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JUDGES AND OFFICERS

OF THE

SUPREME COURT

DURING THE PERIOD OF THIS VOLUME

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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

STATE *v.* SMITH.

Opinion delivered June 7, 1909.

1. BANKS—FRAUDULENT ACCEPTANCE OF DEPOSIT.—An indictment of a bank cashier for fraudulently accepting a check on deposit when he knew that the bank was insolvent was not defective in failing to allege the date and the name of the drawer of the check, where the check is sufficiently identified by stating the name of the drawee and payee and the amount of the check. (Page 3.)
2. SAME—FRAUD—ACCEPTANCE OF DEPOSIT.—An indictment of a cashier of an insolvent bank for fraudulently receiving on deposit a check from one G. should be understood to mean that the deposit was made by G. for his own account. (Page 4.)
3. SAME—FRAUD—SUFFICIENCY OF INDICTMENT.—An indictment of the cashier of an insolvent bank for fraudulently receiving a check on deposit need not state whether the check was received as a general or a special deposit. (Page 4.)
4. SAME—FRAUDULENT BANKING—CONSTRUCTION OF STATUTE.—Kirby's Digest, § 1814, making it a felony for an insolvent bank to receive on deposit any bank bills or notes or United States treasury notes, "or other notes, bills or drafts circulating as money," by the phrase quoted refers to notes, bills or drafts (other than United States treasury notes and national bank notes) which are payable to bearer or are properly indorsed by the payee, so as to pass from hand to hand. (Page 4.)
5. SAME—FRAUDULENT BANKING—ACCEPTANCE OF CHECK.—An indictment of a bank cashier for fraudulently receiving on deposit from G. a check payable to B. is defective in failing to allege either that the check was indorsed by B. or that it was an obligation which circulated as money. (Page 4.)
6. SAME—SUFFICIENCY OF INDICTMENT OF CASHIER.—An allegation, in an indictment of the cashier of an insolvent bank for fraudulently accepting a check on deposit, that the check was accepted by defendant in lieu of money is not equivalent to an allegation that the check was circulating as money. (Page 5.)

Appeal from Ouachita Circuit Court; *George W. Hays,* Judge; affirmed.

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellant.

The ruling on the demurrer is the only question raised by the State's appeal, as defendant did not appeal. Kirby's Dig. § 1225; 44 Ark. 25. The description in the indictment is sufficient to put defendant on notice as to the offense charged, and enable him to plead former acquittal or conviction. 26 Ark. 332; 27 *Id.* 498; 34 *Id.* 159; 98 N. C. 773; 71 *Id.* 176. The meat of the offense is accepting the check as a deposit, and it makes no difference to whose credit it was deposited; nor does its date cut any figure. It is evident the check was indorsed. 79 Ia. 432; 65 N. W. 309; 6 N. E. 123; 7 *Id.* 763; 107 *Id.* 94.

The indictment sets out every fact necessary under § 1814, Kirby's Dig. 163 Pa. St. 142.

McCULLOCH, C. J. The circuit court sustained a demurrer to an indictment in the following form (omitting caption and formal parts): "The said defendant, on the 3rd day of October, 1904, in Union County, Arkansas, then and there being the cashier of the Bank of El Dorado, said Bank of El Dorado being a corporation, with its home office located in the town of El Dorado, Union County, Arkansas, did unlawfully, wilfully, knowingly and feloniously accept and receive on deposit in said Bank of El Dorado, of and from G. D. Yocum, a certain bill of exchange for $974.61, commonly called and known as a check, which was signed and drawn by J. R. Burns and payable to Miss Bobbie Yocum, said bill of exchange so commonly called and known as a check aforesaid, then and there being accepted and received on deposit in said Bank of El Dorado by the said defendant in lieu of money, the said Bank of El Dorado then and there being insolvent, and the said E. H. Smith then and there being the cashier of said bank, and well knowing at the time he so accepted and received on deposit said bill of exchange, so commonly called and known as a check as aforesaid, that said Bank of El Dorado was then and there insolvent."

The points of attack upon this indictment are set forth in the demurrer as follows:

"1st. The date of said check is not stated, nor does the indictment allege that said date was unknown to the grand jury.

"2nd. The name of the bank, corporation, firm, company or person on whom said check was drawn by J. R. Burns is not stated, nor does the indictment allege that same was unknown to the grand jury.

"3rd. The indictment fails to state to whose account said check was deposited by the said G. D. Yocum, or for whose account it was accepted and received by the defendant.

"4th. The indictment fails to state whether the check referred to therein was accepted by the defendant as cashier of the Bank of El Dorado as a general deposit, thereby becoming a part of the funds of said bank, or on special deposit, as bailee of the owner of same.

"5th. The indictment fails to state whether the check referred to therein was indorsed by Miss Bobbie Yocum to G. D. Yocum, or whether the said G. D. Yocum was the owner of said check, and as such deposited same, or whether in the deposit of said check he acted as the agent of the payee or other person.

"6th. The indictment fails to allege that the check referred to therein circulated as money, as required by the statute."

The statute under which the indictment is preferred reads as follows: "No bank shall accept or receive on deposit, with or without interest, any money, bank bills or notes, or United States treasury notes, gold or silver certificates, or currency, or other notes, bills or drafts, circulating as money, or currency, when such bank is insolvent; and any officer, director, cashier, manager, member, party or managing party of any bank who shall knowingly violate the provisions of this section, or be accessory to, or permit or connive at the receiving or accepting on deposit of any such deposit, shall be guilty of a felony, and upon conviction thereof shall be imprisoned in the State Penitentiary not less than three years and not more than five years." Act Feb. 12, 1901, Kirby's Digest, § 1814.

We are of the opinion that the first and second grounds set forth in demurrer are not well taken. The check was fully identified by the description given in the indictment, without stating the name of drawer or the date of the check. The name of the drawee is stated, the name of the payee and the amount of the

check. This, we think, is sufficient to fully identify the check so that the defendant could plead former acquittal or conviction to a second indictment.

The third ground is likewise without substantial foundation. The indictment charges that the deposit was received from G. D. Yocum. This could only be understood to mean that the deposit was made by G. D. Yocum for his own account, and was so accepted by the defendant. *State* v. *Cadwell,* 79 Iowa 432.

There is no merit in the fourth ground of demurrer. The statute makes no distinction between general and special deposits, so far as this offense is concerned, and it is unnecessary to allege in the indictment the particular character of deposit—whether general or special. It is sufficient to allege that the funds, etc., were deposited.

The fifth and sixth grounds of the demurrer relate to the same point, and should be considered together. The allegations of the indictment are to the effect that the check deposited by G. D. Yocum was one drawn by J. R. Burns in favor of Miss Bobbie Yocum, but it is neither alleged in terms that the check was indorsed by the payee nor that it was an obligation which circulated as money.

It is not altogether clear what the Legislature meant by the words "other notes, bills or drafts, circulating as money, or currency." Literally construed, there are no "notes, bills or drafts" which circulate as money or currency except United States treasury notes and national bank notes, and it is obvious that the Legislature did not refer to these in using this language, for they are especially mentioned in the statute. If any meaning at all be given to this language, it must be held to refer to notes, bills or drafts (other than United States treasury notes and national bank notes) which pass from hand to hand; that is to say, such as are payable to bearer or are properly indorsed by the payee, so that the legal title may pass by delivery.

Now, applying this test, the allegations of the indictment do not sufficiently describe the check so as to bring it within the terms of the statute. It is not alleged, either in general terms that it was a "note or draft circulating as money or currency," or that the check which was drawn payable to Miss Bobbie Yo-

cum was ever indorsed by her so that the legal title might pass by delivery.

It is contended on behalf of the State that the allegation of the indictment to the effect that the check was accepted by the defendant in lieu of money was equivalent to an allegation that it was a draft circulating as money. We do not think so. The meaning of the two statements is altogether different. One is descriptive of the written instrument, and the other refers entirely to the manner of acceptance of the paper. It may as well be said that an allegation of acceptance on deposit of a horse or bale of cotton in lieu of money would bring it within the statute.

The statute must be strictly construed, and in order to make out a charge under it the language must state facts within its express terms.

Affirmed.

STATE v. JONES.

Opinion delivered June 7, 1909.

1. ACCESSORIES—LIABILITY.—Under Kirby's Digest, § 1562, defining an accessory after the fact as "a person who, after full knowledge that a crime has been committed, conceals it from the magistrate, or harbors and protects the person charged with or found guilty of the crime," one who, with full knowledge that a felony has been committed, harbors and protects the felon, is guilty as accessory after the fact, regardless of whether an indictment or other judicial proceedings are pending against the principal for his apprehension or punishment or not. (Page 7.)
2. STATUTES—CONSTRUCTION.—When the Legislature uses words which have received a judicial interpretation, or which have a fixed and well-known signification, they are presumed to have been used in that sense, unless the contrary intention clearly appears. (Page 8.)
3. SAME—LEGISLATIVE INTENTION.—The language of a statute should be fairly and rationally interpreted so as to carry out the legislative intention; and if it is susceptible of two constructions, one of which will lead to an absurdity and the other not, the latter will be adopted. (Page 8.)
4. SAME—CONSTRUCTION OF CRIMINAL STATUTE.—In construing a statute defining a crime, it is proper to consider what were the elements of

the crime at common law and whether there was any intention on the part of the Legislature to change such elements. (Page 8.)

5. ACCESSORIES—DEFINITION.—An accessory after the fact at common law is one who, knowing a felony to have been committed by another, shelters, receives, relieves, comforts or assists the felon. (Page 8.)

6. SAME—CONCEALMENT OF CRIME—ALLEGATION OF KNOWLEDGE.—An indictment against an accessory after the fact which alleges that he concealed a felon, having full knowledge that he had committed a felony, is not insufficient in failing to set forth specifically the facts showing that the defendant had knowledge of the alleged felony. (Page 9.)

Appeal from Lincoln Circuit Court, Varner District; *Antonio B. Grace,* Judge; reversed.

Hal L. Norwood, Attorney General, *C. A. Cunningham,* Assistant, for appellant.

The court below misapprehended the meaning of the word "charge," as used in § 1562, Kirby's Digest. The Legislature evidently meant to use the word in its ordinary sense, and not in its legal signification. 1 Bish. Cr. Law, pp. 408-9-10; Clark, Cr. Law, p. 113; Endlich, Int. Stat., § § 258, 264; Lewis' Sutherland on Stat. Int., § § 389, 390, 392, 394; 129 Cal. 364; 92 *Id.* 590; 64 Ky. (1 Bush) 176; 34 N. Y. Suppl. 228.

W. B. Sorrells and *Bridges, Wooldridge & Gantt* for appellees.

The word "charge" has a legal, definite meaning, and the court should so construe. Where a statute has such a meaning at common law, or in the written law, it will be presumed to be used in that sense. Lewis' Suth. Stat. Const., § 398; *Id.* 399; Black, Int. Stat., p. 131; 5 Ark. 539; 46 *Id.* 159, 162; 26 A. & E. Enc. Law. (2 Ed.), p. 598; 24 Ark. 494; 59 *Id.* 244; 38 *Id.* 521; 90 Mass. 478; 20 Fed. Rep. 298, 308; 150 U. S. 68.

Penal statutes are strictly construed, so that no case is held to be reached except such as are clearly within the spirit and letter of the law. 2 Hawkins, P. C. § 16; 38 Ark. 521; 129 Cal. 364.

Charged evidently means accused of or charged with crime in a regular course of judicial proceeding. Webster; 129 Cal. 364; 20 Fed. Rep. 298, 308; 150 U. S. 68; 1 A. & E. Enc. L., (2 Ed.) 481; 112 Mich. 251; 19 Kans. 417, 426; 102 Ga. 673; 74 S. W. 184; Black on Stat. Const. p. 132.

McCULLOCH, C. J. The State appeals from a judgment of the circuit court sustaining a demurrer to an indictment against defendant, J. W. Jones, charging him with having been accessory after the fact to the crime of murder committed by one George Battles. The indictment alleges in substance that the said George Battles did kill and murder one Jarrett Johnson, and that the defendant, after said crime of murder had been committed and with full knowledge that said Battles had committed said crime, "did then and there wilfully, unlawfully, knowingly and feloniously harbor, protect, conceal and aid to escape the said George Battles," etc.

The statute of this State defining the crime of accessory after the fact is as follows: "An accessory after the fact is a person who, after a full knowledge that a crime has been committed, conceals it from the magistrate, or harbors and protects the person charged with or found guilty of the crime." Kirby's Digest, § 1562.

Another section of the statute (1566) provides that "an accessory before or after the fact may be indicted, arraigned, tried and punished, although the principal offender may not have been arrested and tried, or may have been pardoned or otherwise discharged."

The learned circuit judge sustained the demurrer on the ground that the indictment failed to state an offense because it is not alleged therein that a judicial charge or accusation was pending against the principal, George Battles, at the time the defendant is alleged to have committed the acts which constituted the crime of accessory after the fact. In other words, that under the statute it is not a crime to knowingly harbor and protect a felon unless an indictment or other judicial proceedings be then pending against the principal for his apprehension or punishment.

We do not concur in this interpretation of the statute. Under the statutes of this State, either an officer or private person, with or without a warrant, "may make an arrest when he has reasonable grounds for believing that the person arrested has committed a felony." Kirby's Digest, §§ 2119, 2120. So, where a felony has been committed, the felon stands charged with the crime, and it is the duty of all persons who know or have reason to believe that he is guilty of a felony to arrest him. One who, with a full knowl-

edge that the crime has been committed, harbors and protects the felon, is guilty as accessory and may be punished as such, whether the principal offender be arrested or not. Any other view of the statute would permit a person to go unpunished who has been guilty of the most flagrant act of harboring and protecting a felon before a warrant of arrest could be procured or an indictment could be returned.

It is, of course, a well-settled rule of interpretation that when the Legislature uses words which have received a judicial interpretation, words which have a fixed and well-known legal signification, they are presumed to have been used in that sense, unless the contrary intention clearly appears. This court has said that "it is dangerous to interpret a statute contrary to its express words where it is not obvious that the makers mean something different from what they have said." *Memphis & L. R. Ry. Co.* v. *Adams,* 46 Ark. 159.

But it is equally well-settled that the language of a statute should be fairly and rationally interpreted so as to carry out the manifest intention of its framers. "In general, it may safely be said that when words in a statute are susceptible of two constructions, of which one will lead to an absurdity, the other will not, the latter will be adopted." Endlich on Interpretation of Statutes, 258.

Now, the words "charged with," as applied to the perpetration of crime, cannot be said to have a well-known and established legal signification. Chief Justice Andrews, speaking for the Supreme Court of Connecticut, said: "The expression 'charged with,' as applied to a crime, is sometimes used in a limited sense —intending the accusation of a crime which precedes a formal trial. In a fuller and more accurate sense, the expression includes also the responsibility for the crime." *Drinkall* v. *Spiegel,* 68 Conn. 441.

In the search for the meaning of the lawmakers, it is proper to consider what at common law were the elements of this crime, and whether there was any intention to change by statute its elements. Professor Wharton defined the common-law offense of accessory after the fact as follows: "An accessory after the fact is one who, knowing a felony to have been committed by another, shelters, receives, relieves, comforts or assists the felon."

Wharton on Homicide, § 67. Again, it is said by the same learned author: "Two things are laid down in the books as necessary to constitute a man accessory after the fact to the felony of another. First, the felony must be complete. * * * And, second, the defendant must know that the felon is guilty." Sec. 68, *Id.* The other law writers on the subject give the same definition. 3 Russell on Crimes, p. 145; Clark's Crim. Law, § 49 (2nd Ed.); 1 Bishop on Crim. Law (8th Ed), § 692.

Nothing is said by any of these authors about the necessity for a legal charge or accusation against the felon before the crime of being an accessory after the fact can be committed, and we do not think that the Legislature by this statute intended to introduce a new element into this crime which would destroy its effectiveness.

The Supreme Court of California have taken the contrary view in construing a statute identical in its language (*People* v. *Garnett,* 129 Cal. 364); but, with due deference to that learned court, we are unable to agree to that interpretation.

Reversed and remanded with directions to overrule the demurrer.

BATTLE, J., dissenting.

McCULLOCH, C. J. In addition to the grounds of attack set forth in the original opinion, the defendant insists that the indictment is fatally defective in that it does not set forth specifically the facts showing that the defendant had knowledge of the alleged felony committed by George Battles, the principal offender. Reliance is placed upon the decision of this court in *State* v. *Graham,* 38 Ark. 519, where it was held that under a statute making it a misdemeanor for a justice of the peace "who, from his own knowledge or from legal information, knows or has reasonable grounds to believe, any person guilty" of carrying a weapon, to fail or refuse to proceed against such person, an indictment against such officer must set forth the manner in which the knowledge or legal information was given. The indictment in that case merely alleged that the offending officer had legal information, without specifically stating the manner in which it was given. The gist of the offense was that the officer had failed to act after receiving legal information, and it was im-

portant to state in that indictment the manner in which this information was given.

Under the statute now under consideration, it is unimportant how the knowledge is received by the alleged accessory; it is sufficient to constitute the offense if he knows, at the time he harbors and protects the felon, that the latter has committed the felony named in the indictment. Therefore, the statement in the indictment that he had full knowledge that the accused person had committed the crime was a statement of a fact, and not a mere conclusion.

Learned counsel for appellant have renewed with much force their argument made on the point decided in the original opinion; but after a careful re-examination of the questions, we are convinced that a correct conclusion was reached in interpreting the statute.

The petition for rehearing is therefore denied.

LEOLA LUMBER COMPANY v. BOZARTH.

Opinion delivered June 7, 1909.

1. WITNESSES—COMPELLING OPPOSITE PARTY TO TESTIFY.—A party to an action at law may be summoned by the opposite party to testify as to matters within his knowledge if he resides in the county of the venue or in an adjoining county, and if he resides elsewhere he may be compelled to respond to written interrogatories annexed to the answer. (Page 13.)
2. SAME—PRODUCTION OF PAPERS.—The production of books, papers and memoranda of a party, if in the hands of a witness, may be enforced by *subpoena duces tecum;* if in the hands of the opposite party, by an order of court. (Page 13.)
3. PARTIES—PARTNERS.—In an action to enforce a claim against a partnership, the partners are proper and necessary parties, in order that there may be a complete determination of the questions involved. (Page 13.)

Appeal from Grant Circuit Court; *William H. Evans,* Judge; reversed.

Bridges, Wooldridge & Gantt and *A. R. Cooper,* for appellant.

1. The cause should have been transferred to equity, as the defense in the answer was purely equitable. 36 Ark. 229; 52 Ark. 411; 71 *Id.* 487; 44 *Id.* 458; 46 *Id.* 272; 44 *Id.* 496; 49 *Id.* 575; 74 *Id.* 280.

2. Instruction No. 1 should have been given. There was evidence of partnership. 80 Ark. 28. Lynn Butler, the partner, was a necessary party. 60 Ark. 560; 67 *Id.* 27; 30 Cyc. 561.

BATTLE, J. W. F. Bozarth, complaining of the Leola Lumber Company, alleged that he, at the request of the defendant, performed work, labor and services for it in cutting and preparing logs and timber for its mill at agreed and stipulated prices amounting in the aggregate to the sum of $892.78; and asked for judgment for that amount.

The defendant denied the allegations of the complaint, and answered further as follows:

"For further answer defendant says that its business or main office is at Pine Bluff, Arkansas, and its timbered interest, saw mills and saw mill property are at Leola in Grant County; that said corporation was organized, as shown by its articles of incorporation, to buy and sell timber and timbered lands and run a saw mill; that Lynn Butler was vice-president of defendant corporation till the —— day of July, 1908, and as such was in charge of defendant's saw and planing mills located at and near Leola; that on or about the —— day of ——, 1908, the plaintiff W. F. Bozarth and Lynn Butler, while the latter was yet vice-president of defendant's company, formed a partnership known as Bozarth & Company to do a saw milling business at Leola in said county, and planned and conspired together to defraud the defendant; that, pursuant to said conspiracy to defraud the plaintiff, W. F. Bozarth and Lynn Butler purchased two saw mills of their own on or about the —— day of ——, 1908, placed them in operation and begun cutting defendant's timber without the knowledge or consent of defendant, whose mills were closed down and remained idle, all of which was very much to the loss, hurt, and

injury of defendant; that plaintiff Bozarth and Lynn Butler, in operating their own mills above set out, used the log wagons, equipments, mules and oxen of the defendant, and thereby became indebted to the defendant in a large sum, to the defendant unknown; and that the said W. F. Bozarth and Lynn Butler, in the operation of their saw mills, supplied their logging teams with feed belonging to the defendant, thereby becoming indebted to the defendant in a further sum unknown to it. Defendant believes, and therefore alleges as true, that, while operating their own mills, the plaintiff W. F. Bozarth and Lynn Butler unlawfully and without right charged their private labor account to this defendant, and the defendant, being at the time in ignorance of the true state of facts, paid the same, and the plaintiff W. F. Bozarth and Lynn Butler thereby became indebted to the defendant in a large sum to it unknown. That the advances, supplies and moneys and timber cut, paid by defendant to the plaintiff W. F. Bozarth and Lynn Butler, as above set out, are largely in excess of the sum sued on herein, but the defendant sayeth further that on the —— day of July, 1908, Lynn Butler ceased to be vice-president of defendant corporation or have any interest in the same, but refused and still refuses to deliver to the defendant its time books or any other books, papers and memoranda belonging to the defendant, whereby the truth may be determined and an accounting had between the plaintiff W. F. Bozarth and Lynn Butler on the one side and defendant on the other.

"Wherefore defendant says that it has no adequate remedy at law, and prays that Lynn Butler be made a party hereto, and that this cause be transferred to the equity court, and an accounting be had between the defendant and the plaintiff W. F. Bozarth and Lynn Butler and for judgment against said W. F. Bozarth and Lynn Butler or either of them for such sum as the proof may warrant, and it will ever pray."

The court refused to transfer the cause to a court of equity. Lynn Butler was not made a party. Some evidence tending to prove that he was a partner of the plaintiff in the matters in controversy was adduced.

The defendant asked the court to instruct the jury as follows:

"If you find from the evidence that plaintiff, W. F. Bozarth,

was a partner with Lynn Butler in the operation of the saw mills at which he claims to have cut lumber for defendant, then you are instructed that he is not entitled to maintain this suit, and your verdict should be for the defendant." And the court refused to so instruct.

The jury returned a verdict in favor of the plaintiff for $800, and, judgment having been rendered for that amount, the defendant appealed.

The defendant failed to show such a complicated state of accounts between it and appellee as to make it necessary to transfer the cause to equity for adjustment. As to the discovery of facts within the knowledge of the appellee, if he resides in the county in which the action was brought or in an adjoining county, he could have been summoned by the appellant and compelled to testify as any other witness (Kirby's Digest, § 6154); or if he did not reside in such counties, he could have been compelled to respond to written interrogatories annexed to the answer. (*Ib.* § 6158). The production of the books, papers and memoranda of the appellant in the possession of a witness, or a party to the action, needed as evidence, upon proper showing, could have been enforced; if in the possession of a witness, by a subpoena duces tecum (Kirby's Digest, § 3111); if in the possession of a party, by an order of the court. Kirby's Digest, §§ 3074-3078.

Under the statutes of this State all persons who are necessary to a complete determination and settlement of the questions involved should be made parties to an action. Kirby's Digest, § 6011. Unless they are, they will not be bound by the judgment, and as to themselves may relitigate. Partners, in proportion to their interest, are entitled to be heard in the enforcement of all partnership claims, and are proper and necessary parties (30 Cyclopedia of Law and Procedure, 561, and cases cited), and should be made parties for the protection of the defendant against further litigation, and for the final settlement of the rights involved.

Reversed and remanded for a new trial.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. JACKSON.

Opinion delivered June 7, 1909.

1. RAILROADS—PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE.—Where the undisputed evidence shows that plaintiff was hurt while negligently walking near defendant's track without noticing an approaching train when there was no reason why his attention should be attracted elsewhere, he was guilty of contributory negligence as matter of law, and it was error to submit the question whether he was negligent to the jury. (Page 18.)
2. SAME—DISCOVERED PERIL.—Where there was testimony tending to prove that defendant's trainmen discovered plaintiff's peril in time to avoid injuring him either by giving signal or stopping the train, and they failed to do either, the question whether they failed to exercise ordinary care to prevent injuring him was properly submitted to the jury. (Page 19.)

Appeal from Green Circuit Court; *Frank Smith,* Judge; reversed.

STATEMENT BY THE COURT.

At the town of Rector in Clay County, Arkansas, appellant has a main line track and a passing side track running parallel with the main line for nearly a mile and being about nine feet apart. The space between the tracks south of town had been used continuously by pedestrians since the railroad was built. Appellee about six o'clock in the afternoon was walking south along the footpath between appellant's tracks. He saw south of him on the main line a freight train standing still some three hundred yards distant with the engine towards him. Between him and the track on the main line was an engine switching cars on the side track. This engine was approaching near him, and was blowing off steam. Appellee's attention was attracted by this, and he did not look to see what became of the train on the main line; but, as the engine on the passing or side track came near, he walked within a foot of the ends of the ties on the east side of the main line. While thus absorbed and walking on south, the train on the main line, going north at a speed of six or seven miles an hour, ran into him. The pilot beam, which extends beyond the rails about fifteen inches, struck appellee, knocking him down and injuring him severely. The engineer was in his cab on the side next to appellee. The whistle was not blown, the bell was not rung, and there

was no effort to stop the train before appellee was injured. The train was equipped with air, and could have been stopped quickly. The jury might have found the facts as stated above from evidence adduced in behalf of appellee.

On behalf of appellant the fireman on the engine that ran down appellee testified: "When they arrived at Rector, they were flagged by a local brakeman; they slowed up. As they passed down, he saw a couple of men between the tracks. They rolled on down about 50 yards and whistled, signalled to an Iron Mountain train on the siding. Old man Jackson started to go across the track; made out like he was going to cross, and did not go. They got a little closer, and he made another effort to go, but he did not go. Finally they were right down by him, in 6 or 7 feet of him probably, he stepped from between the side track and main track and put his foot on the end of the ties, and next step put it over the rails, and they hit him. Fireman holloed to the engineer to stop; they had hit a man. They ran about four car lengths and stopped. The train was going south. It was about 5:25 in the evening. The first attempt Jackson made to cross the track was something like 60 yards in front of the engine, the next effort he made was about 20, and maybe a little further, and the last attempt was in 8 feet. They were right on him when he made the third attempt."

The engineer testified: "When they arrived at Rector, he was flagged. He pulled down on the main line, and noticed two men between the tracks. They pulled down below the road crossing about one-fourth of a mile south of the depot, and a brakeman called to him to stop; they had killed a man. They were rolling about six or seven miles an hour. The engine was equipped with an automatic bell ringer, and was ringing, and did not cease to ring until they stopped the train. The train was a freight train, containing 45 cars. Stopped in 160 feet after the accident happened. There was an Iron Mountain train standing still on the passing track. The pilot beam extends beyond the rails about 15 inches, the ties extend about 12 inches beyond the rails. He recognized the plaintiff as being the man struck on the 21st of March."

The complaint alleged, among other things, the following: "On the 5th day of May, 1908, the plaintiff was, without fault on his part, and on account of the negligence of the defend-

ant, struck by a moving engine operated along its main line, a short distance south of its depot, whereby the plaintiff's shoulder and collar bone were dislocated, and he was damaged in the sum of $1,999."

The answer contains the following: "Defendant admitted that plaintiff was struck by one of its engines, but denied the injury resulted from the negligence of it or its agents or employees in charge of its train, and denied the plaintiff was wrongfully or negligently injured, and alleged his injury resulted from his own careless conduct, and without the fault of it or its agents, and denied he was damaged in the sum of $1,999."

Among other instructions the court gave the following:

"IV. If you do find that defendant was negligent, that does not mean that your verdict must necessarily be for the plaintiff, but you will further consider the question whether the plaintiff was also negligent; and, if he was, there can be no recovery unless you find defendant liable under instruction No. 5.

"V. If the employees of a railroad company in charge of a train see a man walking along its tracks at a distance ahead sufficient to enable him to get out of the way before the train reaches him, and are not aware that he is insensible of the danger or unable to get out of the way, they have a right to rely on human experience, and to presume that he will act on the principles of common sense and the motive of self-preservation common to mankind in general, that he will get out of the way, to go on without checking the speed of the train until they see he is not likely to get out of the way, when it would become their duty to give an extra alarm by bell or whistle, and if that is not heeded, and it becomes apparent that he will not get out of the way, then, as a last resort, to check its speed or stop the train, if possible, in time to avoid the injury. If, however, the man seen upon the track is known to be, or from his appearance gives them good reason for the belief that he is, insensible of his danger or unable to avoid it, they have no right to presume that he will get out of the way, but should act upon the hypothesis that he might not or would not, and should use the proper degree of care to avoid injuring him. Failing in this, the railroad company would be responsible for damages if by the use of such care, after becoming aware of his negligence, they might have avoided injuring him.

"VI. If you find from a preponderance of the evidence in this case, either direct or circumstantial, that, in time to have avoided injuring Jackson, the operators of the engine which struck him walking along the track knew, or had reasonable grounds for believing, that he was not aware of the approach of the engine and cars attached and so oblivious to his danger, and therefore failed to give him timely warning, or to use reasonable means to avoid injuring him, but thereafter wilfully or wantonly or recklessly ran the engine and cars on to and against him, you will find for the plaintiff. If the evidence fails to show all these things by a fair preponderance, you will find for the defendant."

The jury, upon interrogatories propounded, found that appellee was injured by the "northbound train."

The verdict was in appellee's favor in the sum of $312.50. Judgment was entered for that sum, and appellant seeks by this appeal to reverse the judgment.

Sam H. West and *J. C. Hawthorne,* for appellant.

1. Appellee, under the evidence, was plainly guilty of contributory negligence, and cannot recover. He does not come within any of the exceptions announced in 78 Ark. 60. In 78 Ark. 355 the facts are entirely different. 79 Ark. 137; 80 *Id.* 186.

2. He was guilty of inexcusable carelessness. Contributory negligence follows as a matter of law under such circumstances. 69 Ark. 134; 61 *Id.* 549; 62 *Id.* 158; 65 *Id.* 238; 74 *Id.* 372. It was his duty to look for the approaching train. 81 Ark. 325; *Ib.* 368; 83 *Id.* 300; 84 *Id.* 270. See also 85 Ark. 532; 86 Ark. 306; 88 Ark. 172; 62 Ark. 245; 76 *Id.* 10.

3. There is no testimony or circumstance from which a conclusion could be reached that the employees discovered the plaintiff's position to be a perilous one, and 74 Ark. 407 and 84 *Id.* 478 do not apply. 69 Ark. 380. This case falls within 82 Ark. 522.

J. H. Hill and *Johnson & Burr,* for appellee.

1. This case was submitted to the jury upon the theory that defendant was guilty of negligence after discovering the peril of the plaintiff, and the antecedent contributory negligence in going upon or in close proximity to the track without looking, etc., is immaterial. 85 Ark. 532; 109 S. W. 514. The question

was whether defendant was negligent in discovering plaintiff in close proximity to the track. The jury found that issue for plaintiff, and the verdict will not be disturbed, for there was some legal evidence to sustain it. 116 S. W. 660; 67 Ark. 399; 73 *Id.* 377; 75 *Id.* 111; 76 *Id.* 115. The proof shows defendant guilty of actionable negligence. 89 Ark. 496; 85 *Id.* 532; 74 *Id.* 407; *Ib.* 478; 80 *Id.* 186.

2. The instructions were based upon the allegation of the complaint, the theory upon which the case was tried and the evidence adduced. Cases *supra.*

WOOD, J., (after stating the facts.) The undisputed evidence shows that appellee knew when he was walking between the tracks that there was a train on the main line south of him. It was but a short distance away, and he could see it plainly. But, after first looking and seeing the train, he turned his attention to the engine which was passing him on the side track, and did not look to see the movements of the train on the main line. He moved over so near to the main line track that a casual glance would have shown him that he was too near this track for the train that was south to pass him without striking him. In the middle of the track he would have been perfectly safe from the passing engines. He carelessly chose the place of danger. There was nothing in the surroundings to warrant any confusion of his senses. No emergency of peril that should have caused him to act on the sudden impulse. He had ample time for deliberation in his movements, and with any prudence whatever could have avoided the injury he received. It was a plain case of contributory negligence on his part, which the court should have instructed upon the uncontroverted evidence. *Griffie* v. *St. Louis, I. M. & S. Ry. Co.,* 80 Ark. 186; *Burns* v. *St. Louis S. W. Ry. Co.,* 76 Ark. 10; *St. Louis, I. M. & S. Ry. Co.* v. *Johnson,* 74 Ark. 372; *St. Louis & S. F. Rd. Co.* v. *Crabtree,* 69 Ark. 134; *Little Rock & F. S. Ry. Co.* v. *Blewitt,* 65 Ark. 238; *Martin* v. *Little Rock & F. S. Ry. Co.,* 62 Ark. 158; *St. Louis, I. M. & S. Ry. Co.* v. *Martin,* 61 Ark. 549.

The proof shows that appellee did not look any more for the train on the main line after he first discovered its position, and that he walked on some fifty or one hundred yards between the tracks in the direction of this train. The passing of the engine

near him was no excuse for his failing to look for the other engine on the main line, nor for his placing himself so near the main line that he could not escape injury. He was apprised of the precise conditions, and his failure to use his eyes, under the circumstances, was inexcusable carelessness. See *St. Louis & S. F. Rd. Co.* v. *Portis,* 81 Ark. 325; *St. Louis S. W. Ry. Co.* v. *Bryant,* 81 Ark. 368; *Adams* v. *St. Louis, I. M. & S. Ry. Co.,* 83 Ark. 300; *St. Louis & S. F. Rd. Co.* v. *Ferrell,* 84 Ark. 270.

The court therefore erred in submitting to the jury the question as to whether appellee was guilty of contributory negligence, as it did in instruction number four. *Ark. Central Rd. Co.* v. *Fain,* 85 Ark. 532; *El Dorado & Bastrop Rd. Co.* v. *Whatley,* 88 Ark. 20. Under this instruction the jury might have found that appellant was negligent, and that appellee was not guilty of contributory negligence. Who can tell?

