would have been the only way by which it could be determined whether the account was stated correctly.

"An account stated is an admission that the account is correct, but it does not operate as an estoppel; the person who rendered the account may show that it is incorrect, show that there are mistakes or errors. The account is only *prima facie* evidence of its own correctness. And it has been said that, while a party may institute an original proceeding in equity to be relieved from it, yet, when it is interposed as a defense to an action, it may be disputed and overthrown in the same suit." *Gutshall* v. *Cooper,* 37 Colo. 212, 86 Pac. 125, 6 L. R. A. (N. S.), 820.

In this case the appellant was permitted to interpose the defense and to introduce testimony as to the correctness or incorrectness of the account and as to errors, and the court properly instructed the jury that, if they found from the evidence that there were errors and that those errors amounted to as much as the claim of the plaintiff, a verdict should be rendered for the defendant. See also *Ripley* v. *Sage Land & Imp. Co.,* 138 Wis. 304, 119 N. W. 108, 23 L. R. A. (N. S.), 787.

"An account stated is an acknowledgment of an existing condition of liability of the parties from which the law implies a promise to pay the balance thus acknowledged to be due; the words 'stated' and 'settled,' as applied to accounts, being sometimes used as synonymous." *State* v. *Ill. Cent. Ry. Co.,* 246 Ill. 188, 92 N. E. 814.

And an account stated, in the absence of fraud, error or mistake, is conclusive between the parties; either party, however, is permitted to show that there was fraud, error or mistake. But in this case, whether there was was a question of fact properly submitted to the jury.

This court has said: "An account stated is an account balanced and rendered with an assent to the balance, expressed or implied." *Brown* v. *Sou. Grocery Co.*, 168 Ark. 547, 271 S. W. 342, 40 A. L. R. 383.

"The burden was on appellants to successfully impeach the accounts furnished by appellee and accepted by appellants." *Hawkins Bros.* v. *Lesser-Goldman Cotton Co.*, 157 Ark. 299, 248 S. W. 275.

An account stated, as we have said, is only *prima facie* evidence of its own correctness, and may be impeached, but the burden is upon the person seeking to show errors, fraud or mistake in the account. It is not sufficient to show that, on some page of the books, there was an error, nor is it sufficient to show that the person had given checks without any evidence showing what the checks were for or whether or not they had anything to do with the account.

"When the person sought to be charged thus shows checks upon which an inference may be drawn inconsistent with the presumption of assent to the correctness of the account, the question whether the account became stated becomes one for the jury on all the evidence, under proper instructions from the court." 1 C. J. 693.

"An account stated, whether expressly or by implication, is *prima facie* evidence of the accuracy and correctness of the items thereof and of the liability of the party against whom the balance is found. And this is true although the statement of account expressly provides for the correction of errors and omissions; such a stipulation does not render the statement any the less a settled account and subject to all the rules applicable to a stated account. Accordingly, the burden of adducing evidence of fraud or mistake rests on the party who would avoid its binding force, and, in the absence of such evi-

dence, the account stated is conclusive both at law and in equity." 1 C. J. 175.

The question of whether the evidence showed a mistake or error has been settled against appellant by the verdict of the jury, and the judgment is therefore affirmed.

BLOUNT *v.* BAKER.

Opinion delivered October 8, 1928.

Brundidge & Neelly, for appellant.

John E. Miller and *Cul L. Pearce,* for appellee.

KIRBY, J. This suit was brought by five citizens and taxpayers of Higginson Special School District, three of whom were formerly directors thereof, to have canceled as illegal a certain $500 warrant of the district issued to appellants, as attorneys' fees for services, and a $62.50 warrant, payable to the chancery court clerk, Ben D. Smith, of White County.

The court below sustained appellee's demurrer to the complaint and amended complaint of appellants, and,

appellants declining to plead further, dismissed it for want of equity.

From the allegations of the pleading it appears that there were five directors of the Higginson Special School District; that the board, by a majority vote, attempted in 1926 to issue and sell $20,000 of bonds of the district for refunding its debts, and other purposes. The two minority directors, with other citizens and taxpayers, brought suit to enjoin the issuance of the warrants, and employed appellants as attorneys. The suit resulted in the district being enjoined from issuing bonds in excess of the amount necessary to refund the old indebtedness, $15,900, etc. *Phillips* v. *Baker,* 172 Ark. 727, 295 S. W. 384. Upon remand of the cause and a final decree entered, the directors of the district proceeded to issue and sell bonds for the refunding of the existing bonded indebtedness, and another suit was brought by appellants, as attorneys representing the same taxpayers, to enjoin the district from selling and delivering the bonds. This suit was evidently brought for delaying the delivery of the bonds until the May, 1927, school election, and the trial court, on May 4, 1927, overruled a motion for a continuance which had been filed by these appellants, Blount & Blount, representing the plaintiffs in that suit, and upon appeal this court held that the cause would not stand for trial until 90 days after the issues were made up, under § 1288 of C. & M. Digest of the Statutes, and reversed and remanded the cause for trial. *Phillips* v. *Baker,* 174 Ark. 403, 295 S. W. 384. Before this cause could be again heard, the school election occurred, and the personnel of the board was changed, three of the former directors being succeeded by those newly elected, and all the members of the new board, except W. N. Spratt, had been litigants through their attorneys, the appellants, against the school board over the issuance of bonds for the district. The new board of directors in control employed appellants as attorneys, and issued the warrants of the district sought to be canceled herein in payment of their services, and for costs of this litigation.

Appellants in their brief state that they were employed by the new board to assist in its organization, to proceed with the pending suit to enjoin the issuance of the bonds, and any other litigation that might be brought, "and that the district ratified their employment in the original suit, and issued a warrant for $500 in payment of services rendered and to be rendered, which was alleged to be a reasonable fee."

Appellants insist that the court erred in holding that the new school board could not ratify the acts of the two minority directors, Phillips and Shouse, with the other patrons and taxpayers, in their employment of attorneys to protect the interest of the district in the litigation against the majority action of the board and to represent the district in the suit pending in the chancery court, but this contention is without merit.

School districts are authorized to employ attorneys or ratify the employment of them in their behalf as a necessary incident to their power to contract and to sue and be sued. *State* v. *Aven,* 70 Ark. 291, 67 S. W. 752; see also *Denman* v. *Webster,* 139 Cal. 452, 73 Pac. 139; *Byrne* v. *Board of Education,* 140 Ky. 531, 131 S. W. 260. It is not contended, however, that the old board even attempted to employ appellants as attorneys to prevent their issuance of the bonds of the district for refunding its indebtedness in the first suit, but that, since the new board had contracted with them for services rendered and to be rendered, it thereby of necessity "ratified the employment of appellants in the first instance, as the services inured to the benefit of the district."

It is no longer questioned that invalid contracts made by a school district may be ratified by the board of directors by their full knowledge of and acquiescence therein, but no contract void for want of power to make it in the beginning can be ratified. *Dell Special School Dist.* v. *Johnson,* 129 Ark. 211, 195 S. W. 373.

The old board of directors certainly would not have had the power and there could have been no necessity for its employment of attorneys to resist and enjoin the

action of the majority of the board duly taken in proceeding to refund the indebtedness of the district, under the law authorizing it to be done, the board having plenary power to rescind its action and desist from any such proceeding. Consequently the transaction or contract of employment of the attorneys by the minority members and other taxpayers, to resist the action of the board, was beyond the power of the school board to make, and, being so, could not be ratified by the new board of directors.

The question of benefit or advantage derived by or resulting to the district because of the services rendered by these attorneys could not affect the district's liability, since the board of directors alone could contract a debt against the district or ratify an invalid contract within its power to make. The new board was under no necessity to prosecute further the pending suit for enjoining the district from the issuance of bonds, since it had ample authority to revoke the action of the old board authorizing it done, to refuse to do it in furtherance of the public interest if it regarded such action necessary.

We do not regard it necessary to pass upon the question of the intervener's rights, since no judgment was rendered on the intervention, and consequently its rights are not affected by this appeal.

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

ORR *v.* JOHNSON.

Opinion delivered October 8, 1928.

Ward & Caudle, for appellant.

KIRBY, J. Appellee brought suit against appellant, a road contractor, for damages for personal injury resulting from his leg being injured or broken by an I-beam falling over and striking him and crushing it while he was engaged with others in setting up on edge bridge stringers and I-beams on the ground where they had been unloaded for construction of the bridge near by.

The men had set up three or four of the stringers and were attempting to set up another, which was lying diagonally across one of the other stringers, and, being unable to move it, appellee, Johnson, procured a rail and, while lifting or prizing with the rail near the end of the stringer, stepped over between it and the last one set up, which fell over, catching Johnson's leg, and fracturing the bone between the ankle and knee.

Appellee sued, alleging, first, as the only ground of negligence, that he was required by the foreman to set up said stringers on rocky and uneven ground, which the foreman must have known, in the exercise of ordinary care, would be likely to fall and injure plaintiff.

A demurrer was interposed and overruled, and the trial had, resulting in a verdict for plaintiff. The court sustained a motion for a new trial, and allowed appellee to amend his complaint by interlineation to include the following paragraph: "That said negligence and injury was caused by the defendant's foreman leaving said I-beam or stringer in an unsafe and insecure position,

which caused it to fall, crushing the plaintiff's leg." A general and special demurrer was interposed to this complaint, which, being overruled, defendant answered, denying all the material allegations of the complaint, and pleaded contributory negligence and assumed risk as a bar to recovery. Upon trial the plaintiff recovered judgment in the sum of $375, from which this appeal is prosecuted.

No brief has been filed here for the appellee, and many assignments of error in the giving of and failure to give instructions requested are insisted upon by appellant, and especially does he urge that the evidence was insufficient to support the verdict.

The I-beam had been unloaded on the most nearly level piece of ground near where they were to be used in the bridge construction, and W. W. Jackson, the foreman of appellant, told the men they would set the I-beams up on edge so that the rain, which seemed to be approaching, would wash the dirt off and save that much work about the painting of them. The I-beams were 31½ feet long, about 15 inches high, weighed about 1,400 pounds, with 6 or 7-inch flanges and about 8 or possibly 10-inch channels, as one witness described them, being the stringers that the bridge floor rested upon. There were about 20 of them unloaded at the place, and the men were setting them up, the foreman working with them as a laborer. The men had set up one or two of the stringers on the side of the road where they were working, and had put a small rock under the last one they had set up to keep it from slipping or leaning over. They were trying to set up another stringer, or unloosen the end of it from one it was lying on. Jackson had told all the men to get on one side of the stringer in doing the work, and was working with them as a laborer. Johnson got a rail, and was trying to prize the stringer they were setting up over the end of another one, and, in so doing, stepped over the stringer next to the one last set up, and it fell, injuring and fracturing his leg.