But, notwithstanding the contributory negligence of appellee, it was a question for the jury as to whether the employees of appellant, having discovered his peril, failed to exercise ordinary care to avoid injury to him. The jury might have found that the engineer and fireman saw appellee, and that they were aware from his movements that he was oblivious of the fact that the northbound train was approaching him; that they could have sounded the whistle or rung the bell or have lessened the speed of the train, in order to avoid striking appellee, and that they failed to exercise any of these precautions, and that his injury was caused by such failure. These questions were presented in the evidence and were correctly submitted. *St. Louis S. W. Ry. Co.* v. *Thompson,* 89 Ark. 496; *Ark. Central Rd. Co.* v. *Fain,* 85 Ark. 532; *St. Louis, I. M. & S. Ry. Co.* v. *Evans,* 74 Ark. 407; *St. Louis, I. M. & S. Ry. Co.* v. *Hill,* 74 Ark. 478; *Griffie* v. *St. Louis, I. M. & S. Ry. Co.,* 80 Ark. 186.

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

FERNIMAN v. NOWLIN.

Opinion delivered June 7, 1909.

1. LANDLORD AND TENANT—LIEN FOR SUPPLIES—DEFENSE.—In an action by a landlord to enforce a lien upon his tenant's crop for supplies furnished to make a crop, the fact that the tenant could not make the crop without other supplies than those furnished by the landlord is no defense against the enforcement of the latter's lien. (Page 24.)
2. SAME—LIEN—ENFORCEMENT.—Where a tenant delivers his crop to a mortgagee without having first discharged the landlord's lien for supplies furnished to make the crop, the landlord's remedy is a specific attachment of the cotton in the mortgagee's hands. (Page 24.)
3. SAME—PRIORITY OF LIEN.—Where a landlord brought suit seeking to enforce his lien on his tenant's crop for supplies furnished for the purpose of making such crop, but without asking for a writ of attachment, and a mortgagee of the crop brought replevin against the landlord for the possession of such crop, and the two causes were consolidated, the landlord's lien was paramount to the mortgage lien, and judgment was properly rendered enforcing the former lien. (Page 25.)

Appeal from Marion Circuit Court; *Brice B. Hudgins,* Judge; affirmed.

STATEMENT BY THE COURT.

Charles Burrus rented from C. C. Nowlin and D. S. Nowlin the "Toney farm" in Marion County for the year 1906. The Nowlins furnished him supplies, as he and they testify, "to enable him to make the crop" during the year 1906 according to an itemized account which amounted to the sum of $103.32. When Burrus gathered his cotton (two bales) he took it to the Nowlins' gin, and told them when it was ginned to wrap it in the bagging of one Wm. Ferniman that was at the gin. The cotton was ginned and baled, being wrapped in Ferniman's bagging. The Nowlins, having the cotton in their possession, requested Burrus to let them apply it on his account for supplies furnished him by them. He refused, saying that he had mortgaged the cotton to Ferniman, and had promised to let him have it. He had gone with Ferniman to the gin and turned the cotton over to him, and Ferniman had marked it with his brand. After this, on the 7th day of February, 1907, the appellees brought suit against Burrus and Ferniman. They alleged, in substance, that they were the landlords of Burrus for the year 1906, he having rented from them the place

known as the Toney farm, that he was due them for rent the sum of $10.50 and for supplies furnished him to enable him to make his crop during that year $103.32, that Wm. Ferniman was laying claim to the cotton under a mortgage and interfering with appellees in their possession of the cotton. They alleged that they had a lien on the cotton for the rent and supplies furnished, and they prayed that a lien be declared in their favor, and that the claim of Ferniman be denied, and that they have judgment for the amount of their claim for rent and supplies, and that the cotton be sold to satisfy the judgment.

The cause in the justice's court progressed to judgment in favor of appellees, and appellant appealed to the circuit court.

In the meantime, while the suit was progressing in the justice's court, appellant brought suit in the circuit court of Marion County against appellees to replevy the cotton, setting up that Burrus was indebted to him in account for supplies furnished him under a mortgage on the cotton, that Burrus was willing for appellant to have possession, but that appellees had refused to deliver the cotton to appellant, that appellees pretended to be the owners of the cotton, but that they had no right or title thereto, and he prayed for judgment for possession and for damages, etc. The appellees answered the complaint, and set up their claim to the cotton by virtue of their landlord's lien for rent and supplies furnished, set up the proceedings that they had resorted to in the justice's court, to which appellant had been made party, alleging that the suit in justice's court had proceeded to judgment in favor of appellees, and that appellant had appealed to the circuit court from that judgment, that all the issues in the suit on appeal and in the suit begun by appellant against them in the circuit court were the same. They prayed that the case in the circuit court be dismissed, or that same be consolidated with the case on appeal from the justice's court, that certified copies of the judgments then on file from the justice's court be considered as part of their answer, for judgment against appellant for taking the cotton out of their possession under orders of delivery in the present suit, and for proper orders for the disposition of the cotton and the application of the proceeds and all proper relief, etc.

The court consolidated the case on appeal from the justice's court with the suit begun in the circuit court. The cause went to

trial with a jury, and upon evidence as to the claims and liens of the respective parties as detailed above. The court, over the objections of appellant, refused to permit Burrus to answer the following questions: "Did the supplies furnished you by the Nowlins enable you to make said crops?" "Could you have made said crop with other supplies than those furnished you by the Nowlins?" The appellant duly excepted.

The court instructed the jury at the request of appellees as follows:

"Gentlemen of the jury, I instruct you to find for the plaintiffs, C. C. Nowlin and D. S. Nowlin, the possession of the two bales of cotton in controversy, and also find the value of said cotton, and assess the plaintiffs' damages for the wrongful taking and detaining of said cotton equal to 6 per cent. interest on the value of said cotton from the 25th day of March, 1907."

And refused among others the following requests of appellant:

"2. I instruct you that, before plaintiffs will be entitled to recover, they must show that the supplies which they furnished to said Burrus did enable him to make and gather the crop; and, even if it be shown that the supplies furnished enabled him to make the crop, it is not enough unless supplies were also furnished to enable him to gather the crop.

"No. 3. I instruct you that it devolves upon the plaintiff to show that they took steps by specific attachment within six months after their claims for rent fell due to enforce their landlord's lien for rents; and, if you find said cotton was not attached within said period, then you will find for the defendant, unless you find that said Burrus turned said cotton over to the plaintiffs or put them in the possession of same to apply on their debt against said Burrus.

"No. 4. I instruct that, unless you find that the supplies furnished by the plaintiffs (Nowlins) to said Burrus were furnished for the purpose of enabling him to make and gather said crop, then your verdict should be for the defendant Ferniman.

"No. 5. You are instructed that the jennet is not a "supply," within the meaning of the landlord's lien act herein, and cannot allow that amount to Nowlins.

"No. 6. You are instructed that any supplies furnished be-

fore March 1, 1906, when Burrus commenced to make his crop, cannot be considered by you in estimating the amount of the landlord's lien claimed by the plaintiffs.

"No. 7. You cannot allow plaintiffs the $4.40 taxes as part of their landlord's lien.

"No. 8. You cannot allow the plaintiffs for any of the goods and supplies after the crop season of 1906 was over.

"No. 9. You are instructed that, if plaintiffs took one-fourth of the cotton as rent, then rent for other parts of the land would not be a lien on this cotton."

The appellant duly saved his exceptions to the rulings of the court in refusing these several prayers. The jury returned a verdict in favor of appellee for $105.05. Judgment was entered for that sum, which appellant seeks to reverse by this appeal.

W. S. Chastain, for appellant.

1. In the enforcement of a statutory lien, the statute creating it must be strictly followed. 36 Ark. 575; 37 Ark. 115; 83 Ark. 118. In order to acquire a landlord's lien for supplies, such supplies must have been necessary, and to enable the tenant to make and, if necessary, gather, his crop. Kirby's Digest. §§ 5032-3. The question of fact whether or not the supplies were necessary and furnished in good faith to enable the tenant to make and gather his crop should have been submitted to the jury. 79 Ark. 427.

2. The Nowlins' account against Burrus was due Jan. 1, 1907, and their lien, if any, expired six months thereafter. Their remedy was by attachment or by bill in equity. Kirby's Dig., §§ 5032, subdiv. 8, 5033; 24 Ark. 545; 37 Ark. 115; 44 Ark. 108; 36 Ark. 575; *Id.* 572; 35 Ark. 538; 67 Ark. 455; 38 Ark. 413; 83 Ark. 118; 80 Ark. 243; 72 Ark. 132.

3. In the absence of proof to the contrary, a purchaser is presumed to be an innocent purchaser. Here there is no proof that Ferniman knew of the Nowlin lien, nothing in the record to impute such knowledge, nor anything to put a prudent man on inquiry. 31 Ark. 131; 67 Ark. 362; 52 Ark. 158.

Woods Brothers, for appellees.

1. The facts in evidence show that appellees had a landlord's lien on the cotton which was superior to Ferniman's mort-

gage lien. Being in possession of the cotton, appellees were entitled to hold it until their debt for supplies and rent was paid, and none could maintain replevin for it. 69 Ark. 551; 31 Ark. 557; 36 Ark. 525; 69 Ark. 306.

2. The justice of the peace court had jurisdiction. Attachment is not the suit itself, but only ancillary thereto. Kirby's Dig. §§ 5040, 5041. Its only office is to hold the property until the claims for rents and supplies can be adjudicated.

3. That Ferniman knew Burrus was a tenant of the Nowlins is shown by the mortgage, as also by his own and Burrus's testimony. His knowledge of the tenancy imputes knowledge of the lien. 69 Ark. 306; 72 Ark. 132.

WOOD, J., (after stating the facts). First. The landlord and tenant both testified that the articles of supplies sued for on the account were furnished to enable the tenant to make the crop. The supplies were furnished for that purpose. That is all the statute contemplates. The fact, if proved, that the tenant could or could not have made the crop without other supplies than those furnished by appellees would not tend to show that they had not furnished supplies to enable the tenant to make the crop, or that the supplies furnished by them were unnecessary.

The court did not err in refusing to permit the witness to answer the questions propounded.

Second. After Burrus refused to permit appellees to apply the cotton on their account against him for supplies, appellees had no longer the right to retain possession of the property.

And after Burrus had delivered the cotton to appellant at appellees' gin the remedy of appellees to have their lien declared and enforced was by specific attachment of the cotton in the hands of appellant as prescribed in sections 5040 and 5041, Kirby's Digest. *Upham* v. *Dodd,* 24 Ark. 545; *Reavis* v. *Barnes,* 36 Ark. 575; *Knox* v. *Hellums,* 38 Ark. 413.

The conduct of Burrus in refusing to allow appellees to apply the cotton on his account for supplies with them, and his delivery of the cotton to appellant, constituted grounds for attachment under sections *supra.*

Appellees brought suit in the justice's court, alleging the facts constituting their lien, but without asking for the writ of attachment to seize the property. The attachment was only an incident to

the suit, and was a method prescribed for impounding the property. It could have been issued after the suit was begun in the justice's court or afterwards in the circuit court on appeal.

But appellant brought suit in the circuit court against appellees, before their lien expired, to replevy the cotton, and thus the cotton was impounded in the hands of appellant through the process of the circuit court, to which court the cause that had originated in the justice's court had gone up on appeal. The consolidation of the causes brought the issue before the court as to whether appellees were entitled to judgment for their claim, and also as to whether they were entitled to the possession of the property. Appellant has urged no objection to the consolidation here.

The facts constituting appellees' claim and lien were alleged and proved. The court might have rendered judgment in their favor, and then directed execution to be levied on the cotton if still in the hands of appellant.

The appellant having taken possession of the cotton under bond, the court did not err in rendering judgment against appellant for the cotton or its value in the sum of $100. This sum did not exceed the amount for which appellees were entitled to judgment against Burrus.

While the proceedings were irregular, they were not prejudicial, and the instruction given at the request of appellees was not prejudicial error. All parties in interest were before the court.

The court had jurisdiction, and no other result, in justice, under the law and evidence, could have been attained. Appellant could not recover possession of the property from appellees without tendering the amount due them, for the lien of appellees was superior to that of appellant. *Tomlinson* v. *Greenfield,* 31 Ark. 557; *Buck* v. *Lee,* 36 Ark. 525. See also *Pape* v. *Steward,* 69 Ark. 306; *Noe* v. *Layton,* 69 Ark. 551, as to innocent purchaser of tenants' crops.

We find no evidence in the record to warrant the giving of the prayers of appellant for instructions. The judgment is correct.

Affirmed.

LACOTTS v. PIKE.

Opinion delivered June 7, 1909.

1. PARTNERSHIP—WHAT CONSTITUTES.—In order to constitute a partnership, it is necessary that there shall be something more than a joint ownership of property. (Page 28.)
2. SAME—SHARING IN PROFITS.—While an agreement to share in profits is not a test of a partnership, it is an essential element in one. (Page 28.)
3. PARTITION—ADVERSE POSSESSION.—Partition cannot be had of land held adversely. (Page 29.)
4. SAME—RIGHT OF CO-TENANT.—Unless a tenant in common is in possession of the land, or his title is admitted, he cannot maintain a bill in equity for a partition thereof. (Page 29.)
5. TENANT IN COMMON—OUSTER—REMEDY.—Where a tenant in common of land is ousted from the land or his rights wholly denied by his co-tenants, his remedy is by an ejectment suit for his proportion of the land. (Page 30.)

Appeal from Arkansas Chancery Court; *John M. Elliott,* Chancellor; affirmed with modification.

H. A. Parker, for appellant.

1. Since partition cannot be had until all accounts are adjusted, this action, and not a suit for partition, is the proper remedy. George on Partnership, 303; 82 Hun (N. Y.) 238; Bates on Partnership, § 975; 95 U. S. 401. However, if the court found that an action to settle the partnership affairs was not a proper remedy, he should have caused the proceedings to be changed, rather than to dismiss the bill. Kirby's Dig. §§ 5980, 5991.

2. The facts establish a partnership. 63 Ark. 518; 87 Ark. 412.

J. M. Brice, for appellees.

1. The test of partnership is whether or not the parties share in the profits of the business. At any rate, the absence of sharing in the profits is conclusive evidence that a partnership does not exist. And there is no partnership, even if there is joint ownership, where one of the joint owners rents or agrees to take a certain amount for the use of his interest in the business. 54 Ark. 384; 22 Am. & Eng. Enc. of L., 2d Ed. 22; 44 Ark. 423; 74 Ark. 437.

2. A suit to establish a partnership and to wind up a part-

nership business and partition cannot be joined or maintained where the lands are held adversely or the title is in dispute. 47 Ark. 236; 40 Ark. 155; 56 Ark. 370.

FRAUENTHAL, J. The plaintiff, John LaCotts, instituted this suit on December 14, 1904, in the Arkansas Chancery Court against the defendants, who are the widow and children of J. F. Pike, deceased. In his complaint he alleges that he formed a partnership with said J. F. Pike on September 1, 1888, and that the contract of partnership was evidenced by a deed of that date executed by J. F. Pike to him by which said Pike conveyed to him an undivided one-half interest in certain land and a saw and grist mill, gin stand, press and machinery located on the land; that there had never been any settlement of the partnership; and he seeks an accounting of the partnership business and a division of the partnership assets. Subsequently, the administrator of J. F. Pike was made a party defendant. The defendants denied the existence of a partnership at any time between plaintiff and J. F. Pike, and specifically denied each allegation of the complaint; they also denied that plaintiff had any interest in or title to any of the property; and they pleaded laches and limitation against the alleged claim of plaintiff. John A. Bower filed an intervention, in which he alleged that J. F. Pike had executed to him a mortgage upon the property involved in the suit to secure certain indebtedness owing by Pike to him; and he asked for a foreclosure of this mortgage.

Upon the trial of the cause the chancery court entered a decree in which it dismissed the complaint for want of equity, and dismissed the intervention of Bower without prejudice. From that decree the plaintiff appeals to this court.

The evidence by which the plaintiff seeks to establish the alleged partnership between himself and J. F. Pike consists of a deed in ordinary form executed by J. F. Pike to the plaintiff on September 1, 1888, by which said Pike conveyed to plaintiff an undivided one-half interest in a certain tract of land and the above-mentioned personal property. The plaintiff testified that by virtue of said deed there was a partnership between them, but he did not make any other statement relative to the partnership. He did not state that they should share in the profits, or that they should be liable for the losses of the alleged partner-

ship business; nor did he state the nature and extent of the business contemplated or intended by the alleged partnership. On the contrary, the plaintiff testified that J. F. Pike paid him $50 rent per year for certain years for his interest in the property; and the undisputed evidence is that J. F. Pike replaced all the personal property from time to time with other property of a similar kind, and that he purchased all said property upon his sole and individual account. During all the years from 1888 until the death of J. F. Pike in September, 1903, the property was in the possession of said Pike, and all transactions relative thereto with third persons were had and made in the sole and individual name of J. F. Pike. The evidence tended also to prove that in December, 1888, the plaintiff executed to one Merritt a mortgage upon his undivided interest in the land, and that this interest in the land was sold in 1894 under a decree of foreclosure of said mortgage, and in 1894 after confirmation of said sale a deed therefor was executed by the commissioner in chancery to one J. W. Crockett, trustee. The plaintiff testified that after the conveyance of said interest in the land to said Crockett he considered that the partnership between himself and Pike was thereby dissolved. In 1900 J. W. Crockett, trustee, for $50 conveyed this interest in the land to plaintiff.

In order to constitute a partnership, it is necessary that there shall be something more than the joint ownership of property. A mere community of interest by ownership is not sufficient. This creates a tenancy in common, but not a partnership. *Oliver* v. *Gray*, 4 Ark. 425; *Haycock* v. *Williams*, 54 Ark. 384; *Harris* v. *Umsted*, 79 Ark. 499.

The test of a partnership between the parties themselves is largely a question of intention, but before there can be a partnership between the parties themselves there must be an agreement from which a community of profit and loss arises. There is no presumption of a partnership from a mere joint ownership of the property. *Neill* v. *Shamburg*, 156 Pa. St. 263; *St. John* v. *Coates*, 63 Hun, 460.

It is ordinarily considered that an agreement to share in the profits is an essential element of every partnership, and yet because one shares in the profits this does not necessarily constitute him a partner. But if there is an absence of a sharing in the

profits, then there is no agreement by which it can be said a partnership exists. Between the parties themselves, it is essential that they shall share in the profits before it can be said that an agreement of partnership has been entered into and exists. *Culley* v. *Edwards,* 44 Ark. 427; *Johnson* v. *Rothschilds,* 63 Ark. 518; *Herman Kahn Co.* v. *Bowden,* 80 Ark. 23; *Buford* v. *Lewis,* 87 Ark. 412; 30 Cyc. 366.

In this case there is a total lack of evidence on the part of the plaintiff to show that there was an agreement between him and Pike by which they should share in the profits, or that there was any understanding as to the proportion in which such profits should be shared. And the evidence of plaintiff seems to indicate that he himself had no idea, much less an intention, of bearing any loss. The plaintiff relies upon the deed as an evidence of a partnership; but such deed only makes the parties tenants in common of the property and not partners.

We are of the opinion therefore that the chancellor was correct in his finding that the evidence does not show that the relationship of partners existed between plaintiff and J. F. Pike.

It is urged by the plaintiff that the complaint should be considered in the nature of a petition for partition of the land, and that he should have that relief. But the defendants claim that they are and always have been in the adverse possession of the land, and they dispute the title of plaintiff to the land, and dispute any interest of plaintiff therein. The complaint is founded upon the allegation of a partnership, and the relief sought therein is the winding up of that partnership. The land, by the bill, is claimed to be a part of the assets of the partnership, and its disposal is sought only upon a settlement of the business of the partnership. When the court determined that there was no relation of partnership existing between the parties, there was no equitable ground upon which to assume jurisdiction over the land and the parties. The defendants were claiming the land adversely to plaintiff, and partition cannot be had of land held adversely. *Landon* v. *Morris,* 75 Ark. 6.

It has been repeatedly held by this court that unless a tenant in common is in possession of the land or his title is admitted he cannot maintain a bill in equity for a partition thereof. *Byers* v. *Danly,* 27 Ark. 77; *London* v. *Overby,* 40 Ark. 155; *Moore* v. *Gor-*

don, 44 Ark. 334; *Criscoe* v. *Hambrick,* 47 Ark. 235; *Ashley* v. *Little Rock,* 56 Ark. 391; *Eagle* v. *Franklin,* 71 Ark. 544; *Landon* v. *Morris,* 75 Ark. 6; *Cannon* v. *Stevens,* 88 Ark. 610.

By virtue of his deed the plaintiff was only a tenant in common in the land. Where the tenant in common is ousted from the land or his rights totally denied by the cotenants, his remedy is by an ejectment suit for his proportion of the land. Kirby's Digest, § 2746; *Trapnall* v. *Hill,* 31 Ark. 345.

The party who is in possession claiming the land adversely has a right to have a trial of his cause in the law court; and, until the issue as to the title is determined, a court of equity has no jurisdiction to partition the land between alleged tenants in common. But the plaintiff should not be prejudiced by any decree herein in his right to institute an ejectment suit for the recovery of his alleged portion of the land, if he should so desire.

In order that the decree in this case may not possibly have such effect, the decree should be modified so that it will dismiss his complaint; but will dismiss it without any prejudice to the plaintiff to institute a suit for a recovery of his alleged portion of the land.

The decree will be here modified in that regard. And, so modified, the decree is affirmed.

CHAPMAN & DEWEY LAND COMPANY *v.* WILSON.

Opinion delivered June 7, 1909.

1. DRAINS—VALIDITY OF ORDER ESTABLISHING DISTRICT.—An order establishing a drainage district is not invalid because the termini of the ditch were changed by the county court after the petition was filed. (Page 35.)
2. SAME—CONFIRMATION OF VIEWERS' REPORT—EFFECT.—Upon the confirmation of the viewers' report by the county court. the termini and route of the ditch and the places where excavation is to be made and its extent, as well as the assessments of the benefits made against each tract, are conclusively fixed. (Page 36.)
3. PLEADING—INSUFFICIENCY OF GENERAL DENIALS.—Under the Code, every material allegation in the complaint, not specifically denied in the answer, will be taken as true; a general denial being insufficient. (Page 37.)
4. DRAINS—NOTICE OF LETTING CONTRACT.—Failure to give notice of the letting of a contract to build a public ditch is an irregularity which

does not affect the validity of the contract after the work has been completed thereunder. (Page 37.)

5. CONTRACT—ASSIGNMENT—RIGHT TO SUE.—Where plaintiff was the surety of a construction company which undertook to construct a public ditch, and, upon the failure of such company to perform the work, undertook and completed the work, and the contract and the certificates of indebtedness of the drainage district were verbally assigned to him, he was entitled to sue thereon. (Page 37.)

6. PARTIES—WAIVER OF DEFECT OF.—A defect of parties is waived by failure of the appellant to object thereto in the trial court. (Page 38.)

7. DRAINS—CONTRACT FOR CONSTRUCTION—TIME.—A contract for the construction of a public ditch is not void because the work was not completed within the time provided in the contract where neither the statute nor the contract stipulated that time should be of the essence of the contract. (Page 39.)

8. SAME—CONCLUSIVENESS OF FINDING OF OFFICIALS.—Where the law provided that certain officials should inspect the construction of a public ditch and determine whether same had been completed according to the contract, their decision thereon is binding unless it was obtained by fraud or such gross mistake as would necessarily imply fraud. (Page 41.)

9. SAME—RIGHT TO ENFORCE LIEN.—Under Acts 1899, p. 320, the holder of a lien for the construction of a public ditch is entitled to enforce his lien by suit against the land. (Page 42.)

Appeal from Mississippi Chancery Court; *Edward D. Robertson,* Chancellor; affirmed with modification.

W. J. Lamb, Ashley, Gilbert & Dunn and *R. S. Rodgers,* for appellant.

1. Time was of the essence of the contract, and the attempted extensions thereof were void. Sandels & Hill's Dig., §§ 1215, 1218, 1219; 54 Cal. 54; *Id.* 570; 80 Cal. 5; 69 Cal. 454; 68 Cal. 428; 89 Cal. 316; 80 Mo. App. 574; 86 Mo. App. 349; 169 Mo. 376; 152 Mo. 585; 70 Mo. App. 535; 68 Mo. App. 352; 77 Mo. App. 616; 1 Y. & C. Ex. 401, 416; Pomeroy on Contracts, § 382; 81 Ark. 80.

2. The county court acquired no jurisdiction to establish a drainage ditch with a terminus different from that described in the notice to property owners. 31 Mo. 273; 53 Ill. 97. Although this court has held that the viewers might alter the terminus of the proposed ditch in their report (81 Ark. 80), it has not held that the county court has jurisdiction, after the terminus has been

fixed by the report and notice to owners given, to assess lands for a ditch with a different terminus, or that the contractor may change it. See also 64 Ark. 555.

3. The work was not performed substantially as ordered by the county court and required by the contract. The assessments were made to pay for a drain to be constructed to Tyronza River; also to pay for a drain in which openings were to be left not less than 10 feet in width, not exceeding 50 feet apart, all along said ditch on both sides, and so constructed that "no dirt, stumps or other obstruction shall be left within 8 feet of the slope stakes." No such drain was constructed. 138 Ind. 117; 103 N. W. (Ia.) 979 and cases cited; 31 Mo. App. 522; 200 Ill. 432; 14 Bush, (Ky.) 31.

4. This action was not maintainable in the name of appellee on certificates of acceptance issued to the General Dredging & Construction Company, contractor, and not assigned to Wilson. Sandels & Hill's Dig. § 1220. He was under no contract, and his liability as a bondsman was a separate and distinct matter. That he was on the bond gave no power to the county court to constitute him as a contractor without a reletting as required by statute.

5. No proper authority was shown in W. M. Kerr to issue the certificates. He was neither county surveyor nor one of the surveyors who assisted the viewers. Sandels & Hill's Dig. §§ 1220, 1229.

6. No proof of the giving of notice of the letting of the contract by the county clerk appears in the record. There is no presumption of law that notice was given, and the answer expressly denies it. The burden, therefore, was upon plaintiff to prove it. 11 Enc. of Ev. 877 and cases cited; Cooley on Taxation, 3d Ed., 1004; Black on Tax Titles § 444. The presumptions created by section 1232, Sand. & H. Dig., are in express terms confined to "proceedings occurring prior to the order of the county court establishing the ditch." See also 158 Ind. 525; 30 Mo. App. 380; 49 Mo. App. 117; 51 Ark. 447; 31 Mo. App. 520; 96 Mo. 507; 57 Neb. 78; 49 Neb. 883; 55 Neb. 57; *Id.* 735; 58 Neb. 839; 3 Wash. St. 84; 18 Wis. 92.

7. The decree is reversible because of fatal variances and discrepancies between the assessments and the certificates sued on.

J. T. Coston, for appellee.

1. The first part of the answer simply denies that the plaintiff completed the shares or allotments "on or before the 2d day of January, 1905." The exact date of the completion was immaterial, and the denial is an admission that it was done at a subsequent date. 1 Enc. Pl. & Pr. 799. The remainder of the answer on this point is a mere negative pregnant, being an attempt to deny as a whole material facts alleged in the complaint, as conjunctively stated. *Id.* 797; 77 S. W. 906.

2. Appellant will not be permitted to assume inconsistent positions. Having in the lower court distinctly recognized the engineer's certificates of acceptance as certificates issued to plaintiff showing that he did the work for which they were issued, appellant is estopped to insist here that they were not issued to Wilson but to the Construction Company. 93 S. W. (Ark.) 61; 95 S. W. (Ark.) 1012; 2 Cyc. 665, 666. The statement in the certificates that the General Dredging & Construction Company had completed the work was mere surplusage, not required or authorized by law. Appellee was not deprived of the right to enforce the lien of the assessment in a court of equity. Sand. & H. Dig., § 1220; 36 Ark. 504.

3. The change by the viewers and court of the beginning point of the ditch was within the jurisdiction of the county court. *Driver* v. *Moore,* 98 S. W. (Ark.) 736; 70 S. W. (Ark.) 310; 64 Ark. 555.

4. The county court's finding that the ditch benefits appellant's lands is conclusive.

5. Failure to complete the work within the time specified in the contract did not render the contract void.

6. If the clerk failed to advertise the letting of the contract, this was a mere irregularity which did not affect the validity of the contract. But the notice *was* given, and the allegation in the complaint that it was given was not specifically denied. The manner of denial raises no issue under the statute, but is a species of negative pregnant. 54 Ark. 528; 32 Ark. 105; 46 Ark. 136; 35 Ark. 561; 50 Ark. 564.

7. The report of the viewers, and the contract based thereon, did not require any excavation of soil from Tyronza Bayou. The contractor was required only to construct the ditch in the "man-

ner set forth in the report of the viewers. Sand. & H. Dig., § 1218. And the report of the viewers shows that they complied literally with the statute. Sand. & H. Dig., § 1204, with reference to setting apart to each tract of land, etc., a share of the work in proportion to benefits. The engineer testifies that he found that the allotments had been completed according to the specifications *before* he issued the certificates. The assessments are therefore unquestionably due. Sand. & H. Dig., § 1220.

8. The contract, with the viewers' report made a part thereof, must be construed as a whole, and, so construed, openings every fifty feet on the side of the ditch were not necessary or required. Did the contractor complete, according to specifications, the particular job or allotment assigned or set apart to the particular tract of land in question? This is the sole question. Sand. & H. Dig., § 1220.

After the work has been completed, and the engineer representing the land owners has inspected and received it and issued his certificates, appellant cannot go behind it and urge as a defense slight variations from the specifications contained in the contract. 51 N. E. 936; 109 N. W. 68; 49 N. E. 833; 4 N. E. 317; 43 N. E. 230; 40 N. E. 702; 36 N. E. 547; 2 Cooley on Taxation, § 1280.

9. Appellant knew of and encouraged the construction of the ditch, had many interviews with appellee about the assessments, and made no complaint at any time on account of defective construction or non-compliance with the contract. Appellant is estopped. 15 N. E. 797; 124 Mich. 285; 31 Neb. 668; 94 N. W. 1076; 119 Ill. 504; 166 Ind. 343; 43 Ia. 343; 69 Mich. 484; 22 Neb. 437; 15 O. St. 64.

10. The drainage law, as amended in 1899, not only authorized but required appellee to bring suit in his own name for the collection of the assessments. Acts 1899, p. 321, 322.

FRAUENTHAL, J. The plaintiff, R. E. L. Wilson, instituted this suit against the defendant, the Chapman & Dewey Land Company, in the Mississippi Chancery Court, to recover the amounts of certain assessments made against the lands of the defendant for the construction of a public ditch or drain in a drainage district known as Tyronza Drainage Canal, and to enforce the lien thereon. The drainage district was established by the

county court of Mississippi County under the provisions of sections 1203 to 1232 of Sandels & Hill's Digest. The complaint alleged in detail each step taken in the formation and establishment of the drainage district, the ascertainment of the benefits to the various tracts of land located in the district, and the assessment made against each tract for the construction of the ditch. It also set out in detail the letting of the contract for the construction of the ditch and its completion. The defendant filed an answer, in which it set forth several grounds upon which it resisted the recovery and enforcement of the assessments. The chancery court rendered a decree in favor of the plaintiff for the amounts of the various assessments against the several tracts of land of defendant and subjecting the lands to sale for the payment thereof. From this decree the defendant appeals to this court.

The defendant attacks the validity of the order of the county court establishing the drainage district on the ground that the termini of the ditch were changed from the points as set out in the petition. Upon the filing of the petition the county court appointed viewers who proceeded in manner prescribed by the then law to make an accurate survey of the proposed ditch and to perform the duties required by section 1204 of Sandels & Hill's Digest. The report of the viewers lengthened the ditch at its upper end, but maintained the route of the ditch as set out in the petition. It provided for excavations all along the route from said beginning point to a point where the ditch emptied into what is known as Tyronza Bayou. This bayou extends for a distance of about three miles to where it empties into Tyronza River. And, while the route and extent of the ditch was described from the said beginning point on to Tyronza River, no excavations were reported by the viewers as necessary in said Tyronza Bayou. But these alterations did not change the route of the ditch, and the lands of the defendant, being located between the terminal points, were not affected by the changes. In the formation of drainage districts under the above sections of Sandels & Hill's Digest, the original petition was not for the purpose of making a final location of the ditch. The viewers had a right to vary the same, and all proceedings were of an *ex parte* character until the report of the viewers was made and filed. It was then that the exact location of the ditch was fixed; and each tract of land affected thereby,

either by way of benefit or damage, was set out in the report.

After the filing of such report thus definitely describing the termini and route of the ditch, notice was given to all persons interested in and affected by the location of the ditch of its pendency in the county court, and a time was fixed in the notice when such persons could appear in the said court and be heard. From any order or judgment made by the county court in the matter any person feeling himself aggrieved thereby could appeal to the circuit court, where he was given a trial *de novo* on the matters. So that the defendant had an opportunity to appear in court and be heard on these objections which he now presents. The county court had the jurisdiction of the matter of the construction of the ditch, and had the right and jurisdiction to adopt the termini recommended by the viewers which altered the terminal points of the proposed ditch. *Cribbs* v. *Benedict,* 64 Ark. 555; *Driver* v. *Moore,* 81 Ark. 80.

And, upon the confirmation of the report of the viewers by the court, the termini and route of the ditch became conclusively fixed. And the places where and the extent of the work and excavations that should be done in the construction of the ditch became also determined by the order confirming the report of the viewers in these particulars, as well as the assessments of the benefits made against each tract. *Stiewel* v. *Fencing District,* 71 Ark. 17; *Overstreet* v. *Levee District,* 80 Ark. 462; *Driver* v. *Moore,* 81 Ark. 80; *Hale* v. *Moore,* 82 Ark. 75; *Board of Improvement Dist.* v. *Offenhauser,* 84 Ark. 257.

The Legislature provided that the drainage law should be "liberally construed to promote the drainage and reclamation of wet and overflowed lands; and amounts due contractors holding surveyor's certificates of acceptance shall not be defeated by reason of any defect in the proceedings prior to the order of the county court establishing the ditch, but such order or judgment shall be conclusive that all prior proceedings were regular and according to law." (Acts 1899, p. 321.)