Appellee stated Mr. Jackson believed it was going to rain, and said: "We will set the beams up. It will wash the dirt off of them and will keep them from warping. That is all Mr. Jackson said about setting them up. He said for us all to get on one side and set them up. I knew just as well as Jackson what was necessary in order to set them up. I knew we all ought to get on one side. * * * We had set up three, not over four, I think it was only three. * * * Mr. Jackson was down toward the other end of the stringer. We would all get on the same side, take hold with our hands, and set them up. Mr. Jackson was helping us just the same as anybody else. We all got hold and lifted together. I suppose we were all our own boss in lifting. * * * I don't know what caused the rail to fall, without that rock sticking under it kinder sunk and caused it to turn. It was a little flat rock, put about the middle of the rail. When we put the rock under there and shook the rail, it appeared to be all right. I thought it was safe. I didn't think I was that close to it noway. I expect I could see the condition as well as Mr. Jackson. I didn't think I had my foot close enough that if it fell it would fall on it. I didn't think it was likely to fall. He didn't show me how to put the rail under there. We weren't trying to set the stringer up at the time the other one fell, we were trying to slip it off of that."

Other witnesses testified there were some rocks on the ground, but that it was the smoothest place that could be found near where the stringers were to be used for them to be unloaded; and Jackson directed all the men to stand on the same side of the stringer in doing the work. Johnson got the rail, and was prizing on the stringer, and stepped over it between the one they were lifting and the one that fell, and was injured.

The foreman stated that they had gone out to set the beams up so that the rain would wash the mud off them; that five or six men were with him, and it was thought they could set the beams up by catching hold of them. He directed that all the men should stay on the same side of the rail and use their hands in setting them up. Gave

no instructions about getting a rail, crowbar, or anything else. They used rocks to steady them or key them up so that they would not fall over. Had put two or three rocks under the beam last set up, so that it leaned in the opposite direction. "When keyed up, I thought it was safe. Did not tell Johnson to get a rail, and did not know he was going to get one. I was working, and we all had hold of the I beam. He had the rail in his hand when he got hurt. The first I noticed him with the rail I looked down the line and saw him on the opposite side of the beam we were setting up, and about this time the beam back of him turned forward and caught his leg. I figured he stepped on the plate and turned it over on him. These beams were lying about two feet apart, with the ends practically even. Johnson was working at the end next to a pigpen when he got on the wrong side of the beam Just at that time the other beam turned over."

Another Johnson, not related, stated that he took hold of the rail with appellee to prize the flange over another rail, and they were both lifting on it when he got his leg broken. He got his leg there between the rail that had been set up and the one under the rail they were lifting on. "I don't know whether he hit the one that was setting up or not. Mr. Jackson had told us all to stay on one side and lift together."

Appellee was a man of mature years; saw the conditions existing at the time he began the work of setting up the rails with the other men and the foreman; knew the condition of the ground where the work was being done; said he knew as much about setting up the beams as the foreman did, and also that the foreman had directed all the men to stay on the same side of the beams while they were engaged in setting them up. He voluntarily procured the rail which he regarded necessary for facilitating the setting up of the beam, and, while using it under his own initiative, stepped across on the other side of the rail, next to the last one set up, which turned over and injured him. Other witnesses thought he must have stepped on the flange of the last rail set up to cause it to

turn over. He said himself that he didn't think it was close enough to strike him, and that he regarded it safely keyed up anyway, knowing that the rocks had been put under the edge of the rail next to where they were working to keep it from turning over.

It appears from the undisputed testimony that appellee knew the conditions existing where the work was being done, and appreciated as much as any one else the danger that might arise from its performance in the exercise of the method used, and, contrary to the only direction given by the foreman, who was but a fellow-servant at the time of the injury, stepped over the rail being set up, and was injured by the one last set up turning over and falling upon his leg. He could not have been injured at all had he stayed on the side of the rail that was being set up as directed by the foreman. Having voluntarily and unnecessarily, so far as the evidence shows, stepped over on the wrong side of the rail being set up, he exposed himself to the danger and assumed the risk thereof. Having done this of his own accord, he was without right to call on his employer to compensate him for the resulting injury. *Ward Furniture Mfg. Co.* v. *Weigand,* 173 Ark. 762, 293 S. W. 1002; *Texas Co.* v. *Jones,* 174 Ark. 905, 298 S. W. 342; *St. Louis Southwestern Ry. Co.* v. *Compton,* 135 Ark. 563, 205 S. W. 884.

The evidence, too, fails to show any negligence on the part of appellant that would render him liable for damages for appellee's injury. Appellee violated the instruction given by the foreman at the time of the injury, but for which it could not have occurred, and Jackson, the foreman, was but a fellow-servant of appellee in the work of lifting or helping to turn or set up the beams, appellant, his employer, being an individual, not a corporation. *Graham* v. *Thrall,* 95 Ark. 560, 129 S. W. 532; *Jones* v. *Mayberry,* 143 Ark. 390, 220 S. W. 477; *Ry.* v. *Torrey,* 58 Ark. 217, 24 S. W. 244. See also *Archer-Foster Construction Co.* v. *Vaughan,* 79 Ark. 20, 94 S. W. 717; and *Texarkana Tel. Co.* v. *Pemberton,* 86 Ark. 329, 111 S. W. 257.

It follows that, since the court should have given appellant's requested instruction No. 1, for a directed verdict, it is not necessary to designate the other particular requested instructions that were erroneously refused. The judgment is accordingly reversed, and, having been fully developed, the cause will be dismissed. It is so ordered.

SWIM *v.* BREWSTER.

Opinion delivered October 8, 1928.

Brockman & Reid, for appellant.

Rowell & Alexander, for appellee.

KIRBY J. This appeal is prosecuted from a judgment of foreclosure of a deed of trust made by appellant and her husband to a trustee to secure an indebtedness to Garland Brewster, appellee.