The report of the viewers determined that the excavations in the ditch should only be made along its route to the point where it made a junction with Tyronza Bayou, and that it was not necessary to make any excavations in said bayou on to Tyronza River. The report in that respect was also confirmed by the

court, and, being unappealed from, it became a final determination that the excavations that should be done should only be in that portion of the ditch that extended from its beginning point down to Tyronza Bayou; that it would be practicable to construct the ditch and drain the lands in the district by that extent of excavations. In the opinion of the viewers and the surveyor and engineer who assisted them Tyronza Bayou from the point where the ditch made junction with it to the Tyronza River was a natural stream sufficient in width and depth to carry all waters that would be emptied into it to the river, without any excavations being made in said bayou. In the absence of fraud, that became conclusive.

After the confirmation of the viewers' report the county clerk proceeded to the letting of the contract. The defendant urges in this court that there is no proof that notice of the letting of the contract was given by the clerk. The complaint specifically and in detail sets out the notice that it alleges was given by the county clerk of the letting of the contract, naming the time and place of such letting and stating the manner in which the notice was given. To these allegations the defendant made only a general denial in its answer. This court has often held that a general denial of the allegations of the complaint is not sufficient; and that, under the Code, every material allegation of the bill not specifically denied in the answer will be taken as true. *Guynn* v. *McCauley*, 32 Ark. 97, 105; *McIlroy* v. *Buckner*, 35 Ark. 555, 561.

The object of this rule is to advise the opposing party as to what he must establish by proof. *Hecht* v. *Caughron*, 46 Ark. 132.

The defendant did not in its answer deny specifically the material allegations of the complaint which set out the giving of the notice by the clerk. But, in addition to this, this court has held that, after the work has been duly completed under the contract, the failure to give such notice is only an irregularity, and it will not affect the validity of the contract. *Stiewel* v. *Fencing District*, 71 Ark. 17; *Driver* v. *Moore*, 81 Ark. 80.

It is urged that the plaintiff is not the proper party to bring this suit. It appears that at the letting of the contract the General Dredging & Construction Company was the lowest bidder on all

the allotments of the ditch, and that the same was knocked off to that company, and that the clerk entered into a written contract with that company for the construction of the ditch. As provided by law, that company then executed a bond for the performance of the contract; and the plaintiff became surety on the bond. Thereafter, the General Dredging & Construction Company failed to carry out said contract, and the plaintiff took up and assumed the performance of the same. In this way the plaintiff assumed the position of the General Dredging & Construction Company and proceeded with the contract. As far as the defendant was concerned, it was as if the General Dredging & Construction Company had employed the plaintiff as its agent to perform the work and the requirements of the contract; and in effect it was that company going on with the contract. It is urged that, inasmuch as the contract was made with the General Dredging & Construction Company, and the certificates were issued in its name, that company should have instituted the suit, or should have been made a party to the suit. But it is alleged in the complaint that the contract and all interest therein were duly assigned to the plaintiff, and that he is the true owner of the certificates. In its answer the defendant itself alleged that the plaintiff "procured an assignment of said contract to himself." The contract and these certificates could be transferred without a written assignment thereof. *Heartman* v. *Franks,* 36 Ark. 501; *Lanigan* v. *North,* 69 Ark. 62. The plaintiff, being the owner of the certificate, was the real party in interest, and under our Code he is the proper party to prosecute this suit. Kirby's Digest, § 5999. But, if the defendant thought that the General Dredging & Construction Company had any interest in the subject-matter of this suit and desired that it be made a party, so that all interests in the subject-matter of the suit could be settled, it could have made a motion in the lower court, asking that that company be made a party. Kirby's Digest, § 6011. It did not do so; and its contention in this regard, now made for the first time in this court, is not well taken.

It is contended that the plaintiff did not complete the construction of the ditch on or before the time named in the contract, and on this account he is not entitled to recover. It appears from the evidence that the contract provided that the ditch should

be completed by January 1, 1904. Upon the expiration of the said time named in the contract the county court of Mississippi County made an order directing the county clerk to extend the time for the construction of the ditch from time to time not exceeding sixty days at any one time; and also in its order recited that the plaintiff was proceeding in good faith and as rapidly as possible with the construction of said ditch. The clerk made such extensions by indorsements on the contract every sixty days during the years of 1904 and 1905 until the completion of the ditch in December, 1905.

It is contended by the defendant that, by section 1219 of Sandels & Hill's Digest, it is provided that, if the job is not completed within the time fixed in the contract, the clerk may for good cause give further time, but not exceeding sixty days, for the completion of the work; and that therefore time is of the essence of the contract; and, because the plaintiff did not complete the ditch within said time, the contract became forfeited, and he is, therefore, not entitled to recover anything herein.

It is true that parties may agree upon what shall be the effect of a non-compliance with any of the stipulations of a contract; and so they may agree that the time of performance shall be of the essence of the contract. While the nature of the subject-matter may be such as to require prompt performance at the time stipulated, yet it must be so deemed and understood by both parties at the time of the execution of the contract, and ordinarily there should be an express provision making time of the essence of the contract before it will be so regarded. 2 Page, Contracts, § 1161.

In the case of *Ahl* v. *Johnson,* 20 How. 511, it is said that in equity the general rule may be said to be that time is not of the essence of the contract. And in *Secombe* v. *Steele,* 20 How. 94, it is said: "But it must affirmatively appear that the parties regarded time or place as an essential element in their agreement, or a court of equity will not so regard it. *Dermott* v. *Jones,* 23 How. 220; *Brown* v. *Guarantee Trust Co.,* 128 U. S. 403.

The contract herein was entered into under and in pursuance of the sections of the statute above referred to, which at that time regulated the construction of public ditches. But it is not provided in any of these sections of the statute in terms

that time should be of the essence of such contract, and the contract itself in this case does not contain any such express stipulation. There is no provision of the statute which says that the contract shall be void or of no effect in event the work is not completed within the time named in the contract. The failure to complete the work within the time named might be ground for taking action to avoid the contract; but some affirmative act would have to be taken to so avoid it, if the contractor is still proceeding with the work in good faith and with reasonable dispatch. The statute provides that the contractor upon entering into the contract shall execute a bond obligating himself to pay any damage that might accrue by reason of a failure to complete the job within the time named in the contract. This provides a remedy and a relief to all persons damaged by reason of any failure to perform this stipulation of the contract. The right of the clerk to re-let the contract, without actually doing so, did not avoid the contract. The expiration of the time did not in itself work an avoidance of the contract.

In the case of *Driver* v. *Moore,* 81 Ark. 80, it is said: "Lastly, it is contended that the time for completion of the contract had expired by limitation before the construction of the work alloted to appellants' land, and the contract became void. The expiration of the time did not avoid the contract. It only afforded grounds for avoiding the contract, but no steps to do this were taken. On the contrary, the clerk made an indorsement on the contract, by order of the county court, extending the time for the completion of the work." In the opinion in that case it does not state the length of time for which the completion of the work was extended. But an examination of the record in that case shows that the time for the completion of the work was extended for sixty days at a time for a period of two years. The period of each extension and the number of the extensions in the case at bar and in that case are about similar.

In this case there is no allegation, and no proof, that any damage accrued by reason of the failure to complete the ditch within the time named. The nature of the undertaking is such that it would not ordinarily be expected or contemplated that the completion of the work within the prescribed time was absolutely essential; and, in the absence of such express provision or in-

tendment either in the statute or in the contract, we do not think that it can be considered that time is of such essence of the contract herein as to avoid it solely by the expiration of the time.

It is contended by the defendant that the work was not done in compliance with the terms of the contract. It is urged that the contract provided that certain openings should be made on each side of the ditch, and it is contended that this was not done. But there was sufficient evidence to sustain the finding of the chancellor that the work was done substantially in compliance with the requirements of the contract in this regard. In addition to this, the official whose duty it was to inspect the job and to find whether or not it was completed according to the contract testified that he made examination of the work and found that same was completed according to the specifications. It is also urged that no excavations were made in Tyronza Bayou. But under the contract this was not required. The contract was made in conformity with the report of the viewers, which report is by the specific terms of the contract made a part of it. The viewers reported that it was only necessary to make excavations in the ditch from the beginning point down to the junction of the ditch with the Tyronza Bayou, and they placed stakes at each 100 feet along the route of the ditch to that point, which became stake number 785, and was the last stake to which the excavation should be made. Upon the basis of that extent of work, the viewers computed the number of cubic yards of earth that would be required to be excavated; and it was upon that report and computation that the bid was made and the contract entered into. The officer whose duty it was to inspect the work and determine whether same had been performed according to the contract did inspect the same and did find that it was completed according to the contract, and did execute certificates of acceptance stating that the shares allotted to the lands of the defendant had been completed according to the specifications of the contract. The official who thus inspected and accepted the work was the official named by the law; and the persons who signed the certificates of acceptance were the officials specified in the provisions relating to the construction of ditches.

The law required these officials to inspect the work, and made it their duty to make a finding whether or not the same

had been completed according to the contract. Their decision should be as binding as the decision of parties who have been selected by individuals to finally decide questions as to manner of construction. Their decision should be sustained unless it can be shown that it was obtained by fraud, or that there was such gross mistake as would necessarily imply fraud. That has not been shown in this case. *Hot Springs Ry. Co.* v. *Maher,* 48 Ark. 522; *Ozan Lumber Co.* v. *Haynes,* 68 Ark. 185; *Kihlberg* v. *United States,* 97 U. S. 398; *Martinsburg & Potomac Ry. Co.* v. *March,* 114 U. S. 549; *Chicago, S. F. & C. R. Co.* v. *Price,* 138 U. S. 185; 2 Cooley on Taxation, p. 1280.

It is further urged that there is a variance between the description of the lands in the assessments and in the certificates. We have carefully examined into this, as well as the descriptions of the lands in the decree. We find that the following tract, W. ½ S. E. ¼ section 33, township 12 N., range 9 E., is erroneously set out in the decree. The amount of the assessment of $124.37, which is declared a lien upon this tract and the tract described as E. of R. E. ½ of N. W. ¼, section 33, T. 12 N., R. 9 E., should be declared a lien only on the last-named tract, and the tract first above described should be stricken from the decree. The decree should be modified in that regard. We also find that the amount per cubic yard for excavation of earth is calculated and placed in the decree at 11½ cents per cubic yard, and that this is correct. We also hold that under Sandels & Hill's Digest, § 1232, as amended by the act of the General Assembly of Arkansas, approved May 8, 1899 (Acts 1899, page 320, § 3), the plaintiff was authorized to institute suit in the courts for the recovery of the assessments.

It therefore follows that the decree of the lower court will be modified by striking therefrom the following tract of land: W. ½ of S. E. ¼ of section 33, township 12 N., range 9 E. And, so modified, the decree of the lower court is in all respects affirmed.

BATTLE, J., dissenting.

AMERICAN INSURANCE COMPANY *v.* HAYNIE.

Opinion delivered June 7, 1909.

1. FIRE INSURANCE—FAILURE TO FURNISH PROOF OF LOSS—FORFEITURE.—Failure of the assured to present proof of his loss within the time prescribed by the terms of the policy works a forfeiture of his right to claim anything under the policy. (Page 47.)
2. APPEAL AND ERROR—EXCEPTION—WAIVER.—An objection to an instruction given by the court is waived by failure to except to it. (Page 47.)
3. INSTRUCTION—EXCLUSION OF ISSUE.—It was not error to refuse to give an instruction which excluded one of the issues in the case. (Page 48.)
4. FIRE INSURANCE—PROOF OF LOSS—WAIVER.—Where the insured in good faith furnished an incomplete proof of loss by fire, and the insurance company accepted such proof without objection, its silence will be held to be evidence of a waiver of any defects in such proof. (Page 48.)
5. INSTRUCTION—EXCLUSION OF ISSUE.—It is not error to refuse to give an instruction which, though otherwise containing a correct statement of the law, is obnoxious in presenting the theory of one party to the exclusion of that of his adversary. (Page 50.)
6. SAME—NECESSITY OF REQUEST.—A party cannot complain of the court's failure to give a specific instruction upon a certain subject if he failed to ask a correct instruction on such subject. (Page 50.)
7. FIRE INSURANCE—LIABILITY OF SURETIES.—The liability of sureties of insurance companies under the act of April 24, 1905, is that the company shall promptly pay all claims arising and accruing to any person or persons during the term of their bond, regardless of whether the policies under which such claims arise were issued during the life of the bond or not. (Page 50.)
8. ACTIONS—MISJOINDER—PREJUDICE.—If it was error to permit an action against an insurance company and one against the sureties upon its statutory bond to be joined, such error was harmless where the two causes of action grew out of the same facts, and therefore could have been consolidated under Acts 1905, p. 798. (Page 51.)

Appeal from Nevada Circuit Court; *Jacob M. Carter,* Judge; affirmed.

STATEMENT OF THE COURT.

On the 15th day of October, 1906, the American Insurance Company, in consideration of the sum of eighteen dollars, insured L. B. Haynie for the term of 3 years against loss by fire, for $450, on a dwelling house in the town of Bodcaw in Nevada County, Arkansas; for $100 on his household and kitchen

furniture and $50 on an organ, contained in his said dwelling house.

On the 29th day of October, 1907, the building with most of its contents was destroyed by fire. This suit was brought by Haynie against the insurance company and the sureties on its bond in the Nevada Circuit Court to recover the loss.

The insurance company answered, admitting the issuance of the policy and the destruction of the property by fire, but denied that the insured notified the company of his loss, or that he filed a proof of loss within 30 days in conformity with the requirements of the policy. It admitted that on May 7, 1907, a bond for $15,000 was filed by it in the office of the Auditor of State in compliance with Act. No. 192 of the General Assembly of the State of Arkansas of 1905; but denied that its said sureties are liable on the claim sued on, and "alleges the facts and truth to be that the policy sued on herein was issued and delivered to plaintiff on or about the 15th day of October, 1906, and that said bond alleged to have been made on the 7th day of May, 1907, by defendant and said sureties, was not in existence or in force at the time said policy was issued."

The sureties on the bond first filed a plea in abatement, but by permission of the court withdrew it, and adopted as their answer the answer of the insurance company. All parties then announced ready for trial, and the case was tried before a jury.

L. B. Haynie testified that he was the holder of the policy sued on, and that the fire occurred on the 29th day of October, 1907. That the morning after the fire he asked one Isham Mack to notify the insurance company of the fire, and pursuant to his request Mack wrote and mailed to the company the following letter:

"Bodcaw, Ark., 10, 30, '07.

"American Insurance Co.,

"Little Rock, Ark.

"Gentlemen:

"By request of L. B. Haynie of this place, who holds policy No. 14081 in your company covering his Dwg. & H. H. goods, I write to inform you that his house and most of the contents was destroyed by fire last night. Please send the adjuster for your company and oblige. "Yours respectfully,

"I. H. MACK."

That within 30 days after the fire occurred, intending to comply with the requirements of the policy, he made out and swore to the following paper:

ARTICLES BURNT.

15 Quilts	$ 37.50
4 Cotton Mattresses	12.00
10 Chairs	5.00
1 Chair, Rocker	2.00
1 Bureau	7.50
1 Safe	2.50
Dishes and Glassware	12.00
1 Cook Stove	7.50
4 Tables	4.00
1 Book Case and Books	5.00
3 Bedsteads	12.00
1 Set Bed Springs	2.00
6 Pictures enlarged	16.00
Mechanic Tools	15.00
Canned Goods, Groceries	25.00
Clothing	40.00
Organ	75.00
Total	$280.00

ARTICLES SAVED.

1 Dresser	$ 4.00
1 Machine	8.00
1 Trunk	1.00
2 Beds, Cotton	4.00
1 Set Bed Springs	2.00
8 Quilts	12.00
1 Feather Bed	5.00
Wearing Clothes	10.00

I, J. M. Hairston, a duly commissioned justice of the peace, do hereby certify that the above is a true statement of property burned and saved to the best of my judgment.

Nov. 20, 1907. (Signed) J. M. HAIRSTON, J. P.

That he intended it for a proof of loss and mailed it at once to the insurance company at Little Rock, Ark. That in the same

envelope, but on a separate sheet of paper, he enclosed a statement in writing about the origin of the fire and when it occurred. That no answer was received from the insurance company. The insurance policy and the bond were read in evidence.

The defendants introduced as a witness E. Miles, the secretary of the company. He admitted receiving the letter from I. H. Mack, and the list of "articles burnt" and "articles saved" copied above, but denied receiving the statement about the origin of the fire and where it occurred.

The jury returned into court the following verdict: "We, the jury, find for the plaintiff on house in the sum of $450, and on personalty $150; also we further find 12 per cent. penalty, $72."

From the judgment entered on the verdict the defendants have duly appealed to this court.

C. P. Harnwell, for appellants.

1. The statement mailed to the company by appellee is in no sense a compliance with the requirements of the policy as to proof of loss, and amounts to nothing more than a notice that a fire occurred. The burden of proof was on plaintiffs to show that proof of loss was made out and filed with the company within the time limited by the policy. 77 Ark. 84; 84 Ark. 224; 85 Ark. 337; 87 Ark. 171; 88 Ark. 120.

2. The policy was written October 15, 1906, and the bond sued on was not executed until May 7, 1907. There is no liability against the bondsmen. There was in no event any liability upon the bond, the same being, not an indemnity bond, but merely a fidelity bond for the faithful performance of duty by the officers of the company. Acts 1905, pp. 490-496; Kirby's Dig., §§ 4348, 4380; 92 U. S. 259; 100 U. S. 239; 74 U. S. (7 Wall.) 482; 80 U. S. (13 Wall.) 162; 11 Cal. 222; 97 U. S. 546; 80 Ala. 379; 83 Ky. 162; 108 Ind. 308; 150 N. Y. 139; 35 Ark. 56; 26 Cal. 11; 9 La. An. 165; 44 Mo. 283; 3 Ohio 198; 94 Pa. 450; 28 Vt. 354; 81 Mo. 574; 122 Ind. 69; 60 Wis. 133; 5 L. R. A. 340.

Hamby & Haynie, for appellees.

1. That the proof of loss was given within the time limit is clearly shown by the evidence. Substantial compliance by the assured with the terms and conditions of the policy is all that is

required. Kirby's Dig. § 4375. Knowing that the statement furnished was intended as a proof of loss, appellant, not having objected, should be held to have waived forfeiture. 53 Ark. 499.

2. No exceptions having been saved to instructions given at appellees' request, appellant will not be heard to question them here. 73 Ark. 409.

3. The bondsmen were properly joined in the action. Kirby's Dig. § 4376. And the contention that the bond is not an indemnity, but a fidelity, bond is contrary both to the law and the facts. Act 129, Acts 1905, § 2. The sureties are not relieved of liability because the bond was executed subsequent to the issuing of the policy, as appears by the terms of the bond. 76 Ark. 410.

HART, J. (after stating the facts). 1. At the request of the appellee the court instructed the jury that the law did not require him to furnish the insurance company with a proof of loss in order to recover the amount due for the destruction of his house by fire. This instruction was erroneous.

It has been expressly held by this court that in such cases the failure to present the proof of loss within the time prescribed by the terms of the policy works a forfeiture of the right to claim anything on the policy. *Teutonia Insurance Co.* v. *Johnson,* 72 Ark. 484; *Arkansas Mutual Fire Insurance Co.* v. *Clark,* 84 Ark. 224; *Minneapolis Fire & Marine Mutual Ins. Co.* v. *Fultz,* 72 Ark. 365.

But appellants are in no attitude to complain of any of the instructions given by the court at the instance of the appellee. The record shows that the instructions were given over their objections, but it also shows that appellants did not save any exceptions to the action of the court in giving any of the instructions asked by the appellee.

In the case of *Meisenheimer* v. *State,* 73 Ark. 407, the court said: "An objection precedes an exception. The objection calls for a ruling by the trial court, and the exception directs attention to and fastens the objection for a review on appeal. If a party does not follow the ruling on his objection by clinching it with an exception, he waives the objection." See also *Cammack* v. *Southwestern Fire Ins. Co.,* 88 Ark. 505.

Hence by the rules of practice appellants waived their objec-

tion to the instructions given at the instance of the plaintiff by not excepting to the ruling of the court in giving them, and they are not before us for review.

2. Counsel for appellant also contends that the court erred in refusing instruction No. 3 asked by them. The instruction recites the clause in the policy with regard to the proof of loss, and tells the jury that it was the duty of appellee to comply with the provisions thereof, and that if he did not, "within thirty days after the fire, make out and deliver to defendant company a proof of loss, signed and sworn to by plaintiff, stating his knowledge and belief as to the origin of the fire, the time of the fire, plaintiff's interest and the interest of all others in the property destroyed, the cash value of each item destroyed and the amount of the loss thereon, all incumbrances thereon, all other insurance covering said property, all schedules and descriptions in said policy, any change in the use, title, occupation, location, possession or exposure of said property, by whom occupied and for what purpose the building insured was occupied at the time of the fire, then said policy becomes inoperative and void because of such non-compliance by plaintiffs, and plaintiffs will not be entitled to any recovery, and you must find for the defendants."

This instruction should not have been given. It directly and plainly made the verdict depend upon the proposition stated in it, and excluded all other issues. *St. Louis, I. M. & S. Ry. Co.* v. *Smith,* 82 Ark. 105; *Aluminum Company of North America* v. *Ramsey,* 89 Ark. 522.

The obnoxious feature of the instruction is that it entirely ignored appellee's contention that the insurance company waived all other proof of loss than the one sent to it, and that it was estopped from denying its sufficiency.

We have repeatedly held that a failure to furnish proof of loss of the insured property as required by the terms of the policy may be waived by the insurer. *Minneapolis Fire & Marine Mutual Ins. Co.* v. *Fultz,* 72 Ark. 365; *Home Insurance Co.* v. *Driver,* 87 Ark. 171, and cases cited; *Hartford Fire Insurance Co.* v. *Enoch,* 79 Ark. 475.

Appellee testified that he attempted to comply with the provisions of the policy in regard to the proof of loss; that he made out a list of the articles burnt and of the articles saved, with the

value set opposite each item thereof, swore to the correctness of it, and mailed it to the insurance company, together with a statement on a separate sheet of paper about the origin of the fire and when it occurred; that this was done within the time prescribed by the terms of the policy, and that the company never made any objections to it.

Appellant company admits having received the list of articles referred to, but denies having received the statement which appellee says he inclosed with it about the origin of the fire and where it occurred. Appellee's testimony showed an intention on his part to comply with the requirements of his policy with respect to the proof of loss, and, if it was incomplete, good faith demanded that the insurance company should point out to him in what respect it was lacking.

"The conditions of insurance policies are numerous, varied and minute in details. These are doubtless essential for their protection against fraud, and for their complete security; but they are perplexing to persons not familiar with their requirements and construction. To prevent sharp practice and unfair advantage from a superior knowledge, it seems most just, and without imposing an undue burden on the insurance companies, to hold that, when the preliminary proofs are received, if there are any defects, they shall so state to the insured, that he may amend them in time, if they can be amended. If they intend to deal fairly with an honest loss, why should they not so state? If they believe the claim of a loss is a fraud, let them so state, and contest it on that ground. The interests involved are so great, so many persons hold all they possess dependent on these securities, that both insurers and insured should be held to the utmost good faith, and such has been the manifest purpose of the courts." *Jones* v. *Mechanics' Fire Insurance Co.*, 13 Am. Rep. (N. J.) 405.

In the cases of *Hartford Fire Insurance Co.* v. *Enoch,* and *Home Insurance Co.* v. *Driver, supra,* this court quoted with approval from the Supreme Court of the State of Pennsylvania, the following:

"If the insured in good faith and within the stipulated time does what he plainly intends as a compliance with the requirements of his policy in respect to proof of loss, good faith requires that the insurer shall promptly notify him of objections thereto,

and mere silence may so mislead him to his disadvantage as to be of itself evidence of a waiver of estoppel."

3. Counsel for appellants assigns as error the refusal of the court to give instruction No. 4 asked by them. The instruction reads as follows:

"4. The jury are instructed that the furnishing of proofs of loss within thirty days from the date of the alleged fire is, in this case, a condition precedent to recovery by plaintiffs, and failure to comply therewith is a valid defense to the action upon the policy as if it were made an express ground of forfeiture."

This instruction was also properly refused. It made the furnishing of proof of loss within the stipulated time by the appellee a condition precedent to his right of recovery, and entirely ignored his contention as to the waiver of the proof of loss by the insurance company, and its estoppel to question the sufficiency thereof. It should have contained the qualification, "unless you find that the company has waived the forfeiture," or words of like effect. *St. Louis, I. M. & S. Ry. Co.* v. *Smith,* 82 Ark. 111.

This form of instruction was criticised and condemned in the case of *Ark. Mid. Rd. Co.* v. *Rambo,* 90 Ark. 108. In that case the instruction was given, and the court held that it should have been met by a special and not a general objection because the vice of it had been taken away by other instructions given at the request of the complaining party. But it is not error to refuse to give an instruction which, otherwise containing a correct statement of law, is obnoxious in presenting the theory of one party to the exclusion of that of his adversary.

The court gave, at the request of appellants, a general instruction on the same point which contained the proper qualification. But appellants were entitled to a special instruction covering the point, had they asked a proper one. The court however was not bound to modify or qualify the instruction so as to remedy its defects. The party complaining must ask a correct instruction. *Horton* v. *Jackson,* 87 Ark. 528.

4. Counsel for appellant contend that the court erred in refusing to give the following instruction:

"5. The jury are instructed that the sureties upon the bond of defendant sued on herein are liable only for such losses as accrue on policies issued during the life of said bond on property

situate in the State of Arkansas; and if you find from the evidence the policy sued on was in fact issued before the bond was made, plaintiffs are not entitled to recover on it, as against the sureties."

The instruction should not have been given. The bond was executed pursuant to section 4 of the act of April 24, 1905. Acts of 1905, p. 489.

As was said in the case of *Ingle* v. *Batesville Grocery Co.*, 89 Ark. 378: "The liability of the insurance company is fixed by the policy of insurance, without regard to the character of the insurance company to be made liable. *Block* v. *Valley Mutual Ins. Association,* 52 Ark. 201. But the liability of the sureties on the bond is fixed by the bond itself."

The bond by its terms is conditioned that the company "shall promptly pay all claims arising and accruing to any person or persons during the term of said bond by virtue of any policy issued by any such company or association in this State, whenever the same shall become due."

The property insured was situated in this State. By the provisions of the bond, the sureties were obligated to pay all claims accruing to any person during the term of the bond. The claim accrued when the insured had a present enforceable right of action against the insurance company. Manifestly, his claim against the company accrued during the term of the bond. The bond was executed on the 7th day of May, 1907, and was for a period of one year. The fire occurred on the 29th day of October, 1907. In accordance with the ruling in the case of *United States Fidelity & Guaranty Co.* v. *Fultz*, 76 Ark. 410, we hold that the bond was liable.

Counsel for appellant also insist that there was a misjoinder of parties defendant. It is not necessary for us to determine whether the bondsmen could be sued in the same action with the company.

The sureties adopted the answer of the insurance company, and voluntarily went to trial on the issues raised by the pleadings. Moreover, "when causes of a like nature or relative to the same question are pending before any of the circuit or chancery courts of this State, the court may make such orders and rules concerning the proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the

administration of justice, and may consolidate said causes when it appears reasonable to do so." Acts of 1905, p. 798.

The court having this power to consolidate the suits if brought separately, no prejudice could have resulted from the course adopted. *Mahoney* v. *Roberts,* 86 Ark. 130; *Ashford* v. *Richardson,* 88 Ark. 124.

Finding no prejudicial error in the record, the judgment is affirmed.

THOMPSON v. GRACE.

Opinion delivered May 31, 1909.

1. MORTGAGE—CONSTRUCTION.—Where one who owned a majority of the stock in a business corporation undertook to mortgage the entire plant of the corporation, the instrument will be enforced in equity as a mortgage of his stock. (Page 56.)
2. PARTIES—CONSTRUCTION OF STATUTE.—Kirby's Digest, § 6011, providing that "the court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, or by saving their rights, but when a determination of the controversy between the parties before the court can not be made without the presence of other parties the court must order them to be brought in," intends to require all persons to be made parties to the action who will be necessarily and materially affected by its result, and to forbid the court from determining any controversy between the parties before it where it cannot be done without prejudice to the rights of others or by saving their rights. (Page 56.)
3. MORTGAGE FORECLOSURE—PARTIES.—In a suit to foreclose a mortgage upon corporate stock, neither the corporation nor the holders of other stock are necessary parties; as the court has power to protect the purchaser of stock at such sale by requiring a transfer thereof upon the books of the corporation. (Page 57.)

Appeal from Yell Chancery Court, Dardanelle District; *Jeremiah G. Wallace,* Chancellor; affirmed.

STATEMENT BY THE COURT.

This was a suit by appellee against appellant (defendant below) and wife, and E. G. Collier, to foreclose a mortgage given by appellant and his wife to appellee on certain lands and also what was known as the Post-Dispatch printing plant.

On the 14th day of October, 1908, the defendant Thompson and Collier filed answer admitting the execution of the note and mortgage to appellee, Grace, but allege that the printing plant was sold to Thompson by Jacoway without authority; that John H. Page from whom Jacoway bought the plant had no authority to sell same; that Thompson has been greatly damaged; that the sale of said property in its present condition of title will work a great sacrifice to the defendants, in that, without the cancellation of the title outstanding against the property, it will be sacrificed for want of bidders. They allege the printing plant to be the property of the Post-Dispatch Publishing Company, a corporation, and ask that the Post-Dispatch Publishing Company, John H. Page and H. M. Jacoway be made parties defendant; that their answer be taken as a cross-complaint against Jacoway and Page; that on final hearing the sale from Jacoway to Thompson be rescinded for failure of consideration; and that Jacoway and Page be decreed to pay off the mortgage debt to appellee, Grace, and that note and mortgage given by Thompson to Jacoway be also cancelled.

Depositions were taken, and on the day of the trial oral proof was heard, which was reduced to writing and duly made a part of the record.

On the 22nd day of October, 1908, the day the cause was set for hearing, plaintiff (appellee) filed an amended complaint, in which, in addition to certain allegations (in substance the same as those in the original complaint), he alleged that said J. S. Thompson mortgaged all the property of the Dardanelle Post-Dispatch Publishing Company; that said Thompson was not the owner of said Post-Dispatch Publishing Company, and that he had no right to convey same, but in fact he was the owner of 104 shares of stock in said Post-Dispatch Publishing Company, of the face value of $25 per share, aggregating $2,600, the entire stock of said Publishing Company being $3,000; that said mortgage was a lien on said stock or shares of stock of said Thompson, or an equitable assignment thereof; that by the sale of said Post-Dispatch by the said Jacoway to Thompson the said Jacoway intended to convey all his interest to the said Thompson whether it consisted of stock or otherwise of such company, and such likewise were the intentions of said Thompson when he executed to

plaintiff the mortgage sued on; and prayed that the said 104 shares of stock be sold, etc.

Defendant (appellant), answering the amended complaint, denies that said Thompson bought the stock of the said Post-Dispatch Publishing Company, but alleges that said Jacoway sold to and delivered to him (Thompson) the whole of the personal property mortgaged and took the mortgage (to himself), and induced him to execute the said mortgage to Grace, the said defendant at the time believing that he was acquiring title thereto; and, if he fails to secure the full amount of said property, that it will endanger the rights of said Collier, who is a surety on said notes, by requiring him to pay a larger sum than he agreed or is legally bound to pay.

Others owning shares were made parties, but their rights are not involved here. The court overruled the motion of appellant (defendant) to make the Post-Dispatch Publishing Company, H. M. Jacoway and J. H. Page parties. Then the court made the following findings and decree:

"That defendant Thompson is the owner of 104 shares of stock of said Post-Dispatch Publishing Company of the nominal value of $25 per share; that said Thompson transferred his said shares for value to plaintiff John Grace, and undertook to incumber same with a mortgage lien by executing a mortgage on the physical property of the Post-Dispatch Publishing Company, which the court finds, and so finding decrees, constitutes an equitable mortgage on the shares of said J. S. Thompson in favor of the plaintiff as security for said debt; that the shares so designed and intended to be incumbered for the debt due Grace had in fact never been issued to Thompson, but that he is entitled to have said shares issued to him upon his demand and by otherwise complying with the law; that said mortgage operated as an equitable transfer by said Thompson to Grace of $2,600 of the capital stock of the said Post-Dispatch Publishing Company, and that there is still due on said debt the sum of $2,434 as principal and interest. The court rendered judgment against appellant for that amount, and decreed that the shares of stock held by appellant in the Post-Dispatch Publishing Company be sold, and appointed a commissioner to make the sale with proper orders to give title thereto to the purchaser at said sale. To reverse that decree this appeal was prosecuted by appellant.

Bullock & Davis and *John M. Parker,* for appellant.

1. The original and amended complaints are at variance, and the only evidence admissible as to the property or interest bought by Thompson is the mortgage, which shows clearly that he bought the entire property, and not a part only, or interest therein. The court's finding, therefore, that he bought 104 shares of the capital stock, or an interest in the property proportional thereto, is not supported by the evidence.

2. Jacoway, Page and the Post-Dispatch Publishing Company were indispensable parties, because the legal title was in Jacoway and Page, or one of them, and because, as to the Publishing Company, unless it was before the court, no order made in reference to the stock would be binding upon it. 84 Ark. 444; 39 Ark. 308; 17 Am. & Eng. Enc. of L., 1st Ed., 650, note; 23 Ark. 477; 28 Ark. 171; 37 Ark. 517; 74 Ark. 138. Every person secured by the mortgage should be made a party to the bill to foreclose it. Jones on Chat. Mortg. 4th Ed., § 783 and note; Kirby's Dig. § 6011; 49 Ark. 102.

Priddy & Chambers, for appellee.

None of the persons asked by appellant to be made parties defendant is a necessary party; neither has or claims any interest in the foreclosure suit adverse to appellee. No formal issuance of stock certificates of stock was necessary in order for Thompson, Jacoway's assignee, to become a stockholder. 17 S. W. 1043; 26 Am. & Eng. Enc. of L. 876.

WOOD, J., (after stating the facts.) First. The proof showed that the Post-Dispatch Publishing Company was a corporation having a capital stock of $3,000 issued in shares of $25 each. John H. Page finally became the owner of all except sixteen shares, and he transferred all of his shares except one to H. M. Jacoway. Jacoway became the owner of 104 shares of the stock of the nominal value of $2,600. Jacoway sold all of his stock to appellant for $2,750. Two thousand of this was furnished by appellee. Jacoway had a mortgage to secure him for the balance of the purchase money, but there is an agreement in the record between him and appellee to the effect that appellee's mortgage should have precedence over his. Appellant testified "that it was his understanding that Jacoway owned the Post-Dispatch, and that Jacoway sold it to him; that the only evidence of the

transaction was the note and mortgage; that there was no written transfer of the stock; that he had several times demanded the stock of Jacoway, and he stated that he did not have it; that the stock certificates and books were lost; that Jacoway may have stated that he owned $2,600 in it, would not say that he did not; that at the time Jacoway sold him the Post-Dispatch he did not tell him anything about there being other stock; that he (appellant) may have had knowledge of that before, may have known that there was $3,000 of stock, and, of course, that there was $400 more of stock outstanding." The finding of the court that appellant was the owner of 104 shares of stock in the Post-Dispatch Publishing Company was amply sustained by this evidence. Appellant was put in possession of the plant, and, whether he supposed that he owned the whole plant or the entire capital stock (which carried the right to the *corpus*) or not, it is evident that he intended by the note and mortgage to transfer to appellee the entire interest he had purchased from Jacoway, to secure appellee for the money he had advanced to appellant to enable the latter to make the purchase. It is also true that the only interest he acquired from Jacoway was the 104 shares of stock, for that was all the interest Jacoway had. This evidence, we think, is ample to support the finding of fact by the court that appellant "transferred his shares of stock for value to appellee, and undertook to incumber same with a mortgage on the physical property of the Post-Dispatch Publishing Company."

The court was also correct in holding upon these findings of fact that the transaction constituted an equitable mortgage in favor of appellee on the shares of stock or interest that appellant owned. It is clear that both parties intended that the mortgage should cover appellant's interest, and the court properly construed and enforced the mortgage accordingly.

Second. Section 6011 of Kirby's Digest provides that the court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, or by saving their rights. It also provides that when a determination of the controversy between the parties before the court can not be made without the presence of other parties the court must order them to be brought in. "The obvious intention of the statute," says the court in *Smith* v. *Moore,* 49 Ark. 102, "is to

require all persons to be made parties to an action who will be necessarily and materially affected by its result, and to forbid the court from determining any controversy between the parties before it where it cannot be done without prejudice to the rights of others or by saving their rights."

There were no other mortgagees of this stock except Jacoway, and he acknowledged appellee's superior rights. His agreement in the record shows that he did not question the transfer to appellee.

Page was a witness, and his evidence was such as to warrant the chancellor in finding that he had no interest. The interest of the few outstanding small stockholders could not possibly have been affected by the transfer of appellant's shares of stock, and the corporate entity could not have been in any manner affected by the transfer and by the sale of the stock under the mortgage. Appellee was in no wise concerned with any grievance that appellant claimed to have against Jacoway. No one who was in any wise connected with the corporation was affected by the controversy except appellant and appellee, and appellant was in no position to ask for a postponement of the proceedings. The court of chancery had plenary power to protect the purchaser of the stock at the sale ordered and to see that he secured a correct transfer on the books of the corporation and a perfect legal title. No mere irregularities in the transfer of stock can defeat the rights of the purchaser thereof. Helliwell on Stock and Stockholders, § 159. See *Home Stock Ins. Co.* v. *Sherwood,* 72 Mo. 461; *Rio Grande Cattle Co.* v. *Burns,* 17 S. W. 1043; 26 Am. & Eng. Ency. Law (2d Ed.) 876.

There is therefore no merit in appellant's contention that bidders would be deterred and the stock sacrificed unless the parties named were brought in. The court did not err in overruling the motion to have others made parties. The decree is in all things correct, and is affirmed.

HART, J., not participating.

CZARNECKI v. BOLEN-DARNELL COAL COMPANY.

Opinion delivered May 24, 1909.

1. NUISANCES—WHEN ACTIONABLE.—A public nuisance may be actionable at the suit of one who suffers a peculiar damage therefrom, provided his injury is direct and not consequential merely, and is of substantial character. (Page 60.)
2. SAME—NOXIOUS GASES.—Where the complaint alleged, and the testimony tended to show, that defendant, in operating a coal mine, removed the waste product therefrom and dumped it on the surface, and set fire thereto, which caused smoke, sulphur fumes and other noxious vapors and gases constantly to arise and to render plaintiff's houses near by uninhabitable, and also that rains falling on the dump carried quantities of sulphur, alkaline salts and other substances in solution upon the plaintiff's property, ruining their wells and destroying vegetation, shrubbery and trees, it was error to instruct the jury to find for the defendant. (Page 62.)
3. SAME—MEASURE OF DAMAGES.—Where a nuisance causes a permanent injury to property, the measure of damages will be the depreciation in value of the property; but where the injury is only temporary, the measure of damages is the depreciation in the rental value of the property during the time of its maintenance or up to the time of trial. (Page 62.)

Appeal from Sebastian Circuit Court, Greenwood District; *Daniel Hon,* Judge; reversed.

C. T. Wetherby, for appellants.

1. Whether the state of facts complained of constitutes a public or private nuisance, there is conclusive evidence of special damage, and appellants are entitled to recover. 39 Ark. 403; 98 Mo. 523; 11 S. W. 990; 37 Cent. Dig. 1691, § 164, "Nuisances."

2. The actions are not barred. While no damages could be recovered for losses after the lapse of three years from their occurrence, yet damages accruing within three years are recoverable. The damages from noxious vapors could not be permanent, hence the statute did not begin to run immediately upon the dump becoming ignited; and since the fire had not existed for seven years, no right of prescription exists by way of defense in the defendant. 5 Met. 8; 49 Me. 539; 77 Am. Dec. 271; Wood on Nuisances, 2nd Ed., 727; 24 Am. Dec. 160; 84 Am. Dec. 631. The true measure of damages is the loss of rental values. 19 Hun, 272; 61 Mo. 359.

3. That appellant purchased after the mine was opened and a small dump was started does not affect their case. The injunction "so use your own as to do no injury to the property of another" applies here. Cooley on Torts, 612; 1 Law T. (N. S.) 454; 11 H. L. Cases 642.

Oscar L. Miles, for appellee.

1. The facts shown to exist take this case clearly out of the class of private nuisances, and place it in that of public nuisances. Action for damages was not the remedy, but one to abate or punish a public nuisance. 81 Ark. 117; 71 Ark. 144.

2. Appellee was pursuing a lawful business, carefully and in accordance with the methods and general customs of other operators. No negligence is alleged or proved. 21 Am. & Eng. Enc. of L. 699; 64 Ark. 310.

3. A coal mine can only be located and operated where the coal is found, and the waste accumulations must of necessity be deposited at or near the opening to the mine. In the absence of proof of malice or negligence no action for damages can be maintained. 133 Pa. St. 126; 145 Pa. St. 324.

McCULLOCH, C. J. Antoni Czarnecki instituted an action against the Bolen-Darnell Coal Company to recover alleged damages to his real property, situated in the town of Hartford, Sebastian County, Ark. The owners of other adjacent real estate instituted similar actions against the same defendant, and the cases were consolidated and tried together. When the several plaintiffs had introduced their evidence, the court gave a peremptory instruction in favor of the defendant, and the plaintiffs have appealed.

The facts set forth in the complaint, and which the evidence tended to prove, are substantially as follows: The defendant owns and operates a coal mine at Hartford, Ark. It opened the mine and began operations in January, 1902. The plaintiffs own houses and lots nearby, some of which are occupied by them as their homes, and some are rented out to tenants. The defendant, in opening and operating the mine, removed the waste product, including dirt, shale, slate, slack coal, sulphur and other waste substances, and piled it near by, thus forming an enormous dump pile which, at the time of the action, was estimated to contain a

thousand carloads. The waste product is hauled out of the mine in cars and dumped, and as the pile grows the tracks are extended. This method of removing the waste and dumping it near the mine is shown to be customary in operating coal mines.

When the dump pile was of small proportions, say about fifty carloads, it became ignited and continued to burn as the size of it was increased by the daily additions of the waste products. At the time of the trial, it had been burning about three years, and the testimony tended to prove that the burning of the waste caused quantities of smoke and sulphur fumes and other noxious vapors and gases to arise constantly from the pile, and, being carried by the wind, to render the adjacent houses uninhabitable, and to make it dangerous to health to live therein; also, that the burning of the dump-pile caused quantities of sulphur, alkali, salts and other substances to be separated from the waste product and to become soluble in water; and that rains falling upon the dump carried said substances in solution upon the plaintiff's property, ruining the wells, destroying vegetation, shrubbery and shade trees. The premises of the plaintiffs are situated near this burning dump-pile, and it is claimed that they were damaged in this way.

Did this state of the pleadings and evidence make a case for the jury, or did the court correctly give a peremptory instruction for the defendant? If the defendant has created and maintained either a public or private nuisance, and the plaintiffs have suffered thereby in the use or enjoyment of their property, the remedy at law for the recovery of damages is complete.

"Damages," says Mr. Joyce, "to the special injury of the plaintiff may be recovered where they are occasioned by an act which is indictable as a public nuisance. And there may be a recovery, in an action to recover damages for a nuisance, for inconvenience and discomfort suffered by the plaintiff and which materially impaired the comfortable and healthful enjoyment of his property by himself and family." 3 Joyce on Damages, § 2151.

"A nuisance may be both public and private in its character; in so far as it is public, the person who suffers a peculiar damage therefrom has a right of action. There are three things which one who sues on account of a public nuisance must show, in addition to the existence thereof, before he can recover: 1. A par-

ticular, or, more exactly speaking, a peculiar, injury to himself beyond that which is suffered by the rest of the public. 2. The injury to him must, according to some courts, be direct, and not merely consequential. 3. It must be of a substantial character, not fleeting or evanescent. One who has sustained damage peculiar to himself from a common nuisance has a cause of action against the person creating or maintaining it, although a like injury has been sustained by numerous other persons." 4 Sutherland on Damages, § 1058; *Fisher* v *Zumwalt,* 128 Cal. 493.

This court, in *Durfey* v. *Thalheimer,* 85 Ark. 544, adopted the rule, which is undoubtedly in accord with justice, and which seems to be approved by the large majority of adjudged cases, that "it is the duty of every one to so use his property as not to injure that of another." "The maxim that one should enjoy or use his own property so as not to injure that of another, or the rights of another, is a principle of extensive application in the law of nuisance. It is a sound as well as ancient maxim of the law. It is an established rule as old as the common law itself, and is supported by the soundest wisdom. It may be extended in its meaning to the rule that one should not so use his property as to work harm or annoyance to another or use it in such manner as to infringe upon the rights of others." Joyce on the Law of Nuisances, § 27.

In the opinion in *Durfey* v. *Thalheimer, supra,* Judge BATTLE quoted with approval the following statement of the law from the New York Court of Appeals in *Bohan* v. *Port Jervis Gas Light Co.,* 122 N. Y. 18: "While every person has exclusive dominion over his own property, and may subject it to such uses as will subserve his wishes and private interests, he is bound to have respect and regard for his neighbor's rights. The maxim '*Sic utere tuo ut alienum non laedas*' limits his powers. He must make a reasonable use of his property, and a reasonable use can never be construed to include those uses which produce destructive vapors and noxious smells, and result in material injury to the property and to the comfort of the existence of those who dwell in the neighborhood. The reports are filled with cases where this doctrine has been applied, and it may be confidently asserted that no authority can be produced, holding that negligence is essential to establish a cause of action for injuries of such a character."

According to the principles thus announced, and under the testimony adduced at the trial below, the plaintiffs clearly had the right to have their case submitted to the jury, and an award of damages would have been justified. The burning dump-pile constituted a nuisance—at least the jury might have so found—and its continued maintenance was a sufficient ground for the recovery of damages.

It is argued that a distinction should be made as to a coal mine, because of the fact that it is operated at a fixed place and cannot be moved like manufacturing plants. Another way of stating this recognized distinction is that in the operation of a coal mine the material is not brought to or accumulated on the land, like a manufacturing plant, but that it is found and utilized there. *Pennsylvania Coal Co.* v. *Sanderson,* 113 Pa. St. 126; *Robb* v. *Carnegie Bros. & Co.,* 145 Pa. St. 324.

This distinction is doubtless a sound one as to things which are reasonably essential to the proper operation of the mine. Now, the evidence in this case shows that it is customary in the operation of mines to dump the waste products near the entrance to the mine; but it does not appear that it is either customary or necessary to burn the waste, or that the fire could not have been extinguished. The evidence in this case shows that the pile was comparatively small when it became ignited, but it burned steadily for more than three years because of the fact that the waste product containing inflammable matter had been daily added to it until the pile has grown to immense proportions. The evidence does not show precisely how the pile became ignited, but it was shown that it is customary to throw the ashes from the boiler on the pile, and it may have become ignited in this way.

Instead of taking the case from the jury by a peremptory instruction, the court should have submitted it under proper instructions, setting forth the law applicable to the case.

Mr. Joyce lays down the following rule as to the measure of damages in such cases: "Where a nuisance causes a permanent injury to property, the measure of damages will be the depreciation in the value of the property, that is, the difference between its value before and after the injury. If, however, the injury is not a permanent one, but only temporary or removable, the measure of damages will then be the depreciation in the rental

value of the property during the time of its maintenance or up to the time of trial." 3 Joyce on Damages, § 2150. In view of another trial we call attention to this rule.

For the error of the court in giving the peremptory instruction, the judgment is reversed, and the cause is remanded for new trial.

DOUGLAS v. HAMILTON.

Opinion delivered June 14, 1909.

1. CERTIORARI—NOT SUBSTITUTE FOR APPEAL.—The writ of certiorari cannot be used as a substitute for an appeal or writ of error for the correction of errors or irregularities of proceedings of inferior courts, as where the trial court is alleged to have erred in deciding that a majority of the adult inhabitants within a radius named petitioned for an order prohibiting the sale of liquors. (Page 64.)
2. SAME—Since a proceeding to put in force the three-mile prohibitory law within a certain radius is *ex parte* in its nature until some one appears to oppose the prayer, a person interested who failed to appear and ask to be made a party cannot ask for certiorari to review such proceeding because he received no notice of the proceeding in the county court, and therefore had no opportunity to appeal therefrom. (Page 64.)

Appeal from Cross Circuit Court; *Frank Smith,* Judge; affirmed.

Benjamin Harris, for appellant.

1. The petition is analogous to an election. 51 Ark. 159. Appellant could not appeal; he was not a party in the county court. Hence certiorari was his only remedy. 61 Ark. 605.

2. The order of the county court was void because the petition did not contain a majority of the adult inhabitants. 56 Ark. 112; 70 *Id.* 449.

3. The statute is the operative force that prohibits; the court is only the agency that puts the statute in operation. 46 Ark. 383; 56 *Id.* 112; 135 U. S. 467.

McCULLOCH, C. J. On the petition of Hamilton and others, the county court of Cross County, at the April term, 1908, made an order in conformity with the statute in such cases prohibiting

the sale or giving away of intoxicants, etc., within three miles of a certain school house in the town of Wynne. No one appeared to oppose the making of the order. It was not entered of record by the clerk during that term, but at the next term of the court it was duly entered by *nunc pro tunc* order.

The order is regular in form, and recites the finding by the court to the effect that the petitioners constituted a majority of the adult inhabitants residing within three miles of said school house. Thereafter appellant, Douglas, and another person filed in the circuit court of Cross County their joint petition for a writ of certiorari to review and quash said prohibition order, on the alleged ground that their names appeared on the petition without authority from them; that the names of several persons appeared on the petition more than once; that the petition did not contain a majority of the adult inhabitants residing within the radius named, and that for those reasons the county court was without jurisdiction to make the order. The circuit court denied the prayer of the petition, and an appeal was taken to this court.

The judgment and order of the county court is valid on its face, and recites the necessary jurisdictional facts. If all the allegations of appellant's petition be taken as true, they only show that the county court made an error in deciding that the majority of the adult inhabitants within the radius named had petitioned for the prohibition order. The writ of certiorari cannot be used as a substitute for an appeal or writ of error for the mere correction of errors or irregularities of proceedings in inferior courts. *Merchants & Planters Bank* v. *Fitzgerald*, 61 Ark. 605, and authorities therein cited.

Appellant insists that, as he received no notice of the proceedings in the county court, and had no opportunity to appeal from the order, he is without a remedy unless one is afforded by the writ of certiorari. The statute does not require any notice of such proceedings to be given. The petitioners for prohibition proceed *ex parte* until some one appears to oppose the prayer, and then the proceeding is converted to some extent into an adversary one, and the parties thereto on either side aggrieved by the judgment and order of the court may appeal. The proceeding is conducted as a police regulation, and is in the nature of an election

by the adult inhabitants residing within the stated territory, the county court being the canvasser of the returns; and the sole question before the court is to determine whether or not the petition contains a majority of such adult inhabitants. *McCullough* v. *Blackwell*, 51 Ark. 159; *Wilson* v. *Thompson*, 56 Ark. 110; *Williams* v. *Citizens*, 40 Ark. 290.

No person has the right to contest the prayer of the petition or to appeal from the order except by being made a party to the proceeding. He cannot under other circumstances appeal from the order nor otherwise question its validity when the proceedings are regular and show the jurisdiction of the court.

Affirmed.

LATOURETTE v. STATE.

Opinion delivered June 14, 1909.

1. VENUE—PETITION FOR CHANGE—CREDIBILITY OF AFFIANTS.—It is proper for the trial court, in considering a petition for change of venue, to examine the supporting affiants in open court and to hear any other testimony bearing upon the question of their credibility and to decide whether or not they are credible persons. (Page 67.)
2. APPEAL AND ERROR—SHOWING OF PREJUDICE.—Where error is assigned in the refusal of the trial court to hear testimony of a witness, the record must disclose the substance or purport of the offered testimony, so that it may be determined whether or not its rejection was prejudicial. (Page 67.)
3. VENUE—PETITION FOR CHANGE—ISSUE.—Upon the issue as to the credibility of persons whose affidavits are offered in support of a petition for change of venue, it is not competent to go into the question of the truth or falsity of the statements of their affidavits. (Page 67.)
4. CRIMINAL LAW—INDICTMENT BASED ON INCOMPETENT EVIDENCE—WAIVER.—The objection that an indictment was found upon incompetent evidence is waived where the accused enters a plea of not guilty. (Page 68.)
5. SAME—WAIVER OF OBJECTION TO INDICTMENT.—To the general rule that irregularities in the finding of an indictment are waived by a general plea no exception arises upon proof that an indictment was found upon insufficient evidence and that the accused did not know, and had no means of ascertaining, this fact until after the trial. (Page 68.)

Appeal from Craighead Circuit Court, Jonesboro District; *Frank Smith,* Judge; affirmed.

Hawthorne & Hawthorne, and *S. R. Simpson,* for appellant.

1. A change of venue should have been granted, and it was error to rule that the four witnesses should make an additional affidavit and go on the stand to support it or not be heard. 83 Ark. 36; 162 Fed. 97; 85 Ark. 537; 86 *Id.* 358; 85 *Id.* 514; 76 *Id.* 278; 54 *Id.* 246; 36 *Id.* 28; 68 *Id.* 466.

2. The indictment should have been set aside because there was no evidence on which to base it. Kirby's Digest, § § 2203, 2204, 2207, 2209.

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellee.

No error in refusing change of venue. 71 Ark. 180, 183. The witnesses did not measure up to the standard of credibility required. 54 Ark. 243; 76 *Id.* 276; 80 *Id.* 360; 83 *Id.* 36; 85 *Id.* 518; *Ib.* 536. A further petition, properly verified, should have been filed. 54 Ark. 243; 86 *Id.* 358.

2. The court did not err in refusing to set aside the indictment; the motion was not supported by affidavit. 79 Tenn. (11 Lea) 509, 512; Kirby's Dig., § 2278. The motion came too late. 18 S. E. 545; 5 Ark. 230; 12 *Id.* 190; *Ib.* 630; 13 *Id.* 96; 16 *Id.* 96; 62 *Id.* 543; 66 *Id.* 286.

McCULLOCH, C. J. Appellant, Charles Latourette, was indicted by the grand jury of Craighead County for the crime of having carnal knowledge of a girl under the age of consent, and on a trial before a jury he was convicted and sentenced to the penitentiary for a term of three years. The evidence adduced at the trial was undisputed as to the fact of the appellant's having cohabited with the girl for a time and had sexual intercourse with her, but there was some conflict as to the girl's age. The evidence was sufficient to warrant the finding that she was under the age of consent. The jury fixed the punishment at ten years, and the court reduced it to three years.

Appellant's counsel urge two grounds for reversal: One that the court erred in refusing to permit certain witnesses to testify at the hearing of the petition for change of venue; and the other that the court erred in overruling, after the verdict and

judgment, a motion to quash the indictment. We consider these questions in the order in which they are argued.

The petition for change of venue was in due form, and was supported by the affidavits of two persons. The State challenged the credibility of the two supporting affiants, and they were examined by the court. It has been repeatedly held by this court that it is proper for the trial court, in considering a petition for change of venue, to examine the supporting affiants in open court and to hear any other testimony bearing upon the question of their credibility, and to decide whether or not they are credible persons. It would serve no useful purpose to cite all the cases. They are cited and reviewed in *Duckworth* v. *State,* 86 Ark. 57. We have examined and considered the evidence adduced before the court, and conclude that there was enough to warrant a finding against the credibility of the two affiants.

The bill of exceptions recites that, after the petition for change of venue was overruled, counsel for appellant requested "permission to introduce four additional witnesses to corroborate the two witnesses who made the affidavit," and that the court denied this request, stating to counsel, however, that if the proffered witnesses desired to make any additional affidavits, and go upon the witness stand to support them, they would be permitted to do so. Error is alleged in the refusal of the court to allow these witnesses to testify. The rule has been established by this court that where error is assigned in the refusal of the court to hear testimony of a witness, the record must disclose the substance or purport of the offered testimony, so that this court may determine whether or not its rejection was prejudicial. *Meisenheimer* v. *State,* 73 Ark. 407. In other words, it devolves upon the appellant to show by the record here, before he can complain of the ruling of the court as being prejudicial, that the offered testimony was relevant to the issue and should have been admitted.

Now, the offer made by appellant's counsel was to introduce witnesses to corroborate the supporting affiants on the petition for change of venue. The language in which this offer is couched in its ordinary acceptation is understood to mean an offer to introduce evidence in corroboration of the testimony of the two witnesses. Understood in this way, the testimony was

not relevant. The only issue before the court was that of the credibility of the two supporting affiants. It was not competent to go into the question of the truth or falsity of the statements of their affidavits. *White* v. *State,* 83 Ark. 36; *Strong* v. *State,* 85 Ark. 536. We find no error of the court in this respect.

After the jury returned a verdict of conviction, the appellant filed his motion to quash the indictment on the alleged ground that there was no legal evidence adduced before the grand jury to warrant the finding of an indictment. On the hearing of this motion, the appellant offered to prove by a member of the grand jury that no evidence was presented to that body except a transcript of the testimony heard at the examining trial. The court refused to hear this evidence, and overruled the motion.

The statutes of this State declare that a grand jury can receive none but legal evidence, and should find an indictment when all the evidence before it would, when taken together, if unexplained, warrant a conviction by a trial jury. Kirby's Digest, § § 2203-2204. But an indictment is merely an accusation against a defendant, and any irregularity in the finding and return of it by the grand jury does not deprive the accused of any substantial right. *Worthem* v. *State,* 82 Ark. 321. The failure of the grand jury to receive legal evidence was a mere irregularity, and was waived by the plea of not guilty. The question could not be raised after the trial and verdict. *Carpenter* v. *State,* 62 Ark. 286; *Hamilton* v. *State,* 62 Ark. 543, and cases therein cited.

Appellant undertook to show that he did not know, and had no means of ascertaining, until after the trial the character of the testimony heard by the grand jury. This does not alter the rule that irregularities in the finding of an indictment are waived by a general plea. It is the duty of the accused party and his counsel, before entering a plea of not guilty, to investigate the fact to their satisfaction whether or not the indictment has been regularly returned. The statute fixes the time when this question is put at rest, and hopeless confusion would arise by permitting questions as to irregularities in the finding of the indictment, which do not affect any substantial right of the accused, to be raised after the judgment of conviction is rendered.

It is unnecessary for us to pass on the question whether it

was competent to show by a member of the grand jury the character and quantum of testimony introduced before that body.

Judgment affirmed.

COMPAGIONETTE *v.* MCARMICK.

Opinion delivered June 14, 1909.

1. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDINGS.—A chancellor's findings of fact are conclusive unless clearly against the preponderance of the evidence. (Page 71.)
2. CONTRACTS—ILLEGALITY.—Under Kirby's Digest, § 1636, making it a misdemeanor to sell an animal having the glanders, a note given for the purchase of a horse known to the seller to have the glanders is void. (Page 72.)

Appeal from Clay Chancery Court; *Edward D. Robertson,* Chancellor; affirmed.

Taylor & Brown and *G. B. Oliver,* for appellant.

1. In order to render one liable for false representations, it must be shown that he made such representations with actual knowledge of their falsity and with fraudulent intent. 14 Am. & Eng. Enc. of L. 86; 22 Ark. 454; 23 Ark. 289; 38 Ark. 334; 31 Ark. 170; 71 Ark. 305. Such representations must be relied upon, at least in part, by the purchaser. 8 Ark. 146; 47 Ark. 148; 26 Ark. 28; 11 Ark. 58; Benjamin on Sales, § 429.

2. In all sales of personal property the rule of *caveat emptor* applies, unless some relation of trust or confidence exists between the parties. 20 Cyc. 49; 7 Ark. 167; 14 Ark. 21; 45 Ark. 284. The only act of which appellee can complain is the procuring a third party to by-bid on the sick mule. But by-bidding does not always avoid a sale. 76 Am. Dec. 101; Tiedman on Sales, § 165, p. 231; 19 Ark. 522.

J. N. Moore, for appellee.

In the light of the testimony appellant's representations were false. If it can be said that he did not have actual knowledge of the diseased condition of the mules, he had such knowledge as would put a reasonable man upon inquiry. The purchaser had

the right to rely on the truth of his statements. 44 Ark. 219; Benjamin on Sales, 4th Am. Ed., § 453. This case falls within the exceptions to the rule *caveat emptor*. 20 Cyc. 49, 50, 51; *Id.* 57, 58. See also 3 Keyes (N. Y.) 392; 24 Mo. 223; 30 Mo. 406; 94 Mo. 423. Employment of a by-bidder invalidates the sale. 19 Am. Rep. 232; 53 *Id.* 561; 85 Am. Dec. 168; 87 Ill. 222; 19 Am. Rep. 332; 85 Mo. 152; 55 Am. Dec. 195; 20 N. J. Eq. 159; 17 Hun (N. Y.) 370; 18 Am. Dec. 564; 2 *Id.* 626; 55 *Id.* 492.

FRAUENTHAL, J. On December 3, 1906, the plaintiffs, J. W. McArmick and C. E. McArmick, instituted this suit against the defendant, Joe Compagionette, in the chancery court of Clay County, and in their complaint they alleged that on the 22d day of September, 1906, the defendant sold to the plaintiff, J. W. McArmick, two mules, at public sale, for $249.50, and also some harness for $2.50; and that the plaintiffs executed their joint note therefor, which had not then matured; that at the time of the sale the mules were infected with the disease known as "glanders," and that the defendant knew that the mules were so afflicted, and with the intent to defraud defendant caused the mules to be sold at the public sale at which the plaintiff bought. That the defendant was insolvent, and was preparing to sell the notes. They asked that the defendant be enjoined from disposing of the notes and finally from collecting same. With the complaint the plaintiffs tendered the price of the harness. The defendant filed an answer to the complaint in which he denied that the mules were afflicted with the glanders, and denied that he knew that the mules were so diseased, and denied any intention to defraud in making said sale. The plaintiff J. W. McArmick died during the pendency of the suit, and as to him the cause was revived in the name of his administrator. Upon the trial of the cause the chancellor found "that the sale of said mules was void as to plaintiffs by reason of fraud practiced in the sale," and decreed that the price of the harness, tendered by the plaintiffs, be paid to the defendant, and that the defendant be perpetually enjoined from disposing of and collecting said note.

It is urged by the defendant that the evidence is not sufficient to sustain the chancellor in his finding of facts. We do not think

it necessary to set out in any detail the testimony establishing the issues of this cause. We have carefully examined the same, and from this it appears that at the time of the sale one of the mules had what was then said to be the distemper. Immediately after the sale the plaintiff began doctoring the mule, and this mule died about November 20, following the sale; and the other mule died about December 1, following that date. Witnesses testified as to the various symptoms which these mules exhibited, which indicated that they had the glanders. An experienced veterinary surgeon, engaged in the government service as veterinary inspector for the Bureau of Animal Industry, testified that, from the symptoms described, the mules undoubtedly had the glanders at the time of the sale and died from that disease. So that we think that the testimony amply sustains the finding of the chancellor that these mules were infected with glanders at the time of the sale. The more difficult question to determine is whether the defendant knew this. It would serve no useful purpose to here set out the various circumstances adduced in evidence by which it is attempted to prove that the defendant knew that the mules were so afflicted.

The chancellor by the decree made a finding to this effect. Upon an examination of the testimony we cannot say the finding of the chancellor is against the preponderance of the evidence. By the repeated decisions of this court the finding of the chancellor as to the issues of fact under these circumstances becomes conclusive. *Whitehead* v. *Henderson,* 67 Ark. 200; *Hinkle* v. *Broadwater,* 73 Ark. 489; *Bank of Pine Bluff* v. *Levi,* 90 Ark. 166.

It is urged by counsel for appellant that there is no testimony showing that the defendant warranted the soundness of the mules; and that the evidence is not sufficient to prove that the defendant intended to or did perpetrate a fraud in making the sale; but that the defendant at the time of the sale announced that one of the mules had the distemper. But the true question that is involved in this case, and which fixes its determination, is not whether the defendant warranted the quality of the animals. The facts as settled by the finding of the chancellor, and which we hold are sufficiently sustained by the evidence, are that these mules were at the time of the sale infected with the disease of

glanders, and that defendant was aware of this. Such a sale is prohibited by the statutes of this State, and any contract founded thereon is therefore invalid.

Section 1636 of Kirby's Digest provides: "Any person who shall sell or offer for sale or use or expose or who shall cause or procure to be sold or offered for sale, or used, or to be exposed, any horse or other animal having the disease known as the glanders or farcy or any other contagious or infectious disease known to such person to be dangerous to human life, or which shall be diseased past recovery, shall be guilty of a misdemeanor."

And section 1637 of Kirby's Digest provides that: "Every animal having glanders or farcy shall at once be deprived of life by the owner or person having charge thereof upon discovery or knowledge of its condition; and any such owner or person omitting or refusing to comply with the provisions of this section shall be guilty of a misdemeanor."

A sale is illegal where the statute expressly declares it to be so, or where it prohibits its execution; and a sale is equally invalid where the statute only imposes a penalty upon the party for making it. It is not necessary that the statute should expressly declare the contract of sale to be void; but the infliction of a penalty upon what is declared as an offense implies a prohibition of such act, and thereby renders void any contract founded on such act. In this State it is the well-settled doctrine that: "Every contract made for or about any matter or thing which is prohibited and made unlawful by statute is a void contract." *Tucker* v. *West,* 29 Ark. 386; *Lindsey* v. *Rottaken,* 32 Ark. 619; *Martin* v. *Hodge,* 47 Ark. 378; *Goldman* v. *Goodrum,* 77 Ark. 580; Tiedeman on Sales, § 306; 2 Mechem on Sales, 1044; 1 Page on Contracts, § 327. See also *George* v. *Johnson,* 6 Humph. (Tenn.) 36, 44 Am. Dec. 288.

The note involved in this case was executed in pursuance of a sale of mules having the disease known as glanders. For making such sale a penalty is imposed by the statute of our State. This renders the note void.

We therefore find no error in the decree; and it is affirmed.

STEEN v. SPRINGFIELD.

Opinion delivered June 14, 1909.

1. WILLS—REMOVAL OF EXECUTOR PENDING CONTEST.—Under Kirby's Digest, § 13, providing that, if the validity of any will be contested, letters of administration shall be granted during the time of such contest to some other person, who shall take charge of the property and administer the same, etc., the power to appoint a temporary administrator during the contest of a will does not follow the contest into the circuit court on appeal. (Page 75.)
2. APPEAL AND ERROR—FINAL ORDER.—An order of the circuit court revoking letters testamentary and appointing a temporary administrator during the pendency of a will contest is appealable. (Page 75.)
3. WILLS—REMOVAL OF EXECUTOR PENDING CONTEST.—Kirby's Digest, § 13, providing for the appointment of a temporary administrator during a will contest, does not contemplate that letters testamentary which have been granted under a will shall be revoked upon a subsequent contest of the will, but only that a temporary administrator shall be appointed to take charge of and preserve the estate until the will can be admitted to probate and letters testamentary be issued to the executor if qualified. (Page 75.)

Appeal from Pulaski Circuit Court, Second Division; *James H. Stevenson,* Judge; reversed.

John W. Blackwood and *John H. Cherry,* for appellant.

Marshall & Coffman, M. B. Rose, Miles & Wade and *John D. Shackleford,* for appellees.

McCULLOCH, C. J. An instrument of writing, purporting to be the last will and testament of J. P. Steen, deceased, executed and attested in due form, was filed and presented for probate to the probate court of Pulaski County. Appellant, Wm. E. Steen, the proponent of the will, is named therein as executor. Appellees, claiming to be collateral heirs of said decedent, appeared to contest the will, and the contest was heard by the probate court on September 15, 1908, and judgment was rendered admitting the will to probate. No letters testamentary or of administration on the estate of said decedent had, up to that time, been issued; but in the judgment admitting the will to probate letters testamentary were granted to the appellant. Bond was duly executed in double the estimated value of the estate as required by statute, and letters were issued pursuant to the judgment of the court.

On October 6, 1908, the appellees filed in the probate court their affidavit for appeal to the circuit court from the judgment admitting the will to probate and granting letters testamentary to appellant. The appeal was subsequently granted by the court, and a transcript of the record in the contest proceedings was duly filed in the circuit court.