The testimony shows that Swim, husband of appellant, was a contractor and builder, was awarded a contract to construct a brick building on property in Pine Bluff on the Rutherford estate, upon his bid of $15,600, and, being unable to furnish a bond, appealed to Brewster, who had assisted him before, and to whom he was then indebted in the sum of $9,000 or $10,000. Brewster refused to furnish the bond or finance the contractor, unless he should be assured against loss. Swim urged

his wife, appellant herein, to mortgage her homestead to Brewster and obtain the necessary aid for him. She first refused to execute the mortgage, and it appeared that Swim could not carry out the contract. A few days afterwards Brewster met Mr. and Mrs. Swim on the street in Pine Bluff, and again the matter of security for Swim for performance of the contract was raised. Brewster and J. J. Swim, husband of appellant, insisted it was her duty to assist her husband, and Brewster agreed, if she would execute the mortgage, he would furnish indemnity for Swim's bond and finance the job. She finally agreed to execute the mortgage, and, according to Brewster's statement, the deed of trust sued on was prepared, with a note for $6,000 payable to him, secured by it, and delivered to Mrs. Swim, who refused to sign it until she had had another day to think it over. It was later returned to him by Swim, after being executed by appellant.

Brewster testified he told Swim, the contractor, during the negotiations for having him execute the bond of indemnity in order to have the surety company make the contractor's bond, that he was no longer in the brick business or furnishing building supplies, and would not assist him in making the bond unless he was secured for the past due indebtedness from Swim, amounting to over $9,000. Brewster and Swim then talked to Mrs. Swim on the street, and told her the condition, and that he would not help Swim to make the bond and procure the contract unless he was secured by a mortgage on her homestead. He testified that he tried to explain to her, and thought she understood that the mortgage was executed to secure the past due indebtedness.

She testified that she had refused to execute any mortgage for any past due indebtedness of her husband, Swim; that Brewster knew this; that no mention whatever was made in the conversation with Brewster about the execution of the mortgage of its being to secure any past due indebtedness; that she would not have executed it at all if she had understood that it was to secure any such indebtedness.

J. J. Swim, her husband and the contractor, who is no longer living with his wife, the parties having separated before the bringing of the suit, testified that nothing was said in the conversation between Mr. Brewster and his wife, when she agreed to the execution of the mortgage, about its being to secure his past due indebtedness to Brewster.

Appellant testified that she got Brewster's letter, written the day after the execution of the mortgage, informing her that she had executed a mortgage for $6,000 to secure the payment of her husband's past due indebtedness, and that the indebtedness might be renewed and foreclosure not insisted upon for a certain length of time, if the interest was met, etc. She immediately complained to her husband, who assured her that there was some mistake about it, and that the mortgage was only intended to cover or indemnify Mr. Brewster against any loss he might sustain by reason of having signed his contractor's bond, and that no loss could occur nor any liability attach to the property if he performed the contract and constructed the building in accordance with its terms.

Brewster explained this writing to the appellant by saying that Swim, her husband, had insisted that she was worried about the probable liability under the mortgage, and wanted to be assured that there would be no foreclosure of the mortgage with any unreasonable haste.

The building contract was performed without any loss to Brewster, appellee, by reason of his having indemnified the surety on the contractor's bond.

Appellant defended against the suit to foreclose, denying having executed the $6,000 note at all, and alleging that the mortgage was procured by false and fraudulent representations, was intended only to secure any liability that might be incurred by Brewster on account of signing the bond to indemnify the surety company for making Swim's contractor's bond, and was on that account void, and prayed for its cancellation. From the decree of foreclosure this appeal is prosecuted.

Appellant urges that the decree is not supported by the testimony, and is contrary to and in conflict with the preponderance of the evidence. An executed conveyance will not be canceled, unless the ground for cancellation is established by evidence that is clear, unequivocal and decisive. *McCracken* v. *McBee,* 96 Ark. 251, 131 S. W. 450.

The majority of the court are of opinion, after a careful review of the testimony, that it did not meet this requirement of the rule and warrant cancellation of the mortgage for fraud, and that the chancellor did not err in so holding. The decree will accordingly be affirmed. It is so ordered.

KITTRELL *v.* WILKERSON.

Opinion delivered October 8, 1928.

W. J. Dungan, for appellant.

Elmo CarlLee, for appellee.

MEHAFFY, J. Appellant, who was plaintiff below, brought this suit to recover damages caused by a collision which appellant alleges was due to the negligence of the appellee. The appellant was driving a Ford coupe along the public highway, about two miles east of Augusta, traveling in a western direction, and the appellee was driving a Chevrolet touring car in the same direction, along the same road. It is alleged that he was driving at an excessive rate of speed and in a reckless and negligent manner. That he overtook appellant, and ran his said car into the car of appellant, striking it at or near the rear left wheel and turning it and its occupants over into the ditch on the right side of the road. Appellant alleged that he was on the extreme right side of the road, and that the appellee approached him from the rear in such a reckless, careless and negligent manner as to swerve to the right and strike the car of appellant, damaging it in the sum of $204.58, for which sum he asks judgment.

The appellee filed an answer and cross-complaint, and alleged that the road was in splendid condition, and that cars were passing each other without danger; that he passed appellant's car one time before the accident, and ran ahead for about two miles, and then the appellant passed his car, and it was while appellee was passing appellant's car the second time that the accident occurred. He alleges that appellant swerved to the left, causing the two cars to collide, and that each of them went into the ditch. He alleges that appellant was negligent and careless, and disregarded the signal of appellee that he was passing, and that, on account of said negligence, his car was damaged in the sum of $139, for which sum he asks judgment.