Mrs. Kate Chittim, one of the appellees, claimed under another will, and she filed a separate contest, and also took a separate appeal to the circuit court. On March 10, 1909, the appellees joined in a petition to the circuit court for a revocation of the letters testamentary issued to appellant, and for the appointment of some other person to administer the estate pending the contest. Appellant filed his response, resisting the prayer; but the circuit court granted the prayer of the petition, and ordered the appointment of the Union Trust Company as administrator of said estate pending the contest. From this order the proponent and executor took an appeal to this court, and now moves the court for an order of supersedeas, staying the judgment of the circuit court appointing an administrator.

Inasmuch as the question of appellant's right to a supersedeas is necessarily decisive of the merits of the appeal, and practically ends this controversy, we have concluded to decide the whole controversy now as to the right to administer during the pendency of the contest over the will.

The statutes which bear on the point in controversy, being sections of the Revised Statutes of 1838, are as follows:

"Sec. 10. After the probate of any will, letters testamentary shall be granted to the person therein appointed executor, if qualified."

"Sec. 13. If the validity of any will be contested, or the executor be a minor, or absent from the State, letters of administration shall be granted during the time of such contest, minority or absence to some other person, who shall take charge of the property and administer the same, according to law under the direction of the court, and account for, pay and deliver all moneys and property of the estate to the executor or regular administrator, when qualified to act."

"Sec. 36. If any will be proved, and letters testamentary thereon granted, and such will be afterwards set aside, the letters

testamentary shall be revoked, and letters of administration in succession granted." (Secs. 10, 13 and 36, Kirby's Digest.)

The first question presented is, whether or not the power to appoint a temporary administrator during the period of the contest of a will, if it exists throughout that period, follows the contest into the circuit court on appeal so as to give that court the right to exercise it; for, if it does, and the appointment is ancillary to the contest, like the appointment of a receiver pending litigation, then the order is not final but interlocutory, and cannot be appealed from. We hold that the power does not follow the contest proceedings, and that section 13 of the statute applies only to the administration proceedings in the probate court, like other provisions of the statute concerning the administration of decedent's estates. In re *Blair,* 60 Hun, 523.

It was not intended by this statute to take from the probate court any part of its original jurisdiction over the estates of decedents, but all orders under this statute must originate in that court. An order of that court, either appointing or refusing to appoint an administrator under this section, may, however, be appealed from. Appellees did appeal from the order of the probate court granting letters testamentary to appellant, as well as the order admitting the will to probate; so the question was properly before the circuit court. And the order of the circuit court revoking appellant's letters testamentary and appointing a temporary administrator was appealable.

This, then, brings us to the particular question decided by the circuit court, whether section 13 is mandatory and provides for the appointment of a temporary administrator at any time during the period of the contest of a will, or at any time after a contest arises, even after letters testamentary have already been issued to the executor named in the will.

A careful consideration of these sections of the statute in their relation to each other convinces us that they do not require the appointment of a temporary administrator to take the place of the executor during the period of the contest after the will has once been admitted to probate and letters testamentary have been issued to the executor. Any other view of the statute is based on a misconception of the purposes for which it was enacted. The design of the statute is not, as contended, to pro-

vide for the appointment of a disinterested person, instead of the executor, to take charge of the estate during the pendency of the contest. Nothing is said about the interest of the person to be appointed. The sole design is to provide for a temporary administrator to take charge of and preserve the estate until the will can be admitted to probate and letters testamentary issued to the executor, if qualified. It is merely for the protection of the estate, and not to provide for neutrality towards both contestants and the beneficiaries under the will. Under the statutes of this State, executors as well as administrators are required to act impartially toward all claimants of the estate. Executors are required to give bond in double the value of the estate for the faithful performance of their duties, even though the will of the decedent may direct otherwise. *Bankhead* v. *Hubbard*, 14 Ark. 298. They act under direction of the probate court, and are amenable to its orders at every stage of the administration. There is no provision for the granting of letters testamentary until after the probate of the will. Section 10. *Jackson* v. *Reeve*, 44 Ark. 496. Therefore, it was necessary to provide some method for the preservation of the estate, and the due progress of administration thereof, during the delay of the contest and before the will can be admitted to probate. This is provided for in section 13 of the statute.

The pendency of a contest does not disqualify, even temporarily, the executor named in the will; but the delay in admitting the will to probate prevents his appointment by the court, and may render it necessary that a temporary administrator be appointed. If the will be admitted to probate and letters testamentary granted, then there is no necessity for the appointment of a temporary administrator under section 13, even though the contest continue or is thereafter instituted. In that case the executor remains in charge of the estate under his bond until the contest finally results in setting aside the will, and then the letters testamentary are revoked. Section 36. The statute contains no express provisions for the revocation of letters testamentary, once granted, until after the will is set aside at the end of the contest, or unless the executor becomes a non-resident or "of unsound mind, or waste or mismanage the estate or act so as to endanger his co-executor." Sections 14, 37.

If section 13 of the statute be construed to mean that a temporary administrator must be appointed to take the place of the executor to whom letters testamentary have been granted, then section 36 is meaningless; for, if the former section is mandatory in requiring such appointment, it is superfluous to provide for the revocation at the end of the contest of the letters of an executor who has already been displaced. In other words, if an executor must be removed during the pendency of a contest, it is unnecessary to provide for his removal at the end of the contest. The fact that the provision with reference to the appointment of a temporary administrator in case of absence from the State or minority of the executor is placed in the same section with that having reference to the contest of the will makes the language a little obscure as applied to all three of these contingencies; but the fact that the section contains provision for all three of those emergencies renders it certain that it was intended to provide for a temporary appointment only when letters testamentary cannot be issued, *i. e.,* before the will has been probated or when the executor is absent from the State or is a minor. If the will has been probated and letters testamentary issued, then the contingency provided for in section 13 is not present.

The views we express are supported by cases decided by other courts in construing similar statutes. The Kentucky statute provides that "during the contest about the probate of a will, or when the court for any valid cause shall be delayed in granting letters testamentary or administration, it may appoint a curator to collect and preserve the estate of the decedent until probate of the will be granted or until the cause for which the order was made shall be removed." The Kentucky Court of Appeals, in *Worthington* v *Worthington's Executors,* 35 S. W. 113, speaking through Chief Justice Pryor, said: "This statute does not confer upon the county court the arbitrary power of disregarding the wishes of a testator, by appointing a curator, for the reason, alone, that the paper offered as the last will is being contested, when its probate has been granted, and no disqualification exists on the part of those named as executors."

In Texas the following statute is in force: "Pending any contest relative to the probate of a will or granting of letters of administration, whether such contest be in the county court or in

the district court, it shall be the duty of the county judge, should he deem it necessary, to appoint a temporary administrator in the manner prescribed in the preceding articles in this chapter, with such limited powers as the circumstances of the case may require; and such appointment may continue in force until the termination of the contest and the appointment of an executor or administrator with full powers." The Supreme Court of Texas, in the case of *Elwell* v. *Universalist Church,* 63 Tex. 220, construing the above statute, held that "when a permanent administrator is appointed, he administers the estate pending any contest that may in future arise concerning the will, and the court has no right, in the event of such a contingency, to revoke the permanent letters and place the estate in the hands of a temporary administrator pending the contest."

The Maryland statute on this subject reads as follows: "In all cases where the validity of a will is or shall be contested, letters of administration pending such contest may, at the discretion of the orphan's court, be granted to the person named executor, or to the person to whom the largest portion of the real estate may be bequeathed in such contested will, or to the person who would be entitled to letters of administration by law, as in cases of intestacy." The Court of Appeals of Maryland, in *Munnikhuysen* v. *Magraw,* 35 Md. 280, speaking through Chief Justice Bartol, said: "That section applies to cases where the will has not been admitted to probate, or where letters testamentary have not been granted, or, if granted, have been revoked. Where the will has been admitted to probate, and letters testamentary actually granted, the executors have qualified, and their letters remain unrevoked, the Orphan's Court have no power to appoint an administrator *pendente lite.* The effect of such an order would be to create the greatest confusion in the administration of the estate; for there would be different and opposing parties, both clothed with the powers of administration at the same time."

The Missouri court in *State* v. *Guinotte,* 156 Mo. 513, held to the contrary view in construing a statute identical with our statute; but we cannot approve the conclusion reached by that court. In that case the will was admitted to probate in the probate court, and letters testamentary, without bond (which is authorized by the statute of that State), were issued to the execu-

trix. Subsequently suit was brought in the circuit court to contest the will. During the pendency of the contest the probate court appointed an administrator *pendente lite,* and ordered the executrix to turn over the estate to him, which was done. In the circuit court the will was admitted to probate, and the executrix applied to the probate court for reinstatement. Her application was granted, and the temporary administrator ordered to turn over the estate to her, notwithstanding an appeal was pending in the Supreme Court from the judgment of the circuit court admitting the will to probate. The Supreme Court held, on certiorari, that the tenure of the temporary administrator lasted throughout the contest, and that the order reinstating the executrix before the end of the contest was void. How far the views of the court may have been influenced in its construction of the statute by the fact that the executrix acted without bond, and that the statute authorized it, is not reflected by the opinion in the case. The presence of such a provision of the statute, authorizing an executor to act without bond, would doubtless be of some force in the construction of the other section providing for the appointment of the temporary administrator. We have no such provision in the statutes of this State and, as before stated, all executors are required to give bond.

The circuit court erred in its judgment, and the same is reversed, and the petition of appellees for appointment of a temporary administrator is dismissed.

WILLIAMSON *v.* RUTHERFORD.

Opinion delivered June 14, 1909.

PUBLIC DITCH—FINALITY OF ORDER LOCATING.—An order of the county court fixing the location of a public ditch is subject to change and is not final or appealable until the assessment of damages and benefits has been approved, and up to that time any land owner may appear and object to the proceedings.

Appeal from Independence Circuit Court; *Frederick D. Fulkerson,* Judge; reversed.

Samuel M. Casey, for appellant.

The law relating to the establishment of drains and ditches, Kirby's Dig. §§ 1414-1450, inclusive, is to be strictly construed. 64 Ark. 555. The order of the county court made on December 4, 1906, settled the matter of the location of the ditch, and subsequent changes in its location were without authority and void, and the circuit court acquired no jurisdiction on appeal. 77 Ark. 234; 44 Ark. 377.

McCaleb & Reeder and *Ernest Neill,* for appellees.

The statute expressly provides that changes may be made in the location of the ditch; but, if the county court was without jurisdiction to make the orders subsequent to that of December 4, 1906 (which is not conceded), still, since it did have jurisdiction, as appellants admit, to make that order, the circuit court acquired jurisdiction on appeal, the whole matter standing in that court for trial *de novo.* Kirby's Digest, §§ 1429, 1492, 1428.

McCULLOCH, C. J. This appeal involves the validity of proceedings establishing a certain drainage district in Independence County, and assessing damages and benefits to property resulting from the construction of the drainage ditch. The county court made several changes in the route of the ditch, and it is conceded in the briefs of counsel that the only question presented for our consideration is as to the jurisdiction of the county court to order the last change.

The petition for the establishment of the district, and designating the proposed route of the ditch, was filed in the county court on April 6, 1906, in accordance with the statute, by the owners of the land to be affected by the alleged improvements. The court granted the prayer of the petition, and appointed viewers and an engineer to view and make preliminary survey of the line of the ditch, and to report whether or not the proposed improvement was necessary and practicable, and would be "conducive to the public health or welfare," etc. Due notice was given, in accordance with the statute, of the appointment of viewers, the point of beginning, route and terminus of the proposed ditch and the time fixed by the court at which the viewers should make their report.

The viewers and engineer filed their report on August 26, a

day of the regular July term of the court, recommending the adoption of the route proposed in the petition as being conducive to the public health and welfare. Thereupon the court found in favor of the making of said improvements, and made an order establishing the district. An order was also entered directing the viewers to go upon the proposed line of the ditch and survey and level the same, set stakes, etc., make a profile map, plat and report of same, estimate the amount of earth to be removed and the cost thereof, and assess the damages and benefits from said improvement to each tract of land of forty acres or less.

In obedience to said order, the viewers and engineer proceeded to go upon said route and comply with said order, and thereafter filed their report, which contained an assessment of the damages and benefits to the lands to be affected by the construction of the ditch. All the owners of the land to be affected were duly summoned, as required by the statute, and appeared in court on October 6, 1906, the day fixed therein, and numerous exceptions to the report were filed by the land owners. It is conceded that up to this point the proceedings were regularly conducted and in strict accord with the statute.

The court, after a full hearing of all exceptions and objections, made an order on December 5, 1906 (which was a day of the October term, 1906), reciting a finding that the proposed route of the ditch was impracticable, and that the assessment of damages and benefits made by the viewers was unfair and unjust. The court ordered a change made in the route of the ditch, designating the new route and directing the viewers and engineer to go upon the new line and survey it and set stakes, assess damages and benefits, etc., as directed in the former order. This order was omitted from the record, but was duly entered later by *nunc pro tunc* order at the January, 1907, term of court.

At the next July term of the court, the viewers reported adversely to the route designated by the court in the above mentioned order, and reported that they had laid out another route which they recommended for adoption. The court thereupon found that this report was irregular because all the viewers did not join therein, but found that the last proposed route was practicable and adopted it. Viewers were again appointed to survey and stake out this route, assess damages and benefits, etc., and

report thereon. At the October, 1907, term of the court the viewers again reported, recommending the extension of the ditch, and also reported the assessment of damages and benefits. Exceptions to this report were filed by certain landowners, and on the hearing thereof the court refused to confirm the report, but ordered still another change in the route, and sent the viewers out again to stake out and survey this route and assess the damages and benefits. The original petitioners, without waiting for another report of the viewers, took an appeal to the circuit court, where a motion to dismiss the appeal was overruled, and on a hearing *de novo* the court adopted and confirmed the last report of the viewers which had been rejected by the county court. From this judgment of the circuit court the parties who excepted thereto have prosecuted an appeal to this court.

It is contended by the appellants that the above-mentioned order of the county court, made on December 5, 1906, designating a new route of the ditch and directing the viewers to survey and stake it off, assess the damages and benefits and report back to the court, was final, and that the county court was without jurisdiction to make the subsequent changes in the route. This involves an inquiry into the meaning of the statute which authorizes the proceedings.

The statute provides that the proceedings shall be inaugurated by a petition of land owners, setting forth the necessity for the improvement and giving a general description of the proposed ditch. A cost bond is required of the petitioners. (Kirby's Digest, § 1415.) The court then appoints viewers and an engineer, with directions to make a preliminary survey of the line of the proposed ditch, and to "report, by actual view of the premises along and adjacent thereto, whether the proposed improvement is necessary, practicable, or will be conducive to public health, convenience or welfare, and report the best route for the proposed drain," etc. (Section 1416.)

Notice by publication is required (section 1417) of the pendency of the proceedings and appointment of viewers, and the time fixed for hearing of their report. On the hearing of this report, if the county court finds against the improvement, the petition is dismissed (section 1418); but, if the court finds in favor of the improvement, then "the lands which will be affected thereby or

assessed therefor shall constitute a drainage district," and the court causes to be entered on its records an order directing the viewers to go upon the line described in the order with an engineer and survey and stake out the line, make a map and profile thereof, estimate the cost of the construction and assess the damages and benefits to the lands affected. etc. They may also be ordered to apportion and allot the the construction of the number of linear feet and cubic yards of the proposed work to each respective tract of land affected (section 1420). Notice of this report of the viewers, and of the time of the hearing thereof by the court, must be given by summons to be served on the owner of each tract, or his agent or tenant if residing within the county, or by publication if the owner's residence is without the county or can not be ascertained, and he has no resident agent or tenant (section 1422). The succeeding sections bearing on the subject read as follows:

"Sec. 1423. The court shall first determine whether the required notice has been given. If they find that due notice has not been given, they shall continue the hearing to a day fixed by them and order the notice to be served as herein provided; and when they find that due notice has been given they shall examine the report of the viewers and the apportionment by them made, and if it is in all things fair and just, according to the benefits, they shall approve and confirm the same. If, however, the county court shall find that the location of said ditch or the apportionment reported by the reviewers is unfair and unjust and ought not to be confirmed, they may make an order changing the location or dimension of said ditch or any part thereof and amend the report upon the evidence so as to make it fair and just in proportion to the benefits.

"Sec. 1428. Any person or corporation party to proceedings may, on filing the bond, to be approved by the county court, conditioned to pay all costs occasioned thereby, file exceptions to the apportionment, or to any claim for compensation or damages at any time before the day set for the hearing of said report by the court. The county court may hear testimony and examine witnesses upon all questions made by the exceptions, and for that purpose may compel the attendance of witnesses by subpœna, and their decisions upon each of the exceptions shall be entered of

record; and if they sustain the exceptions the cost of hearing the same shall be paid out of the county treasury, and if they overrule the same such cost shall be taxed against the person or corporation filing the exception. Any person or corporation may appeal from the order of the court, and upon such appeal may determine either of the following questions:

"First. Whether such improvement will be conducive of public health, convenience or welfare, or the location of any part changed.

"Second. Whether the route is practicable.

"Third. Whether the compensation has been allowed for property appropriated.

"Fourth. Whether proper damages have been allowed for property affected by the improvements.

"The appellant shall pray an appeal to the circuit court, and file a motion in writing specifying therein the matters appealed from; which motion shall be filed and recorded. The county court shall then fix the amount of bonds to be given by the appellant, and cause an order thereof to be made on their record. The party appealing shall within ten days thereafter file with the county clerk a bond in the amount fixed by the county court, with at least two good and sufficient sureties, to be approved by the clerk, conditioned to pay all costs made on the appeal in case the appellant fail to sustain the same or the appeal be dismissed for any reason, and the said clerk shall make a complete transcript of the proceedings had before the county court and certify the same with all the original papers filed in his office and file them in the office of the clerk of the circuit court within thirty days from the day of filing said bond."

We interpret the meaning of the statute to be that the court possesses the power to change the location of the ditch at any time before it finally approves the assessment of damages and benefits. The approval of the assessment of damages and benefits is the final act of the court in establishing the district and authorizing the improvement, and up to that time any owner of lands may appear and object to the proceedings, and on appeal from the final order test any of the questions enumerated in section 1428 of the statute.

If any other construction was placed upon the statute, and

an order fixing the location of the ditch without then approving the assessments was held to be final, it would deny the privilege of a hearing on the question of the location of the ditch to the owner of land affected by the new location and subsequently as-assessed. The statute clearly contemplates that, when the final order of the court is made, the owners of all lands to be affected shall have been summoned, so that they can be heard, not only as to the validity of the assessments, but also as to the propriety of the whole project and the practicability of the route adopted. If a change at any stage of the proceedings in the route of the ditch affects the lands of any owner not theretofore summoned, he must be brought in by service of summons in accordance with the statute in order to be given a hearing on the whole project. To do otherwise would be to deny him the equal protection of the statute.

The court may change the location of the ditch and readjust the assessments directly by hearing evidence. This is what this statute seems to contemplate; but it also implies the power to adopt any other means of ascertaining the facts, and may do so by sending viewers out again for another assessment and report. But in either event this order is not final and irrevocable until the assessments are approved by the court. It follows, therefore, that the contention of counsel for appellant is unsound, and that the county court had the power to make the last change complained of.

Now, if the order of the county court changing the route and sending the viewers back to survey it out and assess the damages and benefits was not final, then the last order of that court to the same effect, from which the appeal was attempted to be taken, was not appealable. No appeal could be taken until the court either dismissed the whole proceedings or finally approved the assessments. Then an appeal could be taken, bringing up to the circuit court for hearing *de novo* the whole proceeding.

It is plain that the statute does not contemplate an appeal and hearing in the circuit court by piecemeal. It provides that when an appeal is taken the whole record is sent up to the circuit court, and nothing is left for the county court. When the circuit court renders its judgment, the record is retransmitted to the county court for the purpose of having the judgment of the circuit court

entered, and then the county court orders the letting of the contracts for the construction of the improvement. (Sections 1429-1430.)

We conclude therefore that the appeal from the county court was premature, and should have been dismissed.

Reversed and remanded with directions to dismiss the appeal.

BATTLE, J., dissenting.

GOOSBY v. CROSSETT LUMBER COMPANY.

Opinion delivered June 14, 1909.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.—Plaintiff, an employee of a sawmill company, was riding upon the pilot of an engine while returning to the log camp. There was evidence that it was customary for defendant's employees to ride there, and that the engineer directed him to do so upon this occasion; that the engine was moved forward and collided with a flat car, causing plaintiff to be injured; that the engine was backed on the return trip, and plaintiff supposed it would start back to camp when it moved: *Held* that the question whether plaintiff was negligent in riding on the pilot of the engine was for the jury.

Appeal from Ashley Circuit Court; *Henry W. Wells,* Judge; reversed.

STATEMENT BY THE COURT.

Ed Goosby brought this suit in the Ashley Circuit Court against the Crossett Lumber Company to recover damages for personal injuries received by him on account of the alleged negligence of the employees of said Lumber Company, while operating a train on its line of road.

The defendant company answered, denying negligence on its part, and pleading the contributory negligence of the plaintiff as a defense to the action.

The case was tried before a jury, and the plaintiff, to maintain the issues on his part, testified substantially as follows:

"In October, 1905, I began to work for the Crossett Lumber Company about nine miles from Crossett, Arkansas. On December 6, 1905, while engaged in the service of the company, I

got my right knee hurt. I was carried to the camp boarding house, and was treated there by the company physician for 25 days. About January 1, 1906, I went to Crossett, and stayed with my brother awhile. During the time since I received the injury, I was getting half wages. I had an understanding with the company's doctor that he would certify me disabled, and on that account on half wages into February, and that I could go to my home in Lincoln County until I got well. I was then to come back and resume my work. To perfect this arrangement, it was necessary for me to get a statement of my board, which was to be deducted from my wages, and for this purpose I had to go to the boarding camp in the woods . The lumber company had an engine and train of cars, with which it hauled its logs from its camp in the woods to its mill at Crossett, and on which its employees were accustomed to ride to and from the camp to Crossett. I asked permission of the engineer to ride to the camp on his train. The engineer told me that I could ride with him and directed me to get on the pilot of the engine, which was constructed so that persons could ride there. It had a footboard across the front about one foot above the track, and a broad flat surface extending forward from the boiler. It was the custom to run the engine backwards to the camp. I thought the train was going to the camp when it started, but the engine went towards the switch. It ran into a flat car, and my leg was broken. I was sitting on the right hand side of the pilot with my left leg upon the draw head. I could not jump off on account of my injured knee.

The lumber company, to sustain the issues on its part, introduced as witnesses the engineer and conductor of the train. Each of them denied that permission was given to the plaintiff to ride upon the pilot, and said that it was the most dangerous part of the train to ride upon. They said that the pilot had painted on it a large sign, "Keep Off!" for the purpose of warning persons not to ride there. They also denied that employees of the company were accustomed to ride upon the pilot.

The plaintiff admitted that he saw the sign, but thought it meant to keep off unless the engineer gave one permission to ride there.

The jury returned a verdict for the defendant, and the plaintiff has appealed.

Geo. B. Pugh and *R. E. Wiley,* for appellant.

Only in exceptional cases will the court take the question of negligence from the jury. It is only when the facts themselves and the inferences therefrom are indisputable that the court may take it from the jury. It is a question for the jury where the facts are in dispute, or, if undisputed, fair-minded men might reasonably draw different conclusions therefrom. Cooley on Torts, 3d Ed. 142 *et seq.;* Thompson on Neg. §§ 428-9, 7393-4; Beach on Contributory Neg. § § 448-451; 118 Cal. 55; 97 Wis. 382; 184 N. Y. 100; 159 U. S. 603; 85 Ark. 479; 61 Tex. 499; 87 Ark. 101; 82 Ark. 507; 37 Ark. 519.

T. D. Wynne and *Geo. W. Norman,* for appellee.

The proved facts must lead all reasonable men to the conclusion that appellant was guilty of negligence in riding on the pilot of the engine, and that he was a trespasser. 22 Barb. (N. Y.) 91; 34 Am. & Eng. R. Cas. 271; 83 Ill. 424; 40 Ark. 298; 95 U. S. 439; 14 L. R. A. 552; 33 S. W. 379; 79 S. W. 1101.

HART, J., (after stating the facts). Counsel for appellant assigns as error the action of the court in instructing the jury as a matter of law that appellant was guilty of contributory negligence in riding upon the pilot of the engine, although the conductor or engineer told him to do so.

In support of their contention of the correctness of the ruling of the trial court, counsel for appellee rely chiefly on the case of *Railroad Company* v. *Jones,* 95 U. S. 439; but the facts developed in the present case are more nearly like those in the case of *El Dorado & B. Rd. Co.* v. *Whatley,* 88 Ark. 20. In the Jones case the servant was returning from work on the main line of the railway company, which was a common carrier, where the meeting of trains and the consequent danger from running into other trains was much more imminent than in the present case. In the instant case, appellant testified that the engine always run backward on its return to the camp; that it was customary for employees to ride upon the pilot, and that it had been fitted up with a flat top extending forward from the front of the boiler for that purpose; that but one train ran on the track, and that he understood the engine would start back to the camp when it moved. Under these circumstances, the court should

have left it to the jury to say whether he was guilty of contributory negligence; for they might have found that there was no more reason for him to anticipate danger in riding on the pilot than on any other part of the train. It is only when the court can say from the facts and circumstances detailed in evidence that reasonable and fair-minded men could not believe that the plaintiff was acting as an ordinarily prudent person would have acted under the attendant circumstances that the question of plaintiff's contributory negligence is one of law for the court. As stated in the case of *El Dorado & B. Rd. Co.* v. *Whatley, supra:* "Upon the facts of this case reasonable minds might reach different conclusions as to whether the danger of riding the pilot was such an imminent and obvious one that no prudent man would undertake it."

Therefore the court erred in taking from the jury the question of plaintiff's contributory negligence, and for this reason the judgment must be reversed, and the cause remanded for a new trial.

LITTLE ROCK RAILWAY & ELECTRIC COMPANY *v.* NEWMAN.

Opinion delivered June 14, 1909.

ELECTRICITY—REGULATION—CHARGE FOR READINESS TO SERVE.—Acts 1905, p. 701, providing in substance that in cities of the first class water, gas and electric companies shall furnish meters free of charge and furnish tables of the prices charged per thousand units, and that charges for such commodities shall be based on readings of the meters, does not prohibit such companies from making a minimum charge per month where they put in meters and hold themselves in readiness to serve their patrons.

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

Rose, Hemingway, Cantrell & Loughborough, for appellant.

1. By the common-law rule a charge for "readiness to serve" is reasonable and lawful. 60 N. Y. Suppl. 561; 34 Mo. App. 501. The act of 1905 (Acts of '05, p. 700) does not forbid a charge for readiness to serve. It forbids a *charge for me-*

ters and requires them to base their charges *for the commodity furnished,* etc. *Expressio unius est exclusio alterius.* Hence the act impliedly authorizes a charge for any other service rendered. Endlich, Int. Stat. § 399; Lewis' Suth. Int. Stat. § 491 *et seq.;* 1 Ark. 540; 59 *Id.* 356; 70 Ark. 481; 71 *Id.* 561. Statutes in derogation of the common law are strictly construed. Cases *supra.*

2. If the act prohibits a minimum charge for actual expenses in keeping ready to serve, it is unconstitutional because it denies the equal protection of the law and takes property without due process of law. 169 U. S. 526; 116 *Id.* 331; 128 *Id.* 179; 85 Ark. 18.

J. A. Comer and *John T. Castle,* for appellee.

It may be admitted that, in the absence of a statute to the contrary, public utility corporations may charge a minimum monthly charge for readiness to serve under the common-law rule, but here we have a statute to the contrary, and 60 N. Y. Suppl. 561 does not apply. Joyce on Electricity, § 527; 34 Mo. App. 501; 122 App. Div. 203; 156 U. S. 649; Beale & Wyman, Railroad Regulation, § 443; 79 N. W. 353; 72 N. W. 713; 54 Ark. 112; 15 S. W. 18; 60 Ark. 221. Appellant could only charge for the commodity used, in accordance with the statute. It is not entitled to make a profit from each patron; the business of the whole system should be considered.. One customer cannot be made to pay for or make up losses suffered by dealing with a large customer at reduced rates. 156 U. S. 649; Beale & Wyman on Railroad Regulations, § 443; *Ib.* 446, 60 Ark. 221; 33 L. R. A., 177 notes; 164 U. S. 578.

McCULLOCH, C. J. This case involves the construction of an act of the General Assembly of 1905, entitled "An act to regulate water, gas and electric companies in cities of the first and second class," the first two sections of which read as follows:

"Section 1. That all persons, partnerships or corporations owning or operating any company or enterprise for the furnishing of water, gas or electricity to the general public, in cities of the first and second class, in the State of Arkansas, in case they furnish meters to their patrons for the purpose of measuring such

water, gas or electricity (and in cities of the first class such meters shall be furnished upon demand without charge), are hereby required to supply printed tables to their patrons semi-annually, on the first day of January and July of each year, which said tables shall show the price charged per thousand units for such water, gas or electricity.

"Section 2. That all such water, gas or electric companies shall base their charges for such commodities upon the reading of said meters, and shall charge for same as per printed tables supplied patrons, and bills or statements rendered patrons shall show the number of units charged for."

The third section of the act prescribes a penalty against a company violating its provisions. Acts 1905, p. 701.

This controversy between appellant company and appellee, a resident of the city of Little Rock, arises over the attempt of the former to impose on the latter, before connecting his residence with the lighting plant so as to furnish it with electric current, a contract binding the latter to the following stipulation: "It is expressly understood and agreed that a minimum monthly charge of $1.11 for each separate month shall be paid, covering readiness to serve expense; but if the quantity of electricty consumed each month shall amount to said sum, no readiness to serve charge will be made."

Counsel for appellant contend that the act in question does not attempt to regulate charges for service, and that under a proper construction of its provisions the company is entitled, if it sees fit, to make an uniform minimum monthly charge against customers, sufficient to compensate it for its outlay and expense in keeping its machinery and appliances in readiness to adequately supply them with light at any moment. On the other hand, counsel for appellee contend that the act limits the charges to the actual readings of the meter, and that no charge can be made except for the quantity of current actually consumed, according to the rates fixed for all customers.

The act is in derogation of the right of freedom of contract, and should be strictly construed. *Watkins* v. *Griffith,* 59 Ark. 344; *St. Louis & S. F. Rd. Co.* v. *Cooksey,* 70 Ark. 481.

The first section is somewhat ambiguous, and the most that can be made out of it is that, in cities of the first class, com-

panies or concerns operating the business of furnishing water, gas or electricity to the public must furnish meters to patrons free of charge, and publish, in the manner prescribed, tables of prices charged per thousand units. The second section provides in substance that charges for such commodities shall be based on readings of the meters, and shall be in accordance with the published tables.

A close analysis of the statute does not discover any attempt to regulate charges further than to require publicity and uniformity. The manifest design of the act is to provide means whereby the consumer may be informed as to the exact charge for service, and to require uniformity of charges against all customers using like quantities of the commodity. Nowhere does this statute attempt to say that persons using different quantities of the commodity in a given time must be charged the same price per thousand units, nor that a minimum charge per month for service may not be imposed. The Legislature did not intend to compel the company to put in a meter and hold itself in readiness to serve those who use none of the commodity to be supplied, and the language of the act does not warrant the construction that the fixing of the minimum charge was to be forbidden. If that had been intended, it could have been clearly expressed. So it matters not whether it be termed a "readiness-to-serve charge," or a "minimum rate charge," it amounts to the same thing, and is not forbidden by the language of the statute. The fact that the chage for meters is expressly forbidden negatives, under the maxim *expressio unius est exclusio alterius,* any intention to forbid any other charge uniformly made against all patrons using the same quantity of the commodity.

A regulation of the charges for such service should be just to the company as well as to all patrons, so as to allow compensation to the former and reasonable, uniform rates to the latter, according to the amount of the commodity consumed. One class of patrons should not be favored at the expense of another. And we do not hold that a regulation of charges, based exclusively on the number of units of the commodity consumed, and confined to a fixed charge for each given number of units consumed, would not be sustained if found to be just to the company and all

its patrons. The Legislature has not, we think, attempted to do that.

The decree is reversed, and the cause remanded with directions to overrule the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

BATTLE, J., absent and not participating.

WOOD, J., dissenting.

MEDDOCK v. WILLIAMS.

Opinion delivered June 21, 1909.

1. APPEAL FROM JUSTICE OF THE PEACE—PLEADINGS.—Where a cause is appealed from a justice's court to the circuit court, the defendant may in the latter court plead the statute of limitations for the first time. (Page 94.)
2. TRIAL—REMARKS OF COUNSEL—OBJECTION.—Appellant cannot complain of remarks of opposing counsel which were not objected to in the lower court. (Page 94.)

Appeal from Greene Circuit Court; *Frank Smith,* Judge; affirmed.

Huddleston & Taylor, for appellant.

1. Statutes of limitation must be pleaded even before a justice of the peace. 25 S. W. 32; 3 *Id.* 3, 7.

2. It was an error to submit to the jury the wrong issue, and refuse the right one, viz, that plaintiff was to cultivate the land he cleared.

3. While no pleadings (written) were necessary, if a party elected to plead in writing he is bound thereby, and it was error to permit plaintiff to testify about twelve days' labor.

4. The improper conduct and language of counsel for plaintiff, without rebuke by the court, is sufficient for reversal. 70 Ark. 308; 63 *Id.* 174; 76 N. W. 462.

HART, J. On the 8th day of March, 1907, R. L. Williams brought suit against J. E. Meddock before a justice of the peace for $71.50 for work done in clearing, fencing and cleaning up some land of Meddock.

Meddock claimed that Williams was to cultivate all lands which he cleared; otherwise that nothing was due him for the clearing and fencing. He further pleaded payment, and also as a setoff an account for supplies alleged to have been furnished Williams by him during the previous year.

The trial in the justice's court resulted in a verdict and judgment in favor of Williams for $34.25. On a trial *de novo* in the circuit court, Williams interposed a plea of the statute of limitations to the setoff claimed by Meddock.

There was a jury trial and a verdict in favor of Williams for $25. From the judgment entered thereon Meddock has appealed to this court.

His counsel assigns as error the action of the court in allowing Williams to plead the statute of limitations for the first time in the circuit court. We hold that this was not error.

Sec. 1314 of Kirby's Digest provides that appeals from all inferior courts to the circuit court shall be tried *de novo*.

Sec. 4682 provides that "the same cause of action, and no other, that was tried before the justice shall be tried in the circuit court on appeal, and no setoff shall be pleaded that was not pleaded before the justice, if the summons was served on the person of the defendant."

In construing these two sections in the case of *Texas & St. Louis Railway* v. *Hall*, 44 Ark. 375, Chief Justice COCKRILL, speaking for the court, said: "If there had been no answer at all in the justice's court, the defendant could not be precluded from making defense to the action in the circuit court on appeal. The circuit court may permit amendments and allow new issues to be made, keeping clear of new causes of action and setoffs not presented in the justice's court."

This is conclusive of the question. Manifestly, the plea of the statute of limitations is neither a new cause of action nor a setoff.

In the re-direct examination of the plaintiff by Mr. Block, one of his attorneys, appears the following:

Q. "This man Reed, I will ask you if that is the same man that Jim (referring to the defendant) had called as a witness in your case?" A. "Yes, sir." Mr. Huddleston: "We object." Mr. Block: "I am going to show that this man Reed is one

of Jim's paid witnesses in any lawsuit that he has had."

Counsel for defendant assigns as error the action of the court in permitting Mr. Block to make the remarks above quoted in the presence of the jury, but counsel is in no attitude to complain of this because he did not make any objection thereto. It will be seen from an examination of the record on this point that counsel did not object to the remarks of opposing counsel of which he now complains; but that his objection was to the question that preceded the remarks.

Counsel for the defendant also assigns as error the action of the court in permitting certain questions to be asked witnesses. In each instance objections were made to the questions, and the objections were sustained. The objections to the questions having been sustained, we do not think any prejudice resulted to the defendant from the form in which they were asked.

Counsel for defendant also insists that the court erred in its instructions to the jury. After a careful examination of them, we are of the opinion that the instructions fully presented the respective theories of the parties, and fairly submitted the issues made by the pleadings and evidence.

Finding no prejudicial error in the record, the judgment is affirmed.

WAGNER v. ARNOLD.

Opinion delivered June 21, 1909.

TAXATION—OVERDUE TAX SALE—CONCLUSIVENESS.—Where proceedings were regularly had under the overdue tax act of March 12, 1881, resulting in a sale of land for taxes under the orders of the court, which was confirmed, all persons interested in such land were thereafter precluded from attacking such sale on account of defenses which could have been set up in such proceedings.

Appeal from Little River Chancery Court; *James D. Shaver,* Chancellor; affirmed.

L. A. Byrne, for appellant.

1. The sale of the land under the overdue tax act was a fraud on the part of the State. 75 Ark. 415; 44 Ark. 452; 49 Ark. 87. There were no intervening equities after the donation to the date of the conveyance to Jones. 76 Ark. 450; *Id.* 551.

2. The court had no jurisdiction under the overdue tax act, and its decree is void. 70 Ark. 207; 82 Ark. 295.

E. F. Friedell, for appellee.

1. The proceedings of the Little River court could only be reviewed on appeal. Appellants are estopped and barred by the sale under the overdue tax law. 50 Ark. 190; 49 Ark. 343; 72 Ark. 112.

2. The court had jurisdiction. 52 Ark. 400; 75 Ark. 9.

BATTLE, J. This suit involves the title to a certain tract of land. The appellant, William A. Wagner, claims it under a deed executed by James R. Berry, Auditor of Public Accounts of the State of Arkansas, on the 21st day of June, 1871, whereby the State conveyed to the appellant all its right, title and interest in and to the land in controversy as a donation, upon condition that he "will regularly and annually pay or cause to be paid the State and county taxes which shall thereafter accrue upon the land." The appellee, John H. Arnold, claims the land under a sale thereof made on the 8th day of November, 1882, under a decree of the Little River Chancery Court rendered in the exercise of the jurisdiction vested in it by an act entitled "An act to enforce the payment of overdue taxes," approved March 12, 1881. The land was sold under the decree to enforce the payment of the taxes for the years 1868-69-70-71. Treating the sale as ordered by the court in the exercise of its jurisdiction and regularly made according to the decree of the court and the law and approved, did it divest the appellant of the title to the land? The trial court held that it did.

This question has been decided in the affirmative by this court in *Williamson* v. *Mimms,* 49 Ark. 336, and *McCarter* v. *Neil,* 50 Ark. 188. In those cases the defendants sought to defeat the sales made under decrees of the court in the exercise of the jurisdiction vested in it by the act of March 12, 1881, to pay taxes, by showing that the taxes for which the sales were made had been paid before the institution of the action in which they were

ordered sold. This court treated the proceedings instituted under the act of March 12, 1881, as actions *in rem,* in which all persons interested in the lands affected were concluded by the decrees and orders of the court made and rendered in the exercise of its jurisdiction. The effect of this ruling was to hold that the decrees in those cases estopped or barred persons interested from attacking sales thereunder on account of defenses which they could have set up in the action *in rem* in which such decrees were rendered. So in this case the appellant is barred from attacking the sale under which appellee claims by his failure to defend in the action in which the sale was made, the court rendering the decree having acquired jurisdiction of the land in that case. *McCarter* v. *Neil,* 50 Ark. 191; *Clay* v. *Bilby,* 72 Ark. 101, 112. The existence of the facts in that case which this court has held confer jurisdiction has not been questioned; neither has the regularity of the sale in that case been challenged.

Decree affirmed.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* CARL.

Opinion delivered June 14, 1909.

1. CARRIERS—CONNECTING LINES—VALIDITY OF RESTRICTION OF LIABILITY.—Under the act of Congress of June 29, 1902, known as the Hepburn Act, a stipulation in a bill of lading for a through interstate shipment which exempts the initial or a connecting carrier from liability for loss caused by such carrier is invalid. (Page 99.)
2. SAME—LOSS OF FREIGHT—BURDEN OF PROOF.—Where goods are shipped over connecting lines of carriers on a through bill of lading, and on reaching their destination a box is missing, in an action therefor against the last carrier the burden of proof is on it to show that the loss did not occur on its line. (Page 101.)
3. APPEAL AND ERROR—PREJUDICE.—Where a judgment is right upon the undisputed testimony, no prejudice could have resulted to appellant from any instructions given by the court. (Page 101.)

Appeal from Benton Circuit Court; *J. S. Maples,* Judge; affirmed.

STATEMENT BY THE COURT.

This is an action to recover damages for loss of a box of household goods shipped from Lawton, Oklahoma, to Gentry, Arkansas. The suit was brought before a justice of the peace in Benton County, Arkansas, and judgment was rendered in favor of the plaintiff. The case was duly appealed to the Benton Circuit Court.

On a trial anew in that court, the plaintiff testified that on October 8, 1907, he delivered to the Chicago, Rock Island & Pacific Railway Company at Lawton, Oklahoma, two boxes and one barrel, containing household goods, and that he signed a contract and received a bill of lading. The goods were consigned to himself at Gentry, Arkansas. He received the barrel of goods, and also one of the boxes; but one of the boxes was never received. The value of the goods as testified to by the plaintiff exceeded the sum of $75.

The defense of the railway company was that the goods were shipped upon a contract between the plaintiff and the Chicago, Rock Island & Pacific Railway Company and its connecting carriers; that the defendant is one of the connecting carriers, and is entitled to the benefit of all the provisions of said contract; that said contract contained a stipulation that, in consideration that the plaintiff would receive the lower of two freight rates, in case of loss said goods should be valued at $5 per hundred weight. That all of the goods received weighed 400 pounds; that there was delivered to the plaintiff by the defendant 300 pounds of said goods.

The jury returned a verdict for plaintiff for $75, and the defendant has appealed from the judgment rendered.

Read & McDonough, for appellant.

Appellee entered into a contract limiting the liability, of which he had knowledge, not under coercion nor through fraud and imposition, but having full opportunity to read and understand it. The contract was legal and binding, and a verdict should have directed in favor of appellant. 50 Ark. 406 and authorities cited; 87 Ark. 339; 114 S. W. (Mo.) 1052; 88 Ark. 594; 84 Ark. 423; 73 Ark. 112; 83 Ark. 502; 162 Fed. 585; 204 U. S. 505; 63 N. E. 245. Having had oppor-

tunity to read the contract, as appellee admitted, it was error to admit his testimony that he did not understand the contract. 159 Fed. 960.

HART, J. (after stating the facts). Counsel for appellant urge that upon the undisputed evidence the court should have directed a verdict for appellant. They rely for a reversal on the clause in the contract with the initial carrier limiting the liability as to value in case of loss. They contend that the stipulations restricting the liability in case of loss were made for their benefit as well as for the benefit of the initial carrier, and base their contention on our decisions to that effect in the cases of *St. Louis, I. M. & S. Ry. Co.* v. *Weakley,* 50 Ark. 406; *St. Louis & S. F. Rd. Co.* v. *Burgin,* 83 Ark. 502, and cases cited. But in making their contention they have not taken into consideration the effect of the Hepburn amendment to the Interstate Commerce Act, which became effective on June 29, 1906, a date prior to the time the contract in question was made. That part of the Hepburn Act which applies to the present case is contained in section 20, which reads as follows:

"That any common carrier, railroad or transportation company, receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; *provided,* that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing laws."

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage or injury as it may be required to pay the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

The undisputed evidence shows that the initial carrier received the property for transportation from a point in one State to a point in another State, and the presumption, in the absence of evidence to the contrary, was, as will be seen from our decisions hereinafter referred to, that the goods were lost through the negligence of appellant, the last carrier.

The section of the Hepburn Act above quoted makes the carrier liable "for any loss, damage or injury to such property caused by it, * * * and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed."

The express terms of the act make the carrier liable for any loss caused by it, and provide that no contract shall exempt it from the liability imposed. It is manifest that the act renders invalid all stipulations designed to limit liability for losses caused by the carrier. Public policy forbids that a public carrier should by contract exempt itself from the consequences of its own negligence. For the same reason a statute may prohibit it from making stipulations in a contract which provide for such partial exemption. If the initial carrier is prohibited from making a contract limiting its own liability, it is obvious that it should not make a contract limiting the liability of its connecting carriers; for the section of the Hepburn Act under discussion provides that the carrier issuing the bill of lading may recover from the connecting carrier on whose line the loss occurs the amount of the loss it may be required to pay the owner.

"The act expressly invalidates all stipulations designed to limit liability for losses caused by the carrier." *In the matter of Released Rates,* 13 Interstate Commerce Reports, 550.

In the case of *St. Louis S. W. Ry. Co.* v. *Grayson,* 89 Ark. 154, we held that a restriction of the liability of a carrier to loss upon its own line is in violation of the Hepburn Act, making the initial carrier liable for damage to an interstate shipment, whether it occurs on its own line or on its connecting lines, and in support of the decision cited the case of *Smeltzer* v. *St. Louis & S. F. Rd. Co.,* 158 Fed. 649. The validity of this clause of the Hepburn Act has also been sustained by the Court of Appeals of the State of Georgia in the case of *Southern Pacific Company* v. *Crenshaw Brothers,* 5 Ga. App. 675.

Therefore, we hold that the contract in question was prohibited by the terms of the Hepburn Act, and is invalid in so far as it attempts to limit the liability of the carrier in case of loss caused by it.

This case is distinguished from the case of *St. Louis, I. M. & S. Ry. Co.* v. *Furlow,* 89 Ark. 404, and *St. Louis & S. F. Rd. Co.* v. *Keller,* 90 Ark. 308, where we held that a stipulation in a contract for an interstate shipment which required notice in writing of the loss to be given within a specified time, if reasonable, was not in conflict with the provisions of the Hepburn Act. The stipulation in question there did not exempt the carrier from any liability imposed by the Hepburn Act. They were mostly rules or regulations adopted by the carrier for the purpose of securing it from fraud and imposition.

Having held the contract of shipment invalid in so far as it restricted the liability of the carrier as to the value of the goods shipped in case of loss because such restriction was in violation of the provisions of the Hepburn Act, the cause stands as if the Chicago, Rock Island & Pacific Railroad Company had accepted the goods for shipment from Lawton, Oklahoma, to Gentry, Arkansas, and the appellant was the last carrier of the goods.

"Where goods are shipped over connecting lines of carriers on a through bill of lading, and on reaching their destination a box is missing, in an action therefor against the last carrier the burden of proof is on it to show that the loss did not occur on its line." *St. Louis S. W. Ry. Co.* v. *Birdwell,* 72 Ark. 502. To the same effect see: *Kansas City So. Ry. Co.* v. *Embry,* 76 Ark. 589; *Midland Valley Rd. Co.* v. *Hale,* 86 Ark. 483.

In this case the undisputed evidence shows that the goods were delivered to the initial carrier, and there is nothing to rebut the presumption that they were received by appellant, the last carrier, and lost through its negligence. Hence, under the undisputed evidence as disclosed by the record, appellant was liable for the amount recovered.

The judgment being right upon the undisputed testimony, no prejudice could have resulted to apellant from any instruction given by the court. *St. Louis S. W. Ry. Co.* v. *Grayson, supra.*

Therefore it will not be necessary to discuss the correctness of the instructions given by the court, and the judgment will stand affirmed.

WARREN VEHICLE STOCK COMPANY v. SIGGS.

Opinion delivered June 14, 1909.

1. MASTER AND SERVANT—ASSUMED RISK.—While as a rule the servant assumes the risks that are ordinarily incident to the service in which he is employed, he does not assume those risks of which, by reason of inexperience or some known physical defect, he does not appreciate the danger. (Page 105.)
2. SAME—NEGLIGENCE IN FAILING TO WARN SERVANT.—A master is guilty of negligence if he employs an inexperienced servant and neglects to caution him as to risks which are not obvious to him, by reason of an infirmity of vision known to the master, though the risks are obvious to one having good eyesight. (Page 106.)
3. SAME—WHEN RISK NOT ASSUMED.—An inexperienced servant, having a defective eyesight, was justified in relying upon the master's assurance that he could safely perform certain service with such defective eyesight, without being held to have assumed the risk thereof. (Page 106.)
4. SAME—EFFECT OF CONTRIBUTORY NEGLIGENCE.—A servant cannot recover for the master's negligence if he was guilty of any negligence which proximately contributed to the injury of which he complains. (Page 107.)
5. SAME—CONTRIBUTORY NEGLIGENCE—WHEN QUESTION FOR JURY.—Where fair-minded men might reasonably draw different conclusions from the evidence as to whether the plaintiff was guilty of contributory negligence, the question was properly submitted to the jury. (Page 107.)
6. SAME—INSTRUCTION.—Where it was a question for the jury whether the plaintiff was guilty of contributory negligence, it was error to instruct the jury that defendant was liable if it was negligent, regardless of plaintiff's contributory negligence. (Page 108.)

Appeal from Bradley Circuit Court; *Henry W. Wells*, Judge; reversed.

Purcell & Bradham and *Murphy, Coleman & Lewis*, for appellant.

Before an employee is exempted from the risk incident to a dangerous work on the ground that it was undertaken under the immediate command of his superior, or from contributory negligence under the circumstances in attempting such work, it is necessary (1) that the danger be latent, or exist in consequence of some altered condition of the service caused by the negligence of the master; and (2) the circumstances must be such that the command may be regarded as carrying an implied assurance that it is safe for the employee to obey it. 81 Ark. 343; 77 Ark. 367.

Herring & Williams, for appellee.

It is the duty of the master to warn and instruct his servant as to dangers of which he knew, or ought, in the exercise of reasonable care and diligence, to know, and of which the servant has no knowledge, actual or constructive. 26 Cyc. 1165, div. "D;" 39 Ark. 37; 58 Ark. 177; 79 Ark. 23. Appellee's protest against doing the work because it was "dangerous work" was a general statement, which implied no knowledge of the specific dangers involved. Moreover, his positive testimony was that he was inexperienced, and did not know the dangers involved. Other testimony shows that he was awkward from the first, and did not seem to know much about it. 53 Ark. 117. Under the facts in proof it was a question for the jury to say whether he assumed the risk. 115 S. W. (Ark.) 175; 79 Ark. 57.

FRAUENTHAL, J. The plaintiff, Joe Siggs, instituted this suit against the defendant, the Warren Vehicle Stock Company, to recover damages in the sum of $2,500 for a personal injury which he alleged was received by him through the negligence of the defendant, while he was in its employ. The evidence tended to establish the following facts:

The defendant owns and operates a sawmill plant; and on January 6, 1907, it employed the plaintiff to perform various duties about the plant, and for five or six days the plaintiff worked as second off-bearer at the saw, and for three or four days prior to the day of the injury and on the 23d day of January, 1907, the day of the injury, he was employed as first off-bearer at the saw. He was 51 years old, but an awkward and inexperienced workman. He was ignorant of the manner of doing the work of first off-bearer at the saw, and had never done service in that employment before. Some years before the injury involved in this case was received, his eyesight became greatly impaired, so that at the time of the injury herein his sight was very defective. When the defendant's foreman employed him to do the work of first off-bearer, the plaintiff told him that his eyesight was defective, and the foreman assured him that he could do the work safely, and that he only wanted him to do that work for a short time when he would get another man. The evidence also tended to show that the foreman knew of plaintiff's inexperience in the performance of the duties of this work. The plaintiff testified that he

was not instructed as to the manner in which he should do the work of first off-bearer, and that he was not warned of the dangers incident to the work. In the performance of the duties of this work the rule was that the workman should not put his hands within eighteen inches of the saw and should not take hold with his hands of slabs that were as short as six feet; but the plaintiff received no instructions as to this. On the day of the injury the plaintiff was working at a circular saw at the rear of which was a circular splitter. On this occasion six-foot hickory logs were being sawed into slabs, and as a slab was passing through the saw it either got caught between the splitter and saw or was falling, and the plaintiff attempted to take hold of it with his hand. His hand missed the slab and came in contact with the saw, which cut off two of his fingers.

Several instructions were given at the request of the plaintiff, amongst which was the following:

"3. The court instructs you that if you believe by a preponderance of the evidence in this case that plaintiff, Joe Siggs, was employed by defendant, Warren Vehicle Stock Company, through any of its agents having authority to employ laborers, and that he was assigned to perform the services of first off-bearer at defendant's mill plant, and that the said services were attended with great or unusual dangers, and that plaintiff, Joe Siggs, on account of weakness of his eyesight or from any other mental or physical defect, was incapable of detecting and appreciating the dangers and perils incident to the employment, and from weakness of his eyesight or other mental or physical defect he was not conscious of the constant danger he was in, and was not aware of how close he placed his hands to the circular saw, or other dangerous machinery, and that he did not know he was unfit to discharge the duties to which he was assigned, on account of his weak eyes or other infirmity, and that defendant, Warren Vehicle Stock Company, discovered his unfitness to do the work around such dangerous machinery, or could have discovered plaintiff's unfitness for the service by using that amount of care and oversight which a prudent man would exercise in his superintending control over his servants engaged in the discharge of duties attended with great or unusual dangers, and that defendant, after discovering plaintiff's unfitness for the service, or after

it could have discovered his unfitness for the place by a proper exercise of its superintending control over him, in that degree exercised by prudent business men over their servants engaged in duties attended with great or unusual dangers, and did not remove him from the place of danger, nor notify him of his unfitness for the work, and of the danger he was in, but permitted him to remain there, under the circumstances, until he was injured, as alleged in the complaint, on account of defendant's neglect of such duty, then the court instructs you that for such neglect defendant is liable, and it makes no difference if plaintiff was guilty of contributory negligence in the case of his injury under the circumstances."

To the giving of this instruction the defendant duly saved its exceptions. A number of instructions were given at the request of the defendant, amongst which was the following:

"15. The defendant has pleaded that the accident happened by reason of the negligence of the plaintiff himself or his fellow-servants. The law is that one who contributes to his own injury cannot recover damages therefor. If, therefore, you should find from the evidence that the plaintiff was guilty of any negligence at or before and near the time of the injury, which contributed to the injury, your verdict will be for the defendant, even though you may also find that the defendant was also guilty of negligence in regard thereto, provided they did not discover the danger to the plaintiff beforehand in time to prevent the injury."

The jury returned a verdict in favor of the plaintiff for $200; and from the judgment entered thereon the defendant brings this appeal.

It is urged by the defendant that the injury which was received by the plaintiff was due to the risk which is ordinarily incident to the service in which he was engaged, and which was therefore assumed by him; and also that the undisputed evidence shows that the injury was occasioned by the negligence of the plaintiff.

It is true that usually the servant assumes the risks that are ordinarily incident to the service in which he is employed. But this is not true of a servant who, because of his inexperience or some known physical infirmity, does not know or appreciate the dangers of the service. It is the duty of the master to see that the servant is competent for his position. There is an obligation

resting on the master to see that the servant possesses the ordinary mental and physical qualifications which will enable him to do the work without exposing him to greater dangers than the work necessarily entails. If the master knows that the servant by reason of his ignorance or inexperience is unable to appreciate the dangers of the employment, it is his duty to give him such instructions and warning of the dangers incident to the work as will reasonably enable such servant to understand the duties of the work required and its perils.

As is said by Judge BATTLE in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Inman,* 81 Ark. 591: "It would be a breach of his duty to expose a servant who by reason of his youth or inexperience is not aware of or does not appreciate the danger incident to the work he is employed to do or the place he is engaged to occupy, without first giving him such instructions and caution as would, in the judgment of men of ordinary minds, understanding and prudence, be sufficient to enable him to appreciate the dangers and the necessity for the exercise of due care and caution and to do the work safely, with proper care on his part." *Fones* v. *Phillips,* 39 Ark. 17; *Fort Smith Oil Co.* v. *Slover,* 58 Ark. 168; *Ford* v. *Bodcaw Lumber Co.,* 73 Ark. 49; *King-Ryder Lumber Co.* v. *Cochran,* 71 Ark. 55; *Arkadelphia Lumber Co.* v. *Henderson,* 84 Ark. 382; *Arkansas Central Rd. Co.* v. *Workman,* 87 Ark. 471.

The servant does not assume the risks of the employment if by reason of his inexperience he is not acquainted with the dangers that are incident thereto, or by reason of his known physical infirmity he is not able to observe such dangers. What might be obvious and patent to a man whose vision is unimpaired is not necessarily so to a man whose eyesight is very defective. What therefore would be an act of contributory negligence on the part of the one might not under the circumstances of the case be such negligence on the part of the other, if on account of the known physical infirmity the danger was not obvious and patent to him. And therefore, if the master under such circumstances employs such a servant and fails to instruct and warn him, the master is guilty of negligence. *Emma Cotton Seed Oil Co.* v. *Hale,* 56 Ark. 232; *St. Louis, I. M. & S. Ry. Co.* v. *Touhey,* 67 Ark. 209; *Southern Cotton Oil Co.* v. *Spotts,* 77 Ark. 458; *West-*

ern Coal & Mining Co. v. *Burns,* 84 Ark. 74; 1 Labatt on Master and Servant, §§ 240, 252; 26 Cyc. 1177.

In this case there was evidence tending to prove that the defendant knew of the inexperience of the plaintiff to do the work required of him in this employment, and also knew that by reason of his defective eyesight the plaintiff would incur greater perils in the performance of this service at the saw; and with this knowledge the defendant failed to instruct the plaintiff or warn him of the dangers of the service. On the contrary, there is evidence tending to prove that defendant's foreman assured the plaintiff that he could safely perform the service with the defective eyesight. The plaintiff with his inexperience had a right to rely on this assurance that it was safe for him with his defective eyesight to do this work without being held to have assumed the risk thereof. *Fordyce* v. *Edwards,* 60 Ark. 438; *King-Ryder Lumber Co.* v. *Cochran,* 71 Ark. 57; *Dalhoff Construction Co.* v. *Luntzel,* 82 Ark. 82.

Under the circumstances of this case, therefore, we think there was sufficient evidence from which the jury might find that the defendant was guilty of negligence, by reason of which the injury was incurred by plaintiff.

But it is the well settled law of this State that the negligence of the master does not relieve the servant of using due care; and if his own negligence directly contributed to the injury, he cannot recover, although the master was also guilty of negligence. Here there is no doctrine of comparative negligence. If both parties have been guilty of negligence, the law will not undertake to apportion the degree of negligence between them; but if the plaintiff was guilty of any negligence which proximately contributed to the injury, he cannot recover. *Southwestern Tel. & Tel. Co.* v. *Beatty,* 63 Ark. 65; *Walker* v. *Louis Werner Sawmill Co.,* 76 Ark. 436; *Southern Cotton Oil Co.* v. *Spotts,* 77 Ark. 458; *St. Louis, I. M. & S. Ry. Co.* v. *Jackson,* 78 Ark. 100; *Harris Lumber Co.* v. *Morris,* 80 Ark. 261; 21 Am. & Eng. Ency. Law, 498.

In this case the question of whether the plaintiff used due care under the circumstances or was himself guilty of contributory negligence was peculiarly a question for the jury to determine. There was evidence tending to show that the plaintiff did

not use such care as an ordinarily prudent person would have used under similar circumstances, and although with similar impairment of eyesight and inexperience. At least, "fair minded, reasonable and capable men may honestly draw different conclusions from the facts" as to whether the plaintiff was guilty of contributory negligence. Therefore, the question as to whether or not the plaintiff was guilty of contributory negligence should have been submitted to the jury under all the facts and circumstances of the case.

But in the above instruction number 3 given at the request of the plaintiff the court told the jury: "then the court instructs you that for such neglect defendant is liable, and it makes no difference if plaintiff was guilty of contributory negligence in the case of his injury under the circumstances." This was prejudicial error. And the effect of this error was not removed by the giving of the above instruction number 15 at the request of defendant. This latter instruction seems drafted to present the doctrine of negligence on the part of the defendant after a discovered peril. But there is no evidence in the case upon which to base such an instruction; and it was therefore abstract, and should not have been given. It does not present the contrary of the erroneous statement relative to contributory negligence set out in said instruction number 3 given at the request of plaintiff. We find no other error in the case.

On account of the giving of said instruction number 3 on the part of plaintiff, the judgment will be reversed, and the cause remanded for a new trial.

MIDLAND VALLEY RAILROAD COMPANY v. MORAN BOLT & NUT MANUFACTURING COMPANY.

Opinion delivered June 14, 1909.

1. APPEAL AND ERROR—CONCLUSIVENESS OF COURT'S FINDINGS.—The findings of the circuit court, sitting as a jury, are as conclusive as the verdict of a jury. (Page 110.)

2. MECHANICS' LIEN—RUNNING ACCOUNT.—Evidence that materials were furnished from time to time for the construction of a railroad without specific agreement as to the amount to be furnished or the time within which they were to be furnished, and that there was during the time they were being furnished a reasonable expectation that more would be required for use in the construction of the railroad, was sufficient to sustain a finding that they were furnished under a running account, which constituted an entire demand. (Page 110.)

3. SAME—WHEN LIEN BEGINS TO RUN.—Where various items are furnished upon a running account, the last item thereof is the date from which the limitation as to the time of filing a mechanics' lien begins to run. (Page 111.)

Appeal from Sebastian Circuit Court; *Daniel Hon,* Judge; affirmed.

Ira D. Oglesby, for appellant.

1. All the items are barred except the last item, as the materials were furnished under *separate* orders, in pursuance of a general agreement to sell such material as might be needed, and not under a single continuing contract. Phillips on Mech. Liens, § 325; 33 Mo. 31; 79 Ala. 156.

2. The defendant's requests 5 and 6 should have been given, as the suit was not commenced within one year.

Robert A. Rowe, for appellee; *Kineady & Kineady,* of counsel.

1. Every question was settled by 80 Ark. 399, except the amount of material furnished and used. The statute of limitations must be pleaded; if not, it is waived. 77 Ark. 379.

2. The questions are *res judicatae.* 44 Ark. 383; 55 *Id.* 170; 60 *Id.* 50; 63 *Id.* 141.

3. The jury settled the amount furnished, there was evidence to sustain the verdict, and this court will not disturb it. 25 Ark. 474; 31 *Id.* 163; 22 *Id.* 213; 23 *Id.* 131. There must be a total want of evidence to support it before it will be disturbed. 40 Ark. 144; 60 *Id.* 250; 36 *Id.* 260. The finding of a court setting as a jury is equally conclusive. 38 Ark. 139; 45 *Id.* 41; 50 *Id.* 305.

4. The statute only began to run from the last item furnished.

HART, J. The Moran Bolt & Nut Manufacturing Company brought suit in the circuit court of Sebastian County for the

Greenwood District to enforce a lien for materials furnished to Mike Kelley in the construction of the Midland Valley Railroad. On appeal this court held:

"The judgment in this case was correct in form in fixing a lien on all the property of appellant railroad in the State of Arkansas, but it was erroneous in allowing that lien to be made up of material furnished and used in the construction of appellant's road in the Indian Territory." *Midland Valley Rd. Co.* v. *Moran Bolt & Nut Mfg. Co.*, 80 Ark. 399.

Upon a new trial of the cause, the circuit court sitting as a jury found that $1,794.21 for the material furnished by plaintiff entered into the construction of the road in the State of Arkansas; that $913.35 had been paid upon the same, leaving a balance of $880.86, for which plaintiff was entitled to a lien on defendant's road; and from that judgment this appeal is taken.

It is earnestly insisted by counsel for the defendant that the testimony shows that materials of the value of $1,517.58 and no more were used in the construction of defendant's railroad in the State of Arkansas; and that, after deducting the credits of $913.35, the judgment of the court should have been for $604.23 instead of $880.86.

It has always been the settled rule in this State that the findings of the circuit court sitting as a jury are equally as conclusive in this court as the verdict of a jury. The rule has been recognized and followed so often as to render a citation of authorities unnecessary.

Mike Kelley, the sub-contractor, in his testimony says that all the shipments of material consigned to him at Montreal, Arkansas, were used in the construction of the road in the State of Arkansas. He undertakes to give the date and amount of each shipment, and in the aggregate they amount to $1,794.21. While his testimony is considerably weakened by cross-examination, and is contradicted by that of the engineer for the railroad company, who made an estimate of the amount that was so used, we cannot say that there was no evidence to support the finding of the court.

Counsel for appellant also urges that the court erred in not sustaining its plea of the statute of limitations. He contends that

each order was a separate contract, and that the lien accrued as each separate order was furnished.

In the case of the *Kiser Lumber Co.* v. *Mosely,* 56 Ark., p. 547, in discussing the time in which the lien should be filed in cases where there was no specific agreement as to the amount to be furnished or the time within which they were to be furnished, and where there was reasonable expectation that further material would be required, the court said: "In such a case, if the materials were furnished at short intervals, and were appropriate to the condition and progress of the building, a presumption would arise that it was understood from the beginning that the 'material man was to furnish the same' for the construction of the building as the same should be required; and the account therefor should be considered as one continuous account and one demand; and the last item thereof would be 'the date from which the limitations of the time of filing should be taken.' "

We think the evidence in this case was sufficient to bring the case within the principles there announced. There was a continuous dealing under the contract. The materials were furnished from time to time on bank account. There was, during the entire time that the materials were being furnished, a reasonable expectation that more would be required for use in the construction of the railroad, and that the plaintiff would be called upon to furnish the same. Hence the court was warranted in finding that the various orders for materials constituted a running account, and was therefore one entire demand, which accrued only when the last item was furnished. Phillips on Mechanics' Liens (3d Ed.), § 325; Jones on Liens (2d Ed.), vol. 2, § § 1435 and 1436, and cases cited.

Finding no prejudicial error in the record, the judgment will be affirmed.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY v. MCDERMITT.

Opinion delivered June 21, 1909.

1. GARNISHMENT—INVALIDITY OF JUDGMENT AGAINST DEFENDANT—REMEDY OF GARNISHEE.—While a judgment against a garnishee cannot lawfully be rendered until a judgment has been rendered against the defendant in the main action, the remedy of the garnishee, where the judgment rendered against the defendant is void for this reason, is not to apply for certiorari to quash such judgment but to set up such invalidity as a defense in the garnishment proceeding, and if a judgment be recovered against him therein his remedy outside of the court in which it was rendered would be by appeal or writ of error, unless his appeal was lost without fault on his part. (Page 116.)

2. CERTIORARI—LOSS OF RIGHT OF APPEAL.—A petition for certiorari to review a judgment against petitioners rendered in a mayor's court which alleges that petitioner mailed to the mayor an affidavit and bond for appeal, which petitioner believes was received by the mayor, but that same have been lost or mislaid, fails to show that petitioner lost the right of appeal without fault, since, if the papers were received in time, he could have supplied them on proof of loss, and, if they were not received in time, he still had time to ascertain that fact and perfect the appeal. (Page 116.)

Appeal from Baxter Circuit Court; *John W. Meeks,* Judge; affirmed.

Horton & South, E. B. Kinsworthy and *Lewis Rhoton,* for appellant.

1. The judgment was void for want of service of summons or appearance by him; also because there was no guardian *ad litem* for the minor. Kirby's Digest, § 6023-4; 40 Ark. 56. There must be a valid judgment on which to base garnishment. 32 Ark. 423; 70 Ark. 127; Drake on Att., 460, 711. A void judgment is no judgment. Freeman on Judgm. (3d Ed.), § 117; 1 Black on Judgm., § 70. A judgment without notice is void. Kirby's Digest, § 4424; 58 Ark. 181, 187; 43 Ark. 230; 52 Ark. 373. Garnishment proceedings are purely statutory, and the statute must be complied with. Drake on Att., § 451-451a; 14 A. & E. Enc. Law (2d Ed.), 739, 747, V. 1.

2. The circuit court passed on the question and declared the judgment void; this court will presume that the proper defense

and showing were made. Kirby's Dig., § 6133; 51 Ark. 371; 26 Ark. 655; 55 Ark. 127. Failure to move to make the petition more definite and certain waived the defect. Kirby's Dig., § 6147; 71 Ark. 562; 60 Ark. 45; 58 Ark. 13.

3. Certiorari the proper remedy; the circuit court exceeded its jurisdiction, and the right of appeal was unavoidably lost. 52 Ark. 220; 15 Ark. 43; 25 Ark. 34; 25 Ark. 435; 44 Ark. 513.

Allyn Smith, for appellee.

1. The proceeding was based on *due notice* served. The evidence is not in the record, and this court will not review. The writ was discretionary. 117 S. W. 770.

2. Courts take judicial notice of all prior proceedings in a cause before them. 19 Wis. 539; 16 Kan. 475; 82 Ill. 188; 55 Tex. 193.

3. Jones was served, and entered his appearance. The return is sufficient, and the judgment, not being appealed from, cannot be collaterally attached.