The testimony is conflicting, the appellant and his witnesses testifying, in substance, that appellant was driving carefully on the extreme right side of the road and that the appellee carelessly and negligently ran into

appellant's car, causing the damage alleged. There was some testimony about witnesses examining the tracks and as to what they saw at the place of the accident. Appellant and his witnesses also testify that no horn was sounded and no warning given that appellee intended to pass. Appellant and his witnesses also testified that appellant did not swerve to the left.

The appellee and his witnesses testified, in substance, that his car was going at a moderate rate of speed, 25 or 30 miles an hour, and that they drove behind appellant for something like one-quarter of a mile, and that appellee blew his horn and speeded up, and one of the passengers in the car blew the horn. They testified that appellee's car was on the left side of the road, and that if appellant had stayed on his side of the road the collision would not have occurred. That it seemed that appellant's car was pulled to the left some.

The testimony of appellee about appellant's car swerving to the left was sufficient to submit to the jury the question of appellant's negligence. If there had been no testimony tending to show that appellant's car swerved to the left and that this caused the accident, it would have been the duty of the court to direct a verdict for the appellant. But, under the testimony, the negligence of each party was a question for the jury, and their finding, where there is any substantial evidence, will not be disturbed by this court.

Appellant's first contention is that the trial court should have directed a verdict for the plaintiff. We do not agree with appellant in this contention, but, under the evidence, the negligence of each party was a question for the jury.

It is next contended by the appellant that the case should be reversed because the court permitted the jury to hear and consider irrelevant testimony, as set forth in paragraphs 7 and 8 in his motion for a new trial. The testimony objected to was to the effect that witnesses had seen appellant's car before, and that it had passed appellee before and was passing a third time when the collision

occurred. Appellee's witnesses testified that the cars had passed each other once or twice before, and that they had no trouble in passing. That the travel was about as usual.

We think the testimony was competent. The cases relied on by appellant are cases where evidence of other acts of negligence were introduced. Here the testimony objected to does not show or tend to show any negligence on the part of any one, and it does show that each party knew the other was on the road, and that they were going in the same direction, and about the rate of speed they were traveling, and about this there is no dispute. And, even if the testimony was immaterial, it could not be prejudicial. If there had been testimony introduced tending to show acts of negligence on the part of the appellant at different times, we would have a different question, and the authorities relied on by appellant would be applicable. But, as we have said, the testimony objected to did not tend to show negligence on the part of any one.

Where one seeks to recover damages for the alleged negligence of another, he is not entitled to recover if the evidence shows that his negligence contributed to produce the injury of which he complains, so that, but for his negligence, the injury would not have happened. If the appellant negligently swerved his car to the left and this caused or contributed to produce the injury, he could not recover.

The testimony being in conflict as to whether appellant swerved his car to the left, thereby causing the injury, it was a question for the jury to determine, and the jury returned a verdict against the appellant. The jury, in order to return this verdict, must have found that both parties were guilty of negligence, and that neither of them was entitled to recover from the other.

This court has often held that, where an injured party's own negligence contributes in any degree to produce the injury of which he complains, he cannot recover.

It has been held many times also that, when the verdict of a jury is sustained by any substantial evidence, it will not be disturbed.

Finding no error, the judgment is affirmed.

COPELAND *v.* NATIONAL UNION FIRE INSURANCE COMPANY.

Opinion delivered October 8, 1928.

W. U. McCabe, Noel S. Chaney and *Williamson & Williamson*, for appellant.

S. M. Casey, for appellee.

McHANEY, J. Appellant, Copeland, was the agent of the appellee in the conduct of a fire insurance business in Stone and other counties, and the other appellants were the sureties on the bond executed by him to appellee, conditioned that said "L. W. Copeland, as agent of the said company, shall faithfully and punctually pay over to the said company all amounts due or that may become

due to it from time to time, for moneys collected or received by him for premiums on policies of insurance and renewals thereof, or for any other account whatever, and shall with fidelity do and perform the duties assigned to him as the agent of said company, according to the best of his ability," etc.

This action was instituted against all the appellants to recover the sum of $600.45 as a balance due appellee for premiums collected by appellant, Copeland, which had not been remitted to it. An itemized statement of account was filed with the complaint, beginning in March, 1924, showing in detail the names of the insured, premiums collected, the commission allowed, and the balance due the company.

Copeland answered, denying that he was indebted in the sum claimed, or any other sum, and claimed that there were various credits to which he was entitled, and which had not been given him by appellee, but that, if given proper credits, he would not owe appellee anything. He did not deny any specific item of the account, nor did he set up the particular credits to which he was entitled, although a motion to this effect was interposed and an order of the court made requiring him to do so.

The other appellants, sureties on the bond, answered, admitting their signatures to the bond, but alleged that it was to indemnify appellee against loss on its agency contract with Copeland in force at that time, which covered only "farm policies"; that later appellee and Copeland, without their knowledge or any notice to them, entered into another agency contract, by which Copeland was authorized to write "recording" or city business, and that they executed no bond to cover this particular contract; that full settlement had been made by Copeland with appellee for the "farm" agency business, and that there is no liability on the bond to cover the business done under the later contract, and that all the items in the account filed were for the "recording" agency business.

There was a verdict and judgment for appellee against all the appellants in the sum of $322.27.

To reverse this judgment, it is first said that the court erred in refusing to permit the appellant, Copeland, to testify to certain credits due him prior to March, 1924. There was no error in this regard, as appellee was not suing on an account prior to March, 1924. He failed to comply with the order of the court, made on motion of appellee, requiring him to make his answer more definite and certain, by setting out what credits he claimed, both prior to 1924 and subsequent thereto, and he would have therefore been in no condition to complain if the court had refused to permit him to testify regarding all credits, including those during 1924 and subsequent thereto as well as those prior thereto. The court did allow him to testify to the credits he claimed subsequent to March, 1924, and the jury gave him credit for all the items he claimed, thereby reducing the account to $322.27. In his testimony, Copeland did not question the correctness of any of the items in the statement of account charged against him, but only contended that he was entitled to certain credits, which the court permitted him to testify to, over appellee's objection. Having received credit for all these items, appellants are in no position to complain. Moreover, there is no showing in the record as to what particular credits he claimed on account of cancellations of policies prior to March, 1924.

The next assignment of error is that the court erred in refusing to permit appellant Copeland and his bondsman, appellant Brewer, to testify to the second alleged contract. Only one of the bondsmen, Mr. Brewer, offered to testify that he understood, at the time he signed the bond, that Copeland had a contract with appellee to write "farm" policies only, and that he was told this by Copeland himself, and that later Copeland made an additional contract by which he was to write "recording" or city business, about which he was not consulted, and of which he had no knowledge. Neither of the other bondsmen offered to testify to any such understanding.

There was no error in the court's refusal of such offered testimony, as the bond, the written contract between them and appellees, makes no reference to any particular contract between it and Copeland. Copeland is referred to in the bond "as agent of the company," and there is no limitation on his agency contained therein by reference to any agency contract, in writing or otherwise. By signing the bond, the sureties became liable as conditioned in the bond, to "punctually pay over * * * all amounts due or that may become due to it from time to time, for moneys collected or received by him for premiums on policies of insurance and renewals thereof, or for any other account whatever." In this respect it differs from the case of *Snodgrass* v. *Shader,* 113 Ark. 429, 168 S. W. 567, and the other cases cited by appellants, as in that case there was a written contract of lease particularly referred to in the bond, which was later changed without the knowledge or consent of the sureties. In the case at bar, however, no contract was referred to in the bond.

As said by this court in *Powell* v. *Fowler,* 85 Ark. 451, 108 S. W. 827, 122 Am. St. 41, a case cited by appellants: "If Fowler imposed additional duties upon Powell without altering the original contract, and which did not interfere with the performance of the contract, that would not operate as a release of the surety." In that case the court quoted from 27 Am. & E. Enc. of Law, page 499, as follows: "The general principle controlling in such cases is that the surety for the performance of the original duties is not discharged unless the new duties materially affect the performance of the old, or affect the obligation of the principal in respect to the old, thus increasing the risks of the surety." Since the bond did not refer to any particular agency contract then existing, but only referred to Copeland as its agent, and since the appellants agreed in the bond to stand good for all premiums collected by such agent, we fail to see why an enlargement of the scope of his business permitting him to write additional risks would be such a change in the duties of the agent as to relieve the sureties.

It is finally insisted that the court erred in instructing the jury that the burden was on appellants, and then permitting the appellee to open and close the argument to the jury. They rely on the recent case of *Dickerson* v. *St. Louis-San Francisco Ry. Co., ante,* p. 136. The facts in that case are not applicable to this. There the railroad company admitted the injury and death of the boys, for whose injury and death it was being sued for damages, but did not admit the amount of the damages sued for. This court held that the railroad company was not entitled to open and close the case, because it was still necessary for the plaintiffs to prove the amount of the damages. It voluntarily assumed the burden in the case and asked the right to open and close the argument, but was refused this right because there was still something for the plaintiffs to do in order to establish their case. The 6th subdivision of § 1292, C. & M. Digest, provides that the party having the burden of proof shall have the opening and conclusion. The right to open and close the argument to the jury is a matter to be determined by the pleadings in the case. *Beal & Doyle Dry Goods Co.* v. *Barton,* 80 Ark. 327, 97 S. W. 58; *Columbian Woodmen* v. *Howles,* 131 Ark. 299, 198 S. W. 286. In this case plaintiff alleged that appellants were indebted to it in a certain sum, which appellants denied. Therefore, under the state of the pleadings at the time the trial began, appellee was entitled to open and close, as it had the burden of proving its account against appellants. The fact that appellants did not dispute any of the items of account, but claimed that appellant Copeland was entitled to certain credits which had not been given him in the account, placed the burden on appellant to establish the credits, but still left the burden on the whole case on appellee.

We find no error, and the judgment is affirmed.

LAUGHLIN *v.* TYLER.

Opinion delivered October 8, 1928.

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

C. O. Raley and *C. T. Bloodworth,* for appellee.

McHANEY, J. This is an action in replevin, brought in a justice's court by appellant against appellees to recover the possession of a team of mules sold by appellant to appellees on December 14, 1926. At the time of the sale, appellant and appellee, John Tyler, entered into an oral agreement for appellee to cultivate sixty acres of appellant's land as a sharecropper, and the mules were sold to him to enable him to cultivate the land. Appellees on said date executed and delivered to appellant their promissory note, due ten months thereafter, at 8 per cent., for $175, appellant agreeing to keep the mules and winter them, and to deliver them to appellees in the spring, which was done. Appellees moved on appellant's place, but failed to make any crop, on account of a disagreement between them regarding a settlement for work done by appellees for appellant. Appellees moved off of appellant's land on May 4, 1927, and at the time of their removal appellant presented them their note, and demanded the return of the mules, for the reason that

appellees had breached their contract to cultivate the land. Appellant testified that he would not have sold appellees the mules on a credit, except for the contract for cultivation of the land. The note contained no reservation of title in the mules, and no lien was retained in the instrument itself, or by mortgage or otherwise. Appellees gave a cross-bond and retained possession of the mules. The justice of the peace dismissed the writ of replevin, entered judgment for defendants, and appellant appealed to the circuit court, where a trial anew was had. At the conclusion of appellant's testimony, the court instructed a verdict for appellees, and the case is here on appeal.