4. The application was for a preliminary writ of certiorari. Such a practice is unknown in our law. Kirby's Dig., § 1188, and sub. 3.

BATTLE, J. This is an appeal from the order of the Baxter Circuit Court refusing to grant appellant a writ of certiorari compelling the mayor of the incorporated town of Cotter to send up the record in the case of Theressa McDermitt, plaintiff, *v.* J. L. Jones, defendant, St. Louis, Iron Mountain & Southern Railway Company, garnishee. The petition for certiorari was as follows:

"Comes the garnishee in the above cause and shows to the court, that on the 8th day of April, 1908, C. T. Cannady, as mayor of the incorporated town of Cotter, Baxter County, Arkansas, entered a judgment by default against the garnishee in this cause for $43.41, a copy of which is herewith filed as 'Exhibit A' hereto. That on the 25th day of April, 1908, Tom M. Mehaffy, as attorney for said garnishee, made the necessary affidavit for an appeal from said judgment, and executed a good and sufficient bond therefor, and sent the same by due course of mail to H. D. Routzong, mayor of said town, successor in office

to said C. T. Cannady, and affiant believes the same was received at said office of said mayor on the 26th day of April, 1908, and has been lost or mislaid. That on the 8th day of June, 1908, Z. M. Horton, attorney for said garnishee, made and offered to file with said mayor, H. D. Routzong, the necessary affidavit and bond to perfect said appeal, which filing was refused by the court. It further said, the judgment against J. L. Jones on which said garnishment was issued was and is absolutely void, and had been so declared by the Baxter Circuit Court, on motion of said J. L. Jones, before the issuance of said garnishment. That said judgment was a judgment entered against a minor without an answer by his guardian or guardian *ad litem,* and is without jurisdiction and void. Wherefore said garnishee prays the court to make an order extending the time for perfecting said appeal, and that the same be allowed by this court, or that this petition be taken and considered as an application for certiorari, and that all the necessary orders be made to bring said judgments and proceedings into this court, and that said judgments be quashed. and for all proper relief."

"Exhibit A" referred to in the petition was as follows:

"On the 23d day of August, 1907, issued garnishment and summons against the defendant, returnable on the 2d day of September at 10 o'clock A. M., and delivered the same to Charley Moore, marshal of the incorporated town of Cotter. On the 2d day of September the said writ having been returned duly served on the defendant as follows: 'Received the within writ the 23d day of August, 1907, and served the same on the 23d day of August, 1907, by delivering a copy thereof to J. McDermitt, the person with whom the said defendant lived, and said defendant being a minor over the age of fourteen years, and said minor not being at home, all in the town of Cotter, Baxter County, Arkansas;' and this cause coming on for trial on the 2d day of September, 1907, at 10 A. M., and, the defendant not appearing, the case was adjourned to 1 P. M., and, the defendant still not appearing, the court appoints J. B. Ward as guardian *ad litem,* and continues this case until September 3, 1907, at 9 A. M. And on this 3d day of September, 1907, this cause coming for hearing, and the plaintiff appearing by Allyn Smith, her attorney, and the defendant not appearing in person but appearing by his guardian

ad litem heretofore duly appointed; and it appearing that the defendant, J. L. Jones, was a minor over the age of fourteen years, and was duly served with summons as provided by law, and the court, having heard the evidence and being duly advised in the premises, doth find that the defendant, J. L. Jones, is indebted to the plaintiff for necessaries in the sum of $30.60 as alleged in her complaint; it is therefore considered, ordered and adjudged that plaintiff do have and recover of and from the defendant the said sum of $30.60, and that she recover her costs herein taxed at $....., and hereof let execution issue.

"March 28, 1908, writ of judicial garnishment issued to the St. Louis, Iron Mountain & Southern Railway Company at the request of the plaintiff, returnable April 8, 1908, at 10 o'clock A. M.

"April 8, 1908. Now, on this day this case coming on to be heard, and the plaintiff appearing and the garnishee failing to appear, the court waits three hours and until 1 o'clock P. M., and the garnishee, still not appearing, makes default. And it appearing that writ of judicial garnishment heretofore issued had been duly served by leaving a copy thereof with J. W. Wooley, the station agent of the garnishee at Cotter, Baxter County, Arkansas, on the 28th day of March, 1908, and by said default said garnishee confesses that it has in its possession money of the defendant sufficient to satisfy the judgment of the plaintiff against defendant. It is by the court considered, ordered and adjudged that the plaintiff do have and recover of and from the garnishee, the St. Louis, Iron Mountain & Southern Railway Company, the amount of the judgment and costs recovered by the plaintiff against the defendant, to-wit: ($43.41) forty-three and 41-100 dollars, and hereof let execution issue."

On the 23d day of September, 1908, the foregoing petition came on for hearing in the Baxter Circuit Court, and the parties thereto entered their appearance, and the court, after hearing the petition, and "Exhibit A," denied the writ of certiorari prayed for, and rendered judgment against petitioners for cost, and they appealed.

It appears from the foregoing petition and exhibit that Theressa McDermitt brought an action on the 23d day of August, 1907, before C. T. Cannady, mayor of the incorporated

town of Cotter, against J. L. Jones, a minor, to recover $30.60 for necessaries furnished by her to him, and on the third day of September, 1907, recovered judgment against him for that amount; that plaintiff, Theressa McDermitt, on the 28th day of March, 1908, sued out a writ of garnishment against the St. Louis, Iron Mountain & Southern Railway Company upon the judgment recovered by her, returnable before the mayor of Cotter on the 8th day of April, 1908, on which day it was returned duly served; and that, the garnishee having failed to appear on the day summoned, the mayor rendered judgment against it for $43.41. To quash this judgment appellant asked for a writ of certiorari.

Appellant insists that the judgment against it should be quashed, because there was no service of summons on Jones in the action against him before the mayor, no legal appointment of a guardian *ad litem,* and no appearance by him in that action, and by reason thereof the judgment against him was void.

It is true that a judgment against the garnishee cannot lawfully be rendered until judgment has been rendered against the defendant in the main action. *Norman* v. *Poole,* 70 Ark. 127. But where that judgment has been rendered, and cannot be enforced on account of failures to comply with the statutes, such failures should be set up by the garnishee as a defense. The statute provides that when any plaintiff may have obtained a judgment, and shall have reason to believe that any other person is indebted to the defendant, or has in his hands or possession goods and chattels, moneys, credits, and effects belonging to such defendant, such plaintiff may sue out a writ of garnishment, setting forth such judgment and commanding the officer charged with the execution thereof to summon the person therein named, as garnishee, etc. By such writ the garnishee is called upon to set up any defense he has against the same. If the judgment mentioned in the writ be void, he should set up that fact as a defense. If a judgment should be recovered against him in such proceedings, his remedy outside of the court in which it was rendered would be by appeal or writ of error, unless he has lost the appeal through no fault of his own.

Appellant stated in his petition that judgment was rendered against it as garnishee on the 8th day of April, 1908, and that

on the 25th day of the same month its attorney made the necessary affidavit and bond for appeal from said judgment, and sent the same by mail to the mayor of Cotter, and believes the same was received on the 26th day of April, 1908. If such be the fact, his appeal was taken in time, and he could have supplied affidavit and bond after showing the loss of them. If they were not received in due time, he still had time to ascertain that fact and take the appeal within the time allowed for that purpose. Consequently it failed to show that it lost the right of appeal through no fault of its own.

Judgment affirmed.

LEIGH v. TRIPPE.

Opinion delivered June 21, 1909.

1. TAXATION—RECORD OF DELINQUENT SALES—SUFFICIENCY.—The requirement in Kirby's Digest, § 7092, that the county clerk shall keep a record of lands sold for taxes to individuals separate from the record of lands sold to the State is directory merely, and a sale of lands to the State for nonpayment of taxes is not rendered invalid by noncompliance with such requirement. (Page 118.)
2. SAME—CLERK'S CERTIFICATE—FORM OF.—Under Kirby's Digest, § 7086, requiring the county clerk to record the delinquent list and notice of sale of lands in a book to be kept for that purpose "stating in what newspaper said list was published, and the date of publication, and for what length of time the same was published," etc., a certificate is sufficient which follows the language of the statute. (Page 121.)

Appeal from Desha Chancery Court; *Zachariah T. Wood,* Chancellor; reversed.

Baldy Vinson, for appellants.

1. A failure to keep *separate* records as required by statute is not fatal to the tax sale. Kirby's Digest, § § 7092, 7107; 61 Ark. 39; 70 Ark. 328; 61 Ark. 414; 72 Ark. 375; 76 Ark. 450; 49 Ark. 275. The provisions are not mandatory. The clerk kept the record required by law.

I. Bernhardt, for appellees.

2. The provisions of § 7092, Kirby's Digest, are mandatory. 61 Ark. 414; 70 Ark. 328; 61 Ark. 36; etc.

3. No such record was kept.

4. The delinquent list was not legally advertised. 70 Ark. 327. The record alone can be looked to as evidence. 55 Ark. 218.

McCULLOCH, C. J. This is an action, instituted by the appellees in the chancery court of Desha County against appellants to quiet title to a tract of land claimed by them as heirs at law of William F. Trippe, deceased, who owned it. The land was wild and unoccupied, and appellants claim title under a forfeiture to the State for non-payment of taxes. It was forfeited for the taxes of the year 1897, and appellants purchased it from the State in 1904. The appellees tendered to appellants the amount of the taxes, penalty and costs, with interest, for which the land was sold, together with all taxes which would have become due for subsequent years if the lands had remained on the tax books. The court rendered a decree in accordance with the prayer of the complaint, canceling the tax forfeiture and subsequent deed to appellants.

The principal attack on the validity of the forfeiture is grounded on the fact that the clerk failed to keep a separate record, as required by law, of the lands forfeited to the State, and the chancellor based the decree declaring the forfeiture to be void on that alleged defect in the record. The clerk made a single record, duly certified, of all the lands sold that year, both to individuals and to the State, but did not make a separate record of the sales to the State.

The statute prescribing the duties of the clerk in this regard is as follows:

"The clerk of the county court shall attend all such sales of delinquent lands and lots, town or city lots, or parts thereof, made by the collector of the county, and shall make a record thereof in a substantial book, therein describing the several tracts of land, town or city lots, or parts thereof, as the same shall be described in the advertisement aforesaid, stating what part of each tract of land, town or city lot was sold, and the amount of taxes, penalty and costs due thereon, and to whom sold; and he shall record in a separate book, to be kept for that purpose,

each tract of land, town or city lot sold to the State, together with the taxes, penalty and costs due thereon. Immediately after such sale the clerk of the county court shall make out and certify to the auditor of State a copy of each of said sale lists as recorded in said book, together with an abstract thereof showing the total valuation of the property contained in each, and the total amount of the taxes, penalty and costs thereon in each." Kirby's Digest, § 7092.

The statute, literally construed, contemplates that the clerk shall keep two separate records of the lists of lands sold to individuals and the State, describing the several tracts sold and stating the amount of taxes, penalty and costs due thereon and to whom sold. It obviously does not mean that the first mentioned record must contain a list of the lands sold to the State, for it requires that the record shall state "what part of each tract of land, town or city lot was sold," and there is no provision in the statute for less than the whole of the tract or lot assessed to be bid off in the name of the State. If no person offers the full amount of the taxes, penalty and cost due thereon, the whole of it is bid off in the name of the State. Sec. 7087, Kirby's Digest. It cannot be said that the statute, when literally construed, requires that the list of lands sold to the State must be recorded in a separate book, for the statute is contradictory in that respect. It does say that the clerk shall "record in a separate book" the list of lands sold to the State; but the concluding paragraph of the section provides that he shall certify to the auditor "a copy of each of said lists as recorded in said book," showing that both lists are recorded in the same book, but separately. This shows that the framers of the statute did not intend to provide with accuracy of detail the particular method in which the record should be kept, but that the end to be attained was that a permanent record should be kept from which the owner of the land could ascertain the amount of taxes, penalty and costs for which his land was sold. *Cooper* v. *Freeman,* 61 Ark. 36; *Salinger* v. *Gunn, Id.* 414; *Quertermous* v. *Walls,* 70 Ark. 326.

The question then arises, whether or not the failure to keep separate records of the two lists of sales—those to individuals and those to the State—invalidates the sale when both are kept and certified together. There is no reason to believe that the

provision for keeping the two lists separate was intended to be mandatory, and no reason to so treat it. That is merely a matter of detail, and the keeping of the lists separate affords no protection to the owner. If he searches the record at all for the sale of his land at tax sale, he finds it in the list. He is chargeable with notice of the contents of that list, it affords all the information that would be obtained from a separate list, and he is not misled by the absence of, or failure to keep, such lists. How then is he prejudiced by the failure to separate the two lists? It is the declared policy of our revenue laws to disregard technical irregularities in tax sales which are not prejudicial to the rights of the owner, and to require all proceedings to set aside sales on account of such irregularities to be instituted during the period allowed for redemption. Kirby's Digest, § 7114.

This court upheld that statute, but restricted its operation to mere irregularities which are non-prejudicial to the rights of the owner. In *Radcliffe* v. *Scruggs,* 46 Ark. 96, Judge SMITH, speaking for the court, said: "Our legislation and previous decisions have always distinguished between this class of defects, which have no tendency to injuriously affect the taxpayer, and substantial defects, such as go to the jurisdiction of the levying court to levy a particular tax, or to the power of the officer to sell for nonpayment, or the omission of any legal duty which is calculated to prejudice the land owner."

Search will be in vain for a decision of this court holding a mere irregularity in tax proceedings, which is not jurisdictional and which does not affect nor prejudice any right of the land owner, sufficient to invalidate a tax sale. In all cases where tax sales have been held invalid on account of failure to strictly observe some requirement of the statute, either a defect of jurisdiction is found to have arisen by reason of the omission or a possible prejudicial effect is found in the omission of some safeguard which the statute has provided.

It is contended that *Quertermous* v. *Walls* is decisive of the question, but we do not find it so. In that case the recital of facts in the opinion, which follows closely the lines of the record in that respect, shows an admission in the answer to the effect "that there was no separate book wherein a record of the said tax sales was entered." This can only be understood to mean that

no record of the tax sales was kept. The opinion first holds the sale to be void on other grounds stated therein, and then lays down the law broadly that the requirement of the statute for a record of sales to be kept by the clerk is mandatory, and that his failure to comply with the statute avoids the sale. It is not therein held that all the requirements as to the details are mandatory. The mandatory feature of the statute is described in the following language: "It was intended that the record of the sale actually made should be preserved in permanent form for the protection of the land owner. He can rely upon this record to determine whether his land has been sold, and whether it was legally sold for the proper amount of taxes, penalty and costs charged against it." The language of the opinion must of course be limited in its application to the particular facts of that case, as nothing else was before the court for its decision.

A further attack is made on the validity of the tax sale on the ground that the clerk, in his certificate to the record of the delinquent list, failed to state that the newspaper in which the list was published had a *bona fide* circulation in the county for a period of thirty days before the date of publication. The statute then in force regulating the publication of legal advertisements did not require that the newspaper should have a circulation for any definite length of time before publication. Sand. & H. Dig., § 4684. But, aside from this, it is sufficient to say that the section of the statute prescribing the duties of the clerk in making his certificate does not require that the circulation of the newspaper, or the fact that it had a *bona fide* circulation, should be stated in the certificate. All that the statute requires is that the clerk "shall certify at the foot of said record, stating in what newspaper said list was published, and the date of publication, and for what length of time the same was published before the second Monday in June then next ensuing." Kirby's Dig., § 7086. The certificate of the clerk is sufficient if it follows the language of the statute.

The chancellor erred in annulling the tax sale. Therefore the decree is reversed, and the cause remanded with directions to dismiss the complaint for want of equity.

WOOD, J., dissented.

BIGGS v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY.

Opinion delivered June 21, 1909.

1. PARENT AND CHILD—RIGHT OF PARENT TO CHILD'S WAGES.—As a general rule, a father is entitled to the services and earnings of his minor child; and upon the father's death the mother is entitled to receive such services and earnings. (Page 125.)
2. SAME—EMANCIPATION.—A parent's relinquishment of his right to the earnings of his minor son may be either express or implied from circumstances, as where the parent allows the child to make his own contracts and to collect and retain his earnings. (Page 125.)
3. SAME—EMANCIPATION—REVOCATION.—Where a parent has relinquished his right to the earnings of his minor child, the right of action to recover such wages is in the child, and not in the parent; and such right of the child continues until it is revoked. (Page 125.)
4. SAME—REVOCATION OF EMANCIPATION—WAGES ALREADY EARNED.—Where a parent has permitted his minor child to contract for himself and to receive his wages, he cannot, by revoking this license, acquire rights in wages already earned by the child. (Page 125.)
5. SAME—EFFECT OF EMANCIPATION.—When a mother has emancipated her minor child, payment of the child's wages to the mother will be no defense to a suit by the child to recover such wages, though the mother is named in the suit as the next friend of the child. (Page 126.)
6. MASTER AND SERVANT—NONPAYMENT OF WAGES—PENALTY.—Where, at the time a servant was discharged by a railway company, his foreman notified him that his money would be sent to a station named where a regular agent was kept, to which the servant acquiesced, this was equivalent to a request by the servant to have the money due him sent to the station, and sufficient to entitle him to recover the statutory penalty for failure to send the money. (Page 127.)

Appeal from Greene Circuit Court; *Frank Smith,* Judge; reversed.

Huddleston & Taylor, for appellant.

1. A minor may lawfully receive and enjoy his own wages if his parent sees fit to permit him to make his own contracts, and to appropriate the wages to his own use. Whether or not the parent has manumitted the child may be shown by facts and circumstances from which arises the necessary inference. Rodgers on Dom. Rel., § 485; 53 Ark. 499; 33 Ark. 435; 21 Ark. 387. That Sallie Biggs instituted this suit as next friend is of

itself a waiver on her part of her right to her son's wages. 66 Ark. 409.

2. A guardian or next friend has no authority to compromise or settle the suit except by leave of the court, neither can he compromise a judgment in favor of the infant. 22 Cyc. 663, 670; 27 N. E. 890; 13 S. W. (Tex.) 567; 22 Cyc. 661; 29 N. E. 208; 13 S. E. 59; *Id.* 602.

E. B. Kinsworthy, S. D. Campbell and *F. R. Suits,* for appellee.

1. Sammy Biggs did not name any station and request that his pay, or valid check therefor, be sent there for him. He cannot recover the penalty. 87 Ark. 132; *Id.* 574; 88 Ark. 277.

2. The emancipation, if any, was without consideration, and was revocable, at the will of the mother, at any time during his minority. 77 Ark. 35; 80 Ark. 525.

FRAUENTHAL, J. The plaintiff, Sammy Biggs, by his next friend, Sallie Biggs, instituted this suit against the defendant, the St. Louis, Iron Mountain & Southern Railway Company, before a justice of the peace, for the recovery of his wages as an employee of said railroad company and for penalty for the nonpayment thereof. On November 6, 1907, a judgment was rendered by the justice of the peace in favor of the plaintiff for the sum of $108.25. From this judgment an appeal was taken by the defendant to the circuit court. Upon a trial before a jury in the circuit court the evidence tended to establish the following facts:

Sammy Biggs was a minor about 16 years old. His father was dead, and he was living with his mother, Sallie Biggs, upon a small farm. Through the farming season he worked on the farm for his mother, making his home with her, during which time she maintained him. For a year or two prior to the time he worked for the defendant, when he was not engaged in farming, he worked out for other people, and made his own contracts for his services, and collected his wages, and retained all such earnings as his own property. This was done with the knowledge of his mother; and, while he did not have her express consent in thus working out for himself for others, she did not

make any objection thereto. He had thus worked for himself under the employment of one of defendant's foremen named Hall for the two years next prior to his employment in this case, and he had worked under the foreman Hall for the defendant, and had collected his wages, and retained all such earnings as his own, with the knowledge of his mother and without any objection from her. On August 25, 1907, he was hired by I. A. Copple, one of defendant's foremen, and worked for the defendant for two or three days, when he was discharged. He demanded his wages, and his foreman gave him a written statement, called an "identification ticket," which set forth that Sammy Biggs had worked for defendant during the month of August, 1907, and the amount which as per the pay roll was due him. The amount thus due him was $3.50. At the time of giving him the identification ticket the foreman told him to go for the receipt of the money due him to the depot agent at Delaplaine, which was a station of defendant where a regular agent was kept. And the testimony tended to prove that Sammy Biggs agreed to receive his check or money at that station. Within seven days thereafter he applied to the regular agent at Delaplaine for the payment of his wages, but that official claimed that he had not received it. He applied a number of times to the agent thereafter for payment of his wages, but with like result. He then instituted this suit on October 25, 1907. On December 4, 1907, an attorney of the defendant went to see the mother of plaintiff and paid to her $5.10, and took from her the following receipt:

"My name is Sallie Biggs. I am the mother of Sam Biggs, who is 15 years old. His father is dead, and he has no guardian but me. I have this day received from St. Louis, Iron Mountain & Southern Railway Company five dollars and ten cents in full for wages and interest on same due my son from the railway, about which there is a lawsuit in John Tate's J. P. court. December 4, 1907.

her
"Sallie X Biggs.
mark

"Witness to mark:

"Fred R. Suits."

In addition to the above, the defendant, prior to the day of the trial in the circuit court, paid to the constable the costs of the case in the court of the justice of the peace.

The court thereupon directed the jury to return a verdict in favor of the defendant, which was done. The plaintiff prosecutes this appeal from that judgment.

It is contended by the defendant that, inasmuch as Sammy Biggs was a minor, his wages belonged to his mother, and that it had paid to her the amount of such wages as evidenced by said receipt; and that therefore there was nothing due for said wages at the time of said trial in the circuit court. It is true that, as a general rule, the father is entitled to the services and earnings of his minor child; and that the widowed mother is entitled to these services and earnings to the same extent as the father. That is founded on the universal right of the parent to the custody and control of the child and his duty of maintenance and education of the minor child. But the parent may permit his minor child to make his own contract and to receive and own his wages. The parent has the right to give to his infant son his time and the fruits of his labor, and in such case the minor is under the law entitled to such earnings. The parent may relinquish his right to the services and earnings of the child expressly; but this relinquishment may also be implied from the circumstances. And this relinquishment may be found to have been made where the parent allows the child to make his own contracts and to collect and retain his earnings. *Bobo* v. *Bryson,* 21 Ark. 387; *Fairhurst* v. *Lewis,* 23 Ark. 435; *Vance* v. *Calhoun,* 77 Ark. 35; *Smith* v. *Gilbert,* 80 Ark. 525; *Kansas City, P. & G. Ry. Co.* v. *Moon,* 66 Ark. 409; Rodgers on Domestic Relations, § 485; 29 Cyc. 1626; *Dierker* v. *Hess,* 54 Mo. 246.

And where the parent has thus relinquished his right to the earnings of the minor, the right of action to recover such wages is in the child, and not in the parent; and such right of the child continues until it is revoked. This relinquishment by the parent of the minor's services and earnings may be revoked by the parent. *Vance* v. *Calhoun,* 77 Ark. 35; Rodgers on Domestic Relations, § 485; 29 Cyc. 1627.

But where the parent has permitted the child to contract for himself and to receive his wages, he cannot revoke this license after the wages have been earned, so as to acquire rights in the wages already earned. Under such circumstances, the parent is precluded from asserting a claim to such wages. Rodgers on

Domestic Relations, § 487; *Torrens* v. *Campbell,* 74 Pa. St. 470; *Campbell* v. *Campbell,* 11 N. J. Eq. 268.

In the case of *Tennessee Mfg. Co.* v. *James,* 91 Tenn. 154, Lurton, J., says: "The father may permit the minor to take and use his own earnings. This is called emancipation, and emancipation will be a defense to the father's suit for the minor's wages. It may be express or implied; * * * * * for the whole minority, or for a shorter term. * * * * Emancipation will not enlarge the minor's capacity to contract; it simply precludes the father from asserting his claim to the wages of his child. If one employ a minor with notice of the non-emancipation of the infant, it will be no defense to the father's suit for the wages that the child has received them. On the other hand, payment to the father will be no defense to the minor's suit, if the employer knew of the fact of emancipation." See also note to case of *Wilson* v. *McMillan,* 35 Am. Rep. 117.

In the case at bar we are of the opinion that there was sufficient evidence to go to the jury for that body to pass on the question as to whether the parent in this case had given to the minor son the right to make this contract for his labor and collect and appropriate to his own use the earnings arising from such labor. If she did, then the son had a right to enter suit therefor, and the mother could not then revoke her license to him to have such earnings, so as to collect the same herself and deprive him of the right to recover them. In this case the mother consented to and did act as next friend for the minor, and did as such next friend enter suit for the wages in the name of and for the benefit of the minor, and thus recognized his right to recover same for himself. The defendant had knowledge of this by the institution of this suit and the recovery of the judgment before the justice of the peace. After this judgment was thus recovered, the defendant, with this knowledge, made payment to the parent, and thereafter pleads such payment against the suit of the minor. If Mrs. Sallie Biggs had emancipated her son to make the contract for the wages and to collect same, she had no right thereafter to revoke that license as to these earnings and collect them. And, under such circumstances, a payment by defendant to her would not be a defense to this suit.

Mrs. Sallie Biggs as next friend instituted this suit for the minor. As such next friend, she had no authority either to compromise this case or to receive any money belonging to the minor. The minor had recovered judgment against the defendant for $108.25, and she received therefor $5.10. She could not as next friend defeat the minor by any such compromise or settlement. Her only and entire authority as next friend was to prosecute the suit, and in the progress of the case she could take no action that would be binding on the minor except with the consent of the court. In this case she appears to have made receipt in her own name and right, and not as next friend; but if the receipt could be considered as made by her as next friend, it would not be a defense to this action. *Evans* v. *Davies,* 39 Ark. 235; *Rankin* v. *Schofield,* 70 Ark. 83; *Wood* v. *Claiborne,* 82 Ark. 514; 22 Cyc. 661-663.

It is next urged by the defendant that the plaintiff did not request his foreman or the keeper of his time to have the money due him or a valid check therefor sent to a station named by him where a regular agent was kept; and for that reason is not entitled to any penalty. This suit for penalty was brought under the act of the General Assembly of Arkansas, approved April 24, 1905, and which amends section 6649 of Kirby's Digest. Acts 1905, p. 538. That act makes the above request or notice necessary to a recovery of a penalty. *Wisconsin & Ark. Lbr. Co.* v. *Reaves,* 82 Ark. 377; *St. Louis, I. M. & S. Ry. Co.* v. *Bailey,* 87 Ark. 132; *St. Louis, I. M. & S. Ry. Co.* v. *McClerkin,* 88 Ark. 277.

But the evidence in this case tended to prove that the foreman at the time of the discharge told the plaintiff that the money due him would be sent to the depot agent at Delaplaine, and that the plaintiff agreed to that place for receiving payment. This was equivalent to a request on the part of plaintiff to have the money due him sent to that station.

The above questions were controverted questions of fact, and were within the province of the jury to determine.

Under proper instructions there was sufficient evidence adduced in this case to sustain a verdict of the jury in favor of the plaintiff, should such a verdict have been returned.

The court therefore erred in directing a peremptory verdict in favor of the defendant.

The judgment is reversed; and the cause remanded for a new trial.

COMBS v. LAKE.

Opinion delivered June 21, 1909.

1. EVIDENCE—VALUE OF LAND—OPINION OF NONEXPERT.—A nonexpert witness may testify his opinion as to the usable value of land for certain purposes, after testifying the facts upon which such opinion is based. (Page 132.)
2. EJECTMENT—USABLE VALUE OF LAND.—In an action to recover land wrongfully held by defendant where the evidence showed that the land was wrongfully used by defendant for ferry purposes, that defendant had an exclusive ferry privilege at that place, and that the land was worthless except for ferry purposes, it was not error to instruct the jury that the usable value of the land was its value for ferry purposes. (Page 133.)
3. EVIDENCE—OPINIONS AS TO VALUE.—The opinions of witnesses having knowledge of the particular subject are admissible on questions of value. (Page 133.)

Appeal from Marion Circuit Court; *Brice B. Hudgins*, Judge; affirmed.

STATEMENT BY THE COURT.

This is the second appeal in this case. The case on the first appeal is reported in 84 Ark. 21 (*Lake* v. *Combs*), where the issues and facts are fully stated. On the former appeal we reversed and remanded the cause "with instructions to proceed with the suit for the recovery of the land and the usable value thereof from the date Combs took possession." When the cause on remand reached the lower court, additional pleadings were unnecessarily filed to present the only issue that could be presented under the mandate, to-wit: "the recovery of the land and the usable value thereof."

At the last trial appellant Lake testified: "I claim damage for what the land would be worth from July 1, 1905, to this date.

I was offered $300 a year for it if I would deliver the place that Combs holds with the lands so that the ferry could be put in and operated from that place, but I could not get possession, as Combs held it, and so lost the deal. The place that Combs has his wire cable attached to is worth $300 a year to operate a ferry from, and if Combs would give it up I could get $300 a year for it, but he persists in holding it because it is the best on the Lake land to attach a ferry to and get out from the river." Appellant objected to the above testimony as incompetent, irrelevant and immaterial, and because the witness was not an expert on the question of damage value.

Witness further testified over appellant's objection as follows: "And what the children now want is their land and what its usable value is worth from July 1, 1905, to date, and which is worth $300 per year." The appellant duly excepted to the ruling of the court in admitting this testimony. In varying form the testimony of this witness to the above effect was given over appellant's objection, to which he duly excepted. The testimony of this witness further showed that the usable value of the land in controversy disconnected from ferry privileges was nothing. Appellee Lake further testified that the only place that the appellant's ferry touched the land was from the line where the cable crosses thirty feet in the air to the iron rod where it is fastened, and this was a strip one inch wide and one hundred feet long; that appellant had prevented the Lake heirs from running a ferry, that appellee Lake had demanded possession of the appellant, and he had refused to give it up.

The appellant in his own behalf testified in part as follows:

"I am the owner of this ferry, and I am in possession of the land on the Cotter side of the river and on the Marion County (lake) side of the river the ferry lands at the public road. This road lies between the river bank and the land where the iron stake is driven to which the cable is fastened. This iron stake or bar was put in about fifteen years ago by me with Mr. Lake's consent, and we used it a number of years year and year about—Lake and myself—before I sold my land to the Redbud Realty Company. In 1903 Lake sold the ferry to Wilbur, and through a company to Cornell, who sold the ferry to me. I have the ferry franchise license from Marion and Baxter counties. It was

transferred to me when I bought from Cornell, and it has been renewed to me from year to year since. There is another ferry about a quarter of a mile above there. The operation of this Lake ferry is a losing proposition, and I have offered to let any one have it who will run it and keep it up. The Lake ferry is the one which has the cable anchored to the land about which this suit is over.

"Mr. Lake, if he could get a license to operate a ferry, owns the land just below and just above the ferry, and he could put a cable across the river and anchor it on the bluff, and my possession and the attachment of my wire to that iron rod would not interfere with his doing so, but I would enjoin him if he undertook to run one there. I own the upper ferry, and I am a stockholder and am interested in the Redbud Realty Company, which owns the land on the Cotter side of the river, and I have permission from them to operate the ferry from that side of the bank. In high water we have to suspend the operation of the ferry as we cannot land on the Lake side of the ferry. If the court should eject me from the Lake land, and make me move my cable from the iron rod, I would fasten it to the trees. The anchor on the Lake land is not necessary to the operation and maintenance of the ferry. I took the wire cable loose from where Wilbur and his crowd had fastened it, and moved it back upon the Lake land, and fastened it to the iron bar or rod because it is the best and safest place for it. But there are other places in the bluff just above and just below where my ferry is, but they are on the Lake land, too. Where I fastened my cable, it is so high above the road that it does not interfere with any one passing. This is an entirely different ferry from the one that Lake and I operated year about, and has no connection with it, as all interest I then had in the ferry lapsed."

The appellant asked the court to instruct the jury to return a verdict in his favor, which request the court refused, and appellant excepted. The court then instructed the jury as follows:

"As I understand it, the opinion of the Supreme Court gives the plaintiff the possession of the land, and limits the trial here to the issue of the usable value of the land. You will return a verdict for plaintiff for the possession of the land, together with a reasonable amount for the usable value of the land by Combs,

considering the use it is put to, and whether in operation of the ferry it can be tied to a tree and anchoring the cable some other place." The appellant duly excepted to the giving of the above instruction.

After the argument of counsel, the court said to the jury: "Counsel have presented the question to you. I instruct you that the usable value of the land is the value for the purpose of tying a cable to it, and does not include the value of the boat." The appellant excepted to the instruction.

The jury returned a verdict in favor of appellees for the sum of $569.50. Judgment was entered for that sum after motion for new trial had been overruled. The motion assigned as error the rulings of the court, to which exceptions had been duly saved, and the further grounds that the verdict was contrary to the evidence, and that the amount thereof was excessive.

This appeal has been duly prosecuted.

Z. M. Horton and *Allyn Smith,* for appellant.

1. The evidence of C. A. Lake was irrelevant because (1) It was only the opinion of the witnesses, and not a statement of facts from which the jury could draw a conclusion. 4 Barb. (S. C.) 256, 261; 4 Denio 311; 17 Wend. 137-161; 19 Ohio 142; 5 Hill 608; 6 Kan. 54; 29 Barb. 422; 47 Ark. 497; 76 Ark. 549; 56 Ark. 581. (2) The value of the ferry privilege was not the measure of damages on the remand of this cause by this court (84 Ark. 21). The Lakes had no ferry privilege. 25 Ark. 26; 20 *Id.* 561; Kirby's Dig., § § 4556-9, 3562, 3568-9-70. The question was the value, the usable value; not mere speculative damages. 57 Ark. 207; 47 *Id.* 527.

2. Only nominal damages should have been allowed. 5 Words & Phr. Judicially Defined, 4815-16. At most, a recovery for only a fair rental value for the time unlawfully detained could be had. 58 Ark. 616; 36 *Id.* 525; 12 Minn. 426; 70 Ill. 426; 75 *Id.* 473; 20 Mo. 442; 23 Wis. 365. See also 43 Wis. 183; 46 *Id.* 625.

3. The verdict is not supported, and the damages are excessive. 70 Ark. 385; 57 *Id.* 468; 42 *Id.* 527; Kirby's Dig., § 6215, subd. 4, 5.