In answer to a question as to what the terms of the contract to cultivate the land were, appellant answered: "Well, he was to cultivate the land and give me half, cultivate and gather, etc." In another place he called him a sharecropper. From the evidence we are left in doubt as to the relation existing between them, whether landowner and sharecropper, or landlord and tenant. If appellees were sharecroppers, then the relation of landlord and tenant did not exist. *Woodson* v. *McLaughlin,* 150 Ark. 340, 234 S. W. 185. If the relation of landlord and tenant existed by virtue of the oral contract, which we assume to be the fact, since both parties have apparently so treated it, appellant would have a lien on the crop grown by the tenant for the amount of this note, under § 6890, C. & M. Digest, giving the landlord a lien on the crop raised upon the premises for advances made by him to enable the tenant to make the crop. This statute does not give the landlord a lien on the things advanced themselves, in this case the mules, but only on the crop raised upon the premises. Since there was no crop raised on the premises, there can be no lien. The party must bring himself within the terms of the statute before he is entitled to a lien. *Kaufman* v. *Underwood,* 83 Ark. 118, 102 S. W. 718, 119 A. S. R. 121; *Etheridge* v. *Bird Brothers,* 176 Ark. 649, 4 S. W. (2d) 9.

Appellant contends, however, that the contract to cultivate the land and the sale and purchase of the mules were one entire contract; that appellant sold appellees the mules to enable them to cultivate the land, and as a further provision of the rental contract, wholly on a credit, to be paid for ten months later; and that, having taken possession of the land and the mules under this contract, appellees breached it by refusing to cultivate the land and removing therefrom. Assuming that this contention is true, still was replevin the proper action?

It is well settled that the action of replevin cannot be maintained merely for the collection of a debt, but is purely a possessory action for the recovery of specific personal property. *Spear* v. *Arkansas National Bank,* 111 Ark. 29, 163 S. W. 508, Ann. Cas. 1916A, 735; *Jones* v. *Keebey,* 159 Ark. 586, 252 S. W. 591. It is undisputed that appellant sold appellees the mules outright, even though he did so in connection with the rental contract, and even though he would not have done so but for the rental contract. He retained no title to the property, therefore title to the property passed to appellees. "Property in defendant is a good defense in an action of replevin, and this is ordinarily true whether it be an absolute or a special or qualified property in the goods which are the subject-matter of the litigation." 34 C. J. 1414.

Appellant might have maintained an action to establish and enforce a lien on the mules under the vendor's lien statute, after breach of the contract by appellee for the rental of the land, but the action of replevin will not lie. To maintain replevin, plaintiff must show title in the property, and a landlord's lien is not sufficient to sustain the action. *Security Bank & Trust Co.* v. *Bond,* 132 Ark. 592, 201 S. W. 820; *Brown & Hackney, Inc.,* v. *Lovelace,* 152 Ark. 540, 239 S. W. 21. Having parted with the title to the property by the sale and delivery of possession, appellant is precluded from maintaining this action.

Affirmed.

WADE *v.* SAFFELL.

Opinion delivered October 8, 1928.

R. C. Waldron and *Smith & Blackford,* for appellant.

L. B. Poindexter and *J. H. Townsend,* for appellee.

McHANEY, J. On March 3, 1920, appellee's mother, Zora Saffell, now Zora Claxton, as his guardian, together with Cecil Saffell, an adult brother of appellee, executed to the Bank of Black Rock a joint and several promissory note for $1,500, due January 1, 1921, with interest at 8 per cent. per annum until paid. This $1,500 was borrowed to pay one-half the purchase price of a certain tract of land, title to which was taken in the name of Cecil Saffell and appellee, each of whom furnished an additional $750 to complete the purchase price thereof. To secure said note to the Bank of Black Rock, the same parties executing the note executed and delivered to the bank a deed of trust on the land so purchased. Appellee was born September 9, 1901, and, at the time of the execution of this note and mortgage, was little more than eighteen years of age. Some time thereafter the Bank of Black Rock transferred this note and mortgage, with others, to the Liberty Central Trust Company of St.

Louis, Missouri, to secure money borrowed from it. Later the Bank of Black Rock became insolvent, and was taken over by the Bank Commissioner. This suit was instituted by the Bank Commissioner and the Liberty Central Trust Company, of St. Louis, Missouri, for the purpose of foreclosing the deed of trust securing said note.

Appellee's guardian did not apply to the probate court for an order authorizing her to purchase said land with the funds of her ward, nor for an order authorizing her to borrow said money for her ward, or to execute the note and deed of trust for same, nor did she secure an order of the probate court approving same.

The description of the land in the deed of trust was erroneous, and the complaint in the case above mentioned followed the description as set out in the deed of trust. The makers of the note were made parties to this action, but it nowhere appears, either in the complaint or in the decree rendered thereon, that appellee was a minor. The foreclosure decree was rendered September 27, 1921. At that time plaintiff was only a few days over twenty years of age.

This decree was taken by default. He was not served with a summons, as the statute provides, and no defense was made for him in that action. No answer was filed by his regular guardian, and no guardian *ad litem* was appointed to defend for him, but judgment was rendered against him and the makers of said note, and the land was ordered sold, a commissioner being appointed for this purpose. A sale was attempted to be made by the commissioner on December 31, 1925. Appellee appeared at the time and place the sale was to be had, and objected to the sale proceeding, and no sale was consummated. He thereupon filed in the chancery court his petition or complaint to vacate the decree of September 27, 1921, making the appellant a defendant therein, for the reason that in the meantime the Bank Commissioner had paid off the debts of the Bank of Black Rock to the Liberty Central Trust Company, and had secured a reassignment to him of the assets of said bank in its

hands, which he in turn had sold to appellant. He exhibited a copy of said decree to his complaint, and alleged that the proceedings were erroneous, in that he was an infant at the time of the rendition of said decree, and that no defense had been made for him therein; that the fact that he was a minor did not appear in the record of said proceeding, and that he had a meritorious defense to that action, for the reason that, being the owner of an undivided one-half interest in the land, the note and deed of trust upon which the suit was had were executed without authority by his guardian from the probate court, without appraisal of his interest therein, and without approval from any court; that the loan was secured by his guardian for a purpose other than his support and education, and that his interest in said land was of a value of twice the amount of the loan at the time it was obtained. He further alleged that there was a patent error set out in the description of said lands in the decree and deed of trust, as well as in the complaint in said suit, and that a sale thereof under said description would affect the sale so advertised to his disadvantage.

Appellant filed an answer and cross-complaint, denying that the proceedings in the original foreclosure were erroneous, and that appellee was a minor at the time. He admitted the incorrectness of the description of the lands in the deed of trust and in the decree based thereon. He set out what he contended to be a correct description of the land intended to be inserted in the deed of trust and in the decree, and prayed that the original decree be reformed so as to properly describe the lands in controversy. He further pleaded the statute of limitations against appellee, claiming that he was barred thereby from prosecuting this suit to set aside the former decree.

The court entered a decree setting aside the original judgment and decree of foreclosure in so far as it applied to appellee, Holly Saffell, and permitted the original judgment and decree to stand as to the other judgment debtors, and ordered the undivided one-half interest of

Cecil Saffell in said land to be sold. Hopkins Wade only has appealed from such judgment.

Appellant contends that, by § 6277, C. & M. Digest, appellee is barred from maintaining this action. This section is as follows:

"It shall not be necessary to reserve, in a judgment or order, the right of an infant to show cause against it after his attaining full age, but in any case in which, but for this section, such a reservation would have been proper, the infant, within twelve months after arriving at the age of twenty-one years, may show cause against such order or judgment."

Appellant says that, since Holly Saffell was twenty-one years of age September 9, 1922, he had until September 9, 1923, to bring an action to set aside said judgment, and that, if he desired to avail himself of his rights under this section, he should have filed his suit within that time; that he did not do so, but filed it on December 31, 1925, more than three years after the time permitted by the statute. This contention might be true if the fact of his minority appeared in the record of the proceedings in the original suit to foreclose the mortgage. It is admitted that no defense was made for him in the original action, no answer was filed, no proper service was had upon him, as required by § 1153, C. & M. Digest, or at least the officer's return does not show it, and the appellee's nonage does not appear. In *Pinchback* v. *Graves,* 42 Ark. 222, this court said:

"No judgment should be rendered affecting the interests of an infant until after defense by guardian, and this defense should not be a mere perfunctory and formal one, but real and earnest. He should put in issue, and require proof of, every material allegation of a complaint prejudicial to the infant, whether it be true or not. He is not required to verify the answer, and can make no concessions on his own knowledge. He must put and keep the plaintiff at arm's length. These are wise provisions, and they are so far imperative." See *Ross* v. *Stroud,* 173 Ark. 66, 291 S. W. 996.

It is not contended that the former judgment was not erroneous, but only that he was barred by the above statute of limitation. Counsel have apparently overlooked § 6290, C. & M. Digest, which is as follows:

"The court in which a judgment or final order has been rendered or made shall have power, after the expiration of the term, to vacate or modify such judgment or order: * * * Fifth. For erroneous proceedings against an infant, married woman, or person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings."

This is the section applicable in this case. Erroneous proceedings were had against appellee, an infant, and the condition of such infancy did not appear in the record. There was error in the proceedings by proceeding to judgment against an infant without any defense being made for him. There is no statute of limitations applying to such condition, and § 6277 is not available. That section is applicable to the 8th subdivision of § 6290, and not to the 5th. *Paragould Trust Co.* v. *Perrin,* 103 Ark. 67, 145 S. W. 886; *Brinkley* v. *Wales-Riggs Plantations,* 108 Ark. 47, 156 S. W. 185; *Purcell* v. *Gann,* 113 Ark. 332, 168 S. W. 1102.

In *Foohs* v. *Bilby,* 95 Ark. 302-308, 129 S. W. 1104, this court said:

"Again, counsel for appellant urges a reversal on the ground that appellee had filed a prior application to vacate the judgment, but it is conceded that this was dismissed on his own motion, without prejudice to a renewal of it, and we have no statute limiting the time within which the moving party must act to bring himself within the terms of § 4431, *supra.*"

Section 4431 of Kirby's Digest is the same as § 6290, C. & M. Digest.

We think the appellee set out a sufficient statement to show that he had a defense to the action. The allegations with reference to this defense have already been set out, and it is not necessary to repeat them here.

Appellant says that the only issue presented is whether or not the appellee is barred by the statute of limitation, or availed himself of the benefits of § 6277, C. & M. Digest, and, as we have already shown, this section is inapplicable, and the judgment must be affirmed.