W. S. Chastain, for appellee.

1. The usable value of the land is the only question left in this case. 84 Ark. 21.

2. Lake's evidence was not his opinion. He laid the proper foundation of facts, data and circumstances. 66 Ark. 498; 70 *Id.* 23; 51 *Id.* 324; 79 *Id.* 252; 86 Ark. 91. Besides, if incompetent, it did not prejudice. 76 Ark. 280.

2. Where a defendant is trespassing, evidence that an annual rent of $300 was reasonable was perfectly competent. 58 Ark. 612; 31 Ark. 344.

3. The verdict is supported by the evidence, the damages are not excessive, and this court will not reverse. 64 Ark. 238; 70 Ark. 427; 69 Ark. 134; 23 Ark. 115; 41 *Id.* 202.

WOOD, J., (after stating the facts). First. It appears that appellee Lake "was offered $300 a year for it if he would deliver the place that Combs (appellant) holds with the lands, so that the ferry could be put in and operated from that place." Appellee could get $300 a year for it. Hence he testified that it was worth $300 per year. After the statement of this fact the jury could draw the conclusion as well as appellee that the usable value of the land for ferry purposes was $300 per year. But it was not error, at least not prejudicial error, for him to state that it was worth $300 a year to operate a ferry from, after he had given in evidence the fact which, if believed, showed that it would have yielded its owners that sum. One of the conditions on which the opinions of nonexpert witnesses is received is "that the facts upon which the witness is called upon to express his opinion are such as men in general are capable of comprehending and understanding." *Commonwealth* v. *Sturtivant,* 117 Mass. 122, 137, approved by this court in *Little Rock Traction & Electric Co.* v. *Nelson,* 66 Ark. 494, 498.

The testimony objected to did not come within the familiar rule excluding evidence that is the mere opinion of the witness as to the amount of damages sustained to person or property. *Little Rock Ry. Co.* v. *Hogins,* 47 Ark. 497; Sedgwick on Damages, pp. 158, 159, and cases cited in appellant's brief.

This is not a case where one is seeking to recover damages for personal injuries or for injuries to property. But it is a case merely of showing the usable value of land, and the witness may give his opinion of what that value is, basing it upon statement

of facts, as was done in the case at bar, to justify the opinion. It is rather the case of where there is no room to measure the damages except in one way, *i. e.*, what the land was worth for the uses to which it was adapted. The opinions of witnesses having knowledge of the particular subject are generally held admissible on questions of value." Sutherland on Damages, § 843, p. 2511. See also § 654. See also *St. Louis, I. M. & S. Ry. Co.* v. *Brooksher,* 86 Ark. 91.

Second. The instructions given show that the court comprehended the only issue that the former opinion of this court remanded to it for trial, and correctly submitted that issue to the jury. Under the evidence, it was a jury question, and there was evidence to sustain the verdict in the sum rendered.

Finding no prejudicial error, the judgment must be affirmed.

FRIAR *v.* BALDRIDGE.

Opinion delivered June 21, 1909.

1. SALES OF LAND—TIME OF PERFORMANCE.—Parties may enter into a valid contract relative to the sale of land whereby they may provide that time of payment shall be of the essence of the contract, so that failure to pay promptly will work a forfeiture. (Page 136.)
2. SAME—CONSTRUCTION—EVIDENCE.—Whether a contract for the sale of land contemplated that there should be a forfeiture for failure of the vendees to pay promptly will be ascertained not only from the written contract but also from the acts and conduct of the parties in carrying out the agreement. (Page 137.)
3. SAME—FORFEITURE—WAIVER.—Where there has been a breach of a contract of sale of land sufficient to cause a forfeiture, and the party entitled thereto either expressly or by his conduct waives the forfeiture or acquiesces in the breach, he will be precluded from enforcing the forfeiture. (Page 137.)
4. SAME—WHEN FORFEITURE WAIVED.—When the conduct of a vendor was such as to lead the vendee to believe that he would not insist upon a forfeiture under the contract, he will be held to have waived it. (Page 139.)
5. STATUTE OF FRAUDS—SALE OF EQUITABLE INTEREST IN LAND.—The statute of frauds, § 3654, subdiv. 4, providing that "no action shall be brought to charge any person upon any contract for the sale of lands,

tenements or hereditaments, or any interest in or concerning them," unless the agreement is in writing, signed by the party to be charged therewith, applies to the sale of an equitable interest in lands. (Page 139.)

6. SAME—ORAL AGREEMENT TO RESCIND LAND SALE.—An oral agreement to rescind a contract for the sale of land, entered into after some payments have been made and others are due, will be held to be within the statute of frauds unless followed by an actual abandonment of the sale by both parties and a restoration of the property to the vendor. (Page 139.)

7. TENANCY IN COMMON—POWER OF COTENANT.—One tenant in common cannot bind his cotenant by an unauthorized agreement in respect to the common property. (Page 141.)

Appeal from Logan Chancery Court, Northern District; *J. Virgil Bourland,* Chancellor; affirmed.

Robert J. White, for appellant.

1. Time was of the essence of the contract. A waiver of forfeiture by Friar is not established by the evidence, and is contradicted by the conduct of the parties. Payment at the time specified was a condition precedent to the right to purchase, which right terminated on failure to make such payment. 76 Ark. 579; 54 Ark. 16; 57 L. R. A. 176; 17 N. E. 60; 21 S. W. 970; 45 S. W. 275; 17 N. E. 61; 14 Tex. 373; 113 S. W. 800.

2. A written contract for the sale of land may be rescinded by parol. 151 Pa. St. 561; 25 Ala. 92; 86 Miss. 669; 13 L. R. A. 633; 47 Ala. 714; 4 Cal. 315; 10 Ind. 223; 13 Abb. N. C. (N. Y.) 340; 43 Vt. 592; 44 N. W. 835; 88 N. W. 54; 23 Cent. Dig., § 100, tit. Frauds, St. of; 20 Cyc. 219; 55 Ark. 73.

3. Appellees cannot enforce specific performance over their agreement to rescind the contract. 13 L. R. A. 633; 6 *Id.* 652; 57 *Id.* 176.

Appellees, *pro se.*

1. It is the chancellor's finding that appellant "extended the time orally and by various other acts waived said time," and the evidence sustains such finding. He cannot insist on a forfeiture. 87 Ark. 593, and cases cited.

2. If Baldridge did make a verbal contract with Friar to sell the land back to him, it falls within the statute of frauds and can not be enforced. Kirby's Dig., § 3645; 1 Ark. 391; 15

Ark. 322; 16 Ark. 271; 30 Ark. 249; *Id.* 390; 41 Ark. 264; 54 Ark. 519.

FRAUENTHAL, J. On September 3, 1904, the parties to this litigation entered into a written contract for the sale and rent of a tract of land by William Friar, the defendant below, to F. V. Baldridge and W. A. Baldridge, the plaintiffs below. The portions of said contract which are material to the determination of the rights of the parties herein are as follows:

"CONTRACT OF SALE AND RENT.

"This contract made this 3d day of September, 1904, between Wm. Friar, party of the first part, and F. V. Baldridge and W. A. Baldridge, parties of the second part, witnesseth that, in consideration of the stipulation hereinafter contained, and the payment to be made as hereinafter specified, the first party agrees to sell unto the second parties the following described real estate situated in Logan County, Arkansas, to-wit: (Here follows the description of the land.)

"And the said second parties, in consideration of the premises, hereby agree to pay to the order of the said first party the following sums at the several times named below:

"Nov. 1, 1904, $50, 10 per cent after due.

"Nov. 1, 1905, $100, 10 per cent after date, (indorsed) paid A. Hall.

"Nov. 1, 1906, $100, 10 per cent after date, (indorsed) paid A. Hall.

"Nov. 1, 1907, $100, 10 per cent after date, (indorsed) paid A. Hall.

"For which several amounts the parties of the second part have executed and delivered to the said party of the first their four (4) promissory notes, dated on the 3d day of September, 1904. * * *

"But in case the said second party shall fail to make the payments aforesaid, or any of them, punctually, and upon the strict terms and at the times above limited, and likewise to perform and complete all and each of the agreements and stipulations aforesaid, strictly and literally, without any failure or default, time being of the essence of this contract, then this contract shall, from the date of such failure, be null and void, and all the rights and interests hereby created or then existing in favor of said

second parties, their heirs or assigns, or derived under this contract, shall utterly cease and determine, and the premises hereby contracted shall revert to and revest in the said first party, his heirs or assigns (without any declaration of forfeiture or act of re-entry, or without any other act by the said first party to be performed, and without any right in said second parties of reclamation or compensation for moneys paid or improvements made), as absolutely, fully and perfectly as if this contract had never been made.

"And it is hereby further convenanted and agreed by and between the parties hereto that, immediately upon the failure to pay any of the notes above described, all previous payments shall be forfeited to the party of the first part, and the relation of landlord and tenant shall arise between the parties hereto for the year from January 1st immediately preceding the date of default, and the said party of the second part shall pay rent at the rate of ($50) fifty dollars for occupying the premises from the said January 1st to the time of default, such rent to be due and collectable immediately upon such default."

The defendant claimed that the plaintiffs failed to pay the last two mentioned notes; and on November 27, 1907, he gave written notice to them to quit the land and deliver its possession to him. The plaintiffs on the following day instituted this suit in the Logan Chancery Court, and in their complaint alleged that they had paid all said notes and asked for a specific performance of the above contract to convey said land to them. On December 2, 1907, William Friar instituted in the Logan Circuit Court a suit of unlawful detainer against the plaintiffs, and therein sought a recovery of the possession of said land. That suit was transferred to the Logan Chancery Court, and in said court was consolidated with the above suit of plaintiffs for specific performance.

Upon a trial of the cause in the chancery court a decree was rendered granting the prayer of the plaintiffs and divesting all title to the land out of defendant and investing same in plaintiffs. From that decree the defendant presents this appeal.

1. It is contended by the defendant that the plaintiffs failed to pay the last two notes mentioned in the above contract; and that by its terms time was of the essence thereof, and on the

failure to make said payments the right of plaintiffs to purchase the land became forfeited.

Parties may enter into a valid contract relative to the sale of land whereby they may provide that time of payment shall be of the essence of the contract, so that the failure to promptly pay will work a forfeiture. *Ish* v. *Morgan,* 48 Ark. 413; *Quertermous* v. *Hatfield,* 54 Ark. 16; *Block* v. *Smith,* 61 Ark. 266. But the final effect of such an agreement will depend on the actual intention of the parties, as evinced by their acts and conduct; and such a breach of the contract as would work a forfeiture may be waived or acquiesced in. The law will strictly enforce the agreement of the parties as they have made it; but, in order to find out the scope and true effect of such agreement, it will not only look into the written contract which is the evidence of their agreement, but it will also look into their acts and conduct in the carrying out of the agreement, in order to fully determine their true intent. It is a well-settled principle that equity abhors a forfeiture, and that it will relieve against a forfeiture when the same has either expressly or by conduct been waived. The following equitable principle formulated by Mr. Pomeroy has been repeatedly approved by this court: "If there has been a breach of the agreement sufficient to cause a forfeiture, and the party entitled thereto either expressly or by his conduct waives it or acquiesces in it, he will be precluded from enforcing the forfeiture, and equity will aid the defaulting party by relieving against it, if necessary." 1 Pomeroy, Eq. Jur. 452; *Little Rock Granite Co.* v. *Shall,* 59 Ark. 405; *Morris* v. *Green,* 75 Ark. 410; *Banks* v. *Bowman,* 83 Ark. 524; *Braddock* v. *England,* 87 Ark. 393.

Guided by these principles, we will inquire whether under the evidence there was actually a forfeiture of this contract to sell and convey; and, if so, whether that forfeiture was waived.

The evidence tends to prove that the plaintiffs paid the first note before its maturity, and paid the second note shortly after its maturity. About the time the third note matured the plaintiffs paid to the defendant $75, and desired that it be appropriated on the payment of that note. The plaintiffs were at that time owing the defendant other indebtedness; and the defendant said to them that he would give them time on the payment of

the land notes, and that he would appropriate this payment to the other indebtedness. He had said before that time that he would give the defendants ten years in which to pay for the land; and on this occasion he indicated and agreed that he would extend the time of the payment of the note for the land, and would not insist on its prompt payment. In accordance with that understanding, the above payment was applied by defendant to the other indebtedness. The defendant did not, during the following year of 1907, make any request for rent for that year; nor did he make a suggestion that the contract was forfeited, although nothing was paid on the note maturing November 1, 1906. In the meanwhile, during all these years, the plaintiffs made lasting improvements on the land, of the value of $390. In the fall of 1907, the plaintiff W. A. Baldridge was contemplating moving from the land to the town of Paris; and he and the defendant entered into oral negotiations by which the defendant agreed to purchase the land back at the price of $400; and, after deducting therefrom what was owing by palintiffs, to pay the balance. It is claimed also by the defendant that this oral agreement was a rescission of the above written contract. While this oral agreement to resell to defendant or to rescind the written contract is denied by W. A. Baldridge, yet the preponderance of the evidence establishes such an agreement. But the undisputed evidence is that the other plaintiff and tenant in common, F. V. Baldridge, never made such an agreement, and there is no testimony that he ever authorized W. A. Baldridge to make such an agreement. The undisputed evidence is, further, that the possession of the property was not delivered; that the notes then unpaid were not turned over, but still retained by Friar; that the written contract was still retained; that no payment was made by defendant; in fact that nothing was done towards carrying out the alleged agreement of resale or of rescission. Neither at that time, nor at any other time, was a forfeiture of the written contract declared by the defendant. On the contrary, on that day, November 2, 1907, the last note was not due, inasmuch as with grace it was not due until November 4, 1907. The defendant testified that it was not convenient to draft the necessary papers evidencing their agreement on that day, and, inasmuch as he was going to be absent from the county for several days, the

drafting and execution of such written agreement were postponed. It appears that the defendant had left the two unpaid notes in the hands of an attorney at Paris for safe keeping. This attorney had transacted generally a great deal of business for the defendant; and he had drafted the original contract executed by the parties in 1904 and the four notes, and had retained possession of the notes ever since their execution. When the two first notes were paid, the attorney turned those two notes over to defendant, who delivered them to plaintiffs. On November 7, 1907, the plaintiffs sold the land to Mollie E. Green, and transferred to her the above written contract, and placed her in possession of the land. On the same day W. A. Baldridge paid to said attorney the entire amount due on the last two notes, and from him received the two notes. The attorney also noted the payment of these notes on the contract. He did this on the assurance of said Baldridge that this was agreeable to the defendant. The defendant, however, refused to recognize this act of collection and surrender of said notes, and refused to accept said money. The attorney at the hearing still had the money and offered to pay same into court for the party entitled thereto.

From this testimony it would appear that it is doubtful whether there was such a failure to make payment as to work a forfeiture of the contract. The note maturing November 1, 1906, was extended, and presumably for a year. About the time of the maturity of the two last notes, negotiations were being made relative to the land by the defendant and one of the plaintiffs; and within three days after the maturity of the notes they were paid in full by the plaintiffs. In addition to this, the conduct of the parties indicate that it was not the intention of the parties to insist on payment on the exact day of maturity of the two last notes; and in any event that the defendant waived any such forfeiture or acquiesced in it, if such forfeiture was actually made. So that under the facts and circumstances of this case the defendant cannot insist now in a court of conscience on a forfeiture of this contract.

2. It is urged by counsel for defendant that by the above oral agreement the plaintiffs relinquished to him the written contract and their interests therein, and thus rescinded the written contract of sale. It is urged that such an agreement need not be

in writing. The above written contract for the sale of the land, not being forfeited but in full force, was in effect a bond for title. By virtue of that contract, therefore, the plaintiffs obtained an equitable interest in the land. Under the statute of frauds, as enacted in this State, it is provided that: "To charge any person upon a contract for the sale of lands, tenements or hereditaments or any interest in or concerning them," such agreement or contract must be in writing signed by the party to be charged therewith. Kirby's Digest, § 3654, subdiv. 4. In Browne on Statute of Frauds, § 229, it is said: "The 4th section of the statute of frauds, extends to and embraces equitable as well as legal interests." In the case of *Smith* v. *Burnham,* 3 Sumner's Reports, 435, Story, J., says: "A contract for the conveyance of lands is a contract respecting an interest in lands. It creates an equitable estate in the vendee in the very lands, and makes the vendor a trustee for him. A contract for the sale of an equitable estate in lands * * * is clearly a sale of an interest in the land within the statute of frauds." In *Hughes* v. *Moore,* 7 Cranch, 176, Marshall, C. J., says: "The court can perceive no distinction between the sale of land to which a man has only an equitable title and a sale of land to which he has a legal title. They are equally within the statute."

The alleged agreement made on November 2, 1907, was in effect a resale of the land, or of the interest of the plaintiffs therein, back to the defendant. It was therefore a sale of an equitable interest in the land, and falls within the statute of frauds. The rescission of a contract of the sale of land is in effect the sale of an equitable interest in the land; it is in effect a resale of the land. And while it appears that it is somewhat unsettled as to whether a contract for the sale of land may be rescinded by a parol agreement, yet, as is said in Smith on the Law of Fraud, § 363: "The weight of authority would seem to be that it cannot." And it appears to be uniformly held that an oral agreement to rescind a contract for the sale of land entered into, after some payments have been made and others are due, will be held to be within the statute of frauds and invalid, unless followed by an actual abandonment of the sale by both parties and a restoration of the property to the vendor. *Pratt*

v. *Morrow,* 45 Mo. 404; *Dougherty* v. *Catlett,* 129 Ill. 431; *Miller* v. *Pierce,* 104 N. C. 389; *Maxon* v. *Gates,* 112 Wis. 196.

Furthermore, it is not contended that the plaintiff F. V. Baldridge entered into any contract for a resale of the land or a rescission of the contract. "One tenant in common cannot bind his cotenant by any unauthorized agreement or act in respect to the common property." 17 Am. & Eng. Ency. Law (2d Ed.), 672; 23 Cyc. 494.

It follows, therefore, that there are no errors in the findings of the chancellor. The decree is affirmed.

FAGAN v. STUTTGART NORMAL INSTITUTE.

Opinion delivered June 14, 1909.

1. CORPORATION—POWERS OF OFFICERS.—A director of a corporation may become a creditor of the corporation, if the transaction is open and *bona fide,* and in that event, to protect himself, may purchase the corporate property at a judicial sale. (Page 147.)
2. TRUST—PURCHASE OF CORPORATE PROPERTY BY DIRECTOR.—Where a director in a corporation purchases the property of the corporation at an execution sale to satisfy the claim of another, he does so subject to the rights of the corporation or its stockholders to disaffirm the sale in equity and demand a resale without showing any actual fraud or prejudice. (Page 147.)
3. SAME—WHEN ENFORCED.—A purchase of corporate property at execution sale by a director is good at law, and is only voidable in equity at the suit of some party in interest having equitable rights. (Page 147.)
4. ESTOPPEL—ACQUIESCENCE.—Where stockholders in an incorporated academy recognized the validity of a purchase of the corporate property by a director at execution sale, and encouraged an assignee of such director in acquiring the property and improving it, they will not be permitted to question the validity of such purchase. (Page 148.)

Appeal from Arkansas Chancery Court; *John M. Elliott,* Chancellor; reversed in part.

C. E. Pettit, for appellants.

1. Porter, by virtue of his position as director and controlling stockholder, was a trustee, and could not speculate upon

the corporation's property, or purchase at sheriff's sale, except as trustee. 38 Ark. 17, 26, 30; 10 Cyc. 815, 787, 791, 799; 35 Ark. 314; 75 *Id.* 188; 33 *Id.* 587.

2. The notice required by section 4923, Kirby's Digest, was not given, and the sale is subject to redemption.

3. The property was in fact redeemed in time. Porter accepted the amount tendered as sufficient, and cannot now object. He is estopped. 17 Cyc. 1334; 31 Ark. 252.

4. Hendrix College is not an innocent purchaser for value. Miller, the president, had notice of the trust and redemption.

5. Mrs. Pettit, the intervener, is certainly entitled to relief, as she loaned the money in pursuance of the order of court.

6. Even if Edwin Pettit was estopped by signing the subscription list, the other stockholders are not.

John L. Ingram, for appellees.

1. No right to sue is shown in plaintiffs. 2 Beach, Priv. Corp., § 884. The question can be raised at any time. Kirby's Digest, § 6096.

2. They are barred by laches. 145 U. S. 368.

3. A director is not prohibited from purchasing corporation property when good faith is exercised. 2 Freeman on Ex., § 292 (3 Ed); 5 L. R. A. 166; 1 S. W. Rep. 408; 127 U. S. 589; 91 U. S. 587; 10 Cyc. 813; 2 A. & E. Dec. Eq. 255, par. 1; 2 *Id.* 257, par. 2.

4. The presumption is that due notice was given, and the burden was on appellants to show it was not. But if not given the sale was not invalid. 15 Ark. 209; 47 *Id.* 226.

5. The sheriff's deed is *prima facie* evidence that there was no redemption. Kirby's Dig., § 760; 50 Ark. 297. There is no common-law right of redemption. It is purely statutory, and the terms of the statute must be strictly complied with. A deposit in bank is not sufficient. 25 Enc. Law, 847; 38 N. E. 555; 35 S. W. 890; Rorer on Jud. Sales, § § 1148, 1181 to 1193. The full amount requisite must be paid or tendered. 25 Am. & Eng. Enc. Law, p. 487. The statute was not complied with. Kirby's Dig., § § 3281, 3293. General deposits are the property of the bank. 46 Ark. 537; 5 Ark. 283.

6. Hendrix College was an innocent purchaser, and plaintiffs are estopped by signing the subscription list.

7. Mrs. Pettit never loaned the receiver any money. She loaned it to Edwin Pettit. But the receiver still has the money to pay her.

FRAUENTHAL, J. In 1889 a number of the citizens of Stuttgart organized a corporation under the name of the Stuttgart Normal Institute. This corporation was formed under the general incorporation laws of Arkansas relating to "manufacturing and other business corporations." The purpose of its formation was "the establishment and maintenance of an institution of learning at Stuttgart, Arkansas." And it was not expected or intended that its stockholders should obtain any financial profit therefrom, although it was formed under the provisions of the statute relating to business corporations. It secured land known as block 96 in Improvement Company's Addition to the town of Stuttgart, and erected a school building thereon. It proceeded with its purpose and secured teachers and conducted a school, which had its varying periods of success and failure. At times efforts were made to get some organization to take the property free of charge and establish and conduct a permanent school or college there. But these efforts did not meet with success. The affairs of the corporation were conducted by a board of directors, consisting of nine members; and the defendant J. I. Porter was one of these directors from its organization until its dissolution by the decree in this case.

The corporation became indebted to one James A. Gibson, who recovered a judgment against it in the Arkansas Circuit Court on November 10, 1901. Upon this judgment an execution was issued, and by the sheriff of said county levied on the above property, which was all the property owned by the corporation. The property was offered for sale under said execution by the sheriff at public outcry on March 2, 1901, and at this sale J. I. Porter was a bidder. He bid $1,100 for the property, and, this being the highest offer, the same was sold to him by the sheriff.

On January 13, 1902, the plaintiffs, W. M. Price, Edwin Pettit and S. J. Parks, instituted this suit in the chancery court of Arkansas County against the defendants, the Stuttgart Normal Institute and J. I. Porter, and in the complaint asked for the ap-

pointment of a receiver to take charge of the property of the corporation and for the authorization of the receiver to borrow money and redeem the property from said execution sale, and for the dissolution of the corporation. The chancery court, with the agreement of the parties, appointed G. W. Fagan, receiver. On March 1, 1902, the receiver, under the above direction, borrowed from Angeline Pettit the sum of $743.21 for the purpose of paying on the redemption of said property from said execution sale. It appears that at the time of said execution sale the amount due on the judgment and cost was $617.23, and that in making good his bid J. I. Porter paid in money the sum of $617.23, and executed his note for the balance of the bid: $482.77. This cash payment so made by Porter amounted with interest at the rate fixed by the statute in redemption at execution sales to said sum of $743.21 on March 1, 1902. At this time and prior thereto the receiver was also cashier of the German-American Bank, of Stuttgart, Arkansas, and J. I. Porter was vice-president of this bank and carried an account there. The receiver placed to the credit of J. I. Porter on this account with said bank said sum of $743.21. The receiver testified that he did this in the way of paying this sum to Porter in redemption of the property. But Porter refused to recognize this as a payment, and it remained in this form on the books of said bank at the time of the final hearing of the case in 1907. The note for $482.77 which had been executed by Porter on his bid was left with the circuit clerk by the sheriff, and Porter paid the amount thereof to the clerk who thereupon paid the same to the receiver. Thereafter, on May 22, 1902, the sheriff executed a deed to J. I. Porter for the property under the above execution sale.

About this time and prior to June 4, 1902, J. I. Porter entered into negotiations with the president of Hendrix College for the purpose of establishing a school on the property under the supervision and ownership of said Hendrix College or the Trustees of the Methodist Episcopal Church, South. It appears that Hendrix College is a corporation organized under the laws of Arkansas governing the incorporation of institutions of learning, and that its board of trustees are selected by controlling authorities of the Methodist Episcopal Church, South.

On June 4, 1902, the plaintiffs W. M. Price and Edwin Pettit and a number of citizens of Stuttgart, Arkansas, signed an instrument which therein is denominated, "Subscription paper for funds to establish a Hendrix Academy at the Town of Stuttgart, Arkansas;" and is as follows:

"For the purpose of securing the property of the school known as the Stuttgart Normal Institute and sufficient money to meet the $10,000.00 conditions of the trustees of Hendrix College (the college of the Methodist Episcopal Church, South, located at Conway, Ark.), we, the undersigned, agree to pay to the properly designated representatives of Hendrix College the sums set opposite our respective names; provided, that: First, all money and property donated under the terms of this subscription shall be used to improve, equip and maintain the college property at Stuttgart; second, the deed shall be made in fee simple to Hendrix College, but provision shall be made so that if it may become necessary to separate the college and academy the latter shall be owned and controlled by trustees appointed by the annual conference of the Methodist Episcopal Church, South, in which it is located, and, while the college and academy shall not be liable each or either for the other's debts, if the property should be sold, the proceeds must be invested in a similar school in Stuttgart, so that the object for which these subscriptions are made shall not be defeated; and, third, these subscriptions shall not be due and payable until the president of Hendrix College, in writing, acknowledges that the conditions of the constitution of Hendrix College can be satisfied."

Each of the subscribers to said instrument agreed to its terms, and amongst them was the defendant, J. I. Porter, who subscribed the above school property, which was placed at $5,000, and also $1,000 in money; and the remainder of the $10,000 was subscribed by numerous public spirited citizens of Stuttgart. On the same day J. I. Porter executed an instrument whereby he agreed to convey to Hendrix College or said trustees all the property described in said sheriff's deed upon demand, this being the property referred to in said subscription instrument. Thereupon, the various subscriptions were substantially all collected; and with the funds buildings were erected on the said land during 1902. And Hendrix College at once took possession of the property for the purpose of conducting a school thereon; and ever since said

time such school has been maintained thereon under the name of the "Stuttgart Hendrix Academy." In pursuance of the above agreement, J. I. Porter executed a deed for said property to certain named trustees of and for the the Little Rock Conference of the Methodist Episcopal Church, South.

During all the above time the above suit lay dormant; and there is evidence tending to prove that J. I. Porter, Hendrix College and all the subscribers to the above instrument, including the plaintiffs who signed same, understood that the above agreement evidenced by said subscription paper and the payments made thereunder, together with the execution of the bond for deed and the acceptance of the property by Hendrix College, was a settlement of said litigation, and operated in placing a good and perfect title to the property in said trustees. And such evidence was sufficient to sustain a finding to that effect.

Thereupon the court made an order dissolving the corporation, the Stuttgart Normal Institute, and proceeded further in its order to provide for winding up its affairs.

For some time the suit again lay dormant, but it was still pending. Thereafter the plaintiffs filed a supplemental complaint, in which they sought to set aside the above sheriff's deed to Porter and to restore the property for the benefit of the stockholders of the Stuttgart Normal Institute, or to charge said Porter with the value thereof. The receiver was made a party plaintiff, and adopted the above supplemental complaint. Thereupon said Hendrix College intervened, and asked that the supplemental complaint be dismissed, or that it have a lien declared in its favor on the property for the $4,000 expended by it on the property. Later the said Angeline Pettit filed an intervention, seeking a recovery of the money loaned by her to the receiver.

Upon a final hearing, the chancellor dismissed the supplemental complaint of plaintiffs and the receiver and the intervention of Angeline Pettit, and ordered that G. W. Fagan strike from the credit of the account of J. I. Porter on the books of said bank the said sum of $743.21, and ordered that the said sum of $482.77 in the hands of the receiver be distributed amongst the stockholders of the corporation. And from this decree the plaintiffs and intervener, Angeline Pettit, have appealed to this court.

The pleadings in this case are very numerous, and the testi-

mony voluminous; and we have endeavored above to give as briefly as practicable the issues involved and the testimony relating thereto. From this it appears that J. I. Porter was a director of the corporation, the Stuttgart Normal Institute, at the time of his purchase of its property under the sale made under the execution against it. The effect of his relation to the corporation made that sale voidable. A director cannot, as a general rule, make a valid purchase of the property of the corporation at a public or judicial sale. He may become a creditor of the corporation, if the transaction is open and *bona fide;* and in such event, to protect himself, he may purchase at a judicial sale. But, if he purchases at such a sale to satisfy the claim of another, his purchase, in equity, is subject to be set aside at the instance of a party in interest. He is considered in equity as being a trustee for the stockholders and creditors of the corporation, and his position as a bidder is inconsistent with that relation. His appearance as a bidder may have the effect to prevent bidding; and his private interest may conflict with his duties as a trustee of the corporators in protecting their interest. The rule, as sustained by sound moral principles and the weight of authority, is that where a director purchases at a judicial sale made under process in favor of another the properties of the corporation, he does so subject to the right of the corporation or its stockholders to disaffirm the sale and to demand a resale without showing any actual fraud or any actual prejudice. *Little Rock & Ft. Smith Ry. Co.* v. *Page*, 35 Ark. 304; *Jones* v. *Ark. Mechanical & Agricultural Co.*, 38 Ark. 17; *Crawford County Bank* v. *Bolton*, 87 Ark. 142; *McAllen* v. *Woodcock*, 60 Mo. 174; *San Francisco Water Co.* v. *Pattee*, 86 Cal. 623; 3 Thompson on Corporations, § 4071; 6 Thompson on Corporations, § 7866; 21 Am. & Eng. Enc. Law (2 Ed.) 904; 10 Cyc. 814. But such a purchase by the director is good at law, and is only voidable in equity at the suit of some party in interest and with equitable rights. *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 587. Under the evidence in this case the plaintiffs are not now in an equitable position to ask that this sale be set aside. After the purchase by Porter at the sheriff's sale, he entered into negotiations with Hendrix College for a transfer of his title, thus obtained, to it or to trustees for its benefit. The plaintiffs or those representing them

not only agreed to these negotiations, but they executed a written instrument by which they encouraged Hendrix College in accepting this title. They thus recognized the validity of the sheriff's deed to Porter, and by their conduct and their act in writing caused a number of citizens to subscribe and pay towards obtaining that title. These parties actually invested their money on this assurance, and Hendrix College erected new buildings on the land on this assurance. By this act and this conduct the plaintiffs in equity and good conscience should not now be permitted to take a different position and attack this sheriff's sale to Porter and the deed executed thereunder.

In the case of *Trapnall* v. *Burton,* 24 Ark. 372, the trustees of a college were about to purchase certain land which was in litigation, and spoke to the plaintiff in the case in which the land was involved, relative thereto. The trustees, relying upon his acts and conduct indicating that he would place no obstacle in the way of the purchase, made the purchase. In that case the plaintiff was held to be estopped to set up any claim that would impair such purchase.

In this case the plaintiffs by their actions induced Hendrix College and its representatives to act upon the reasonable belief that they waived or would waive any rights, remedies or objections which they might have insisted on against the purchase by Porter at the sheriff's sale. And to permit the plaintiffs now to assume a different position would work an injury and a prejudice, not only to Hendrix College, but to every citizen who subscribed and paid towards this commendable cause. The principle of equitable estoppel is "that when a man has done an act or said a thing, and another, who had a right to do so, has relied on that act or word and shaped his conduct accordingly and will be injured if the former can repudiate the act, it shall not be done." *Trapnall* v. *Burton,* 24 Ark. 371; *Youngblood* v. *Cunningham,* 38 Ark. 571; *Gill* v. *Hardin,* 48 Ark. 409; *Cox* v. *Harris,* 64 Ark. 213; *Rogers* v. *Galloway Female College,* 64 Ark. 627; *Warren & O. V. Rd. Co.* v. *Garvin,* 74 Ark. 136; 16 Cyc. 774-805.

It follows, therefore, that the chancery court was correct in dismissing the supplemental complaint of the plaintiff. However, we are of opinion that the intervention of Angeline Pettit should not have been dismissed, but the relief should have been granted

to her. Under the direction of the chancellor the sum of $743.21 was borrowed by the receiver from her, and the receiver executed to her a note with interest therefor. That should be paid to her. There is really in the hands of the receiver through the German-American Bank the sum of $743.21, and in addition to that the sum of $482.77. Out of these funds the receiver should be directed to pay to said Angeline Pettit the amount of said note and interest, if there shall be sufficient funds. And that the receiver should distribute any balance to the stockholders, as provided in the decree of that court.

The decree, in so far as it dismisses the supplemental complaint of plaintiffs, is affirmed. But it is reversed, in so far as it dismisses the intervention of Angeline Pettit; and this cause will be remanded with directions to enter a decree in accordance with this opinion.

SULLIVAN v. WINTERS.

Opinion delivered June 21, 1909.

1. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDINGS.—A chancellor's findings of fact will not be disturbed on appeal unless clearly against the preponderance of the evidence. (Page 152.)
2. STATUTE OF FRAUDS—CONTRACT TO DIVIDE PROCEEDS OF SALE OF LAND.—A verbal contract to divide the proceeds of the sale of land to be thereafter made is not within the statute of frauds. (Page 152.)
3. SAME—EFFECT OF PERFORMANCE.—If so much of a verbal contract for the division of the proceeds of land to be sold as relates to the sale of land be within the statute of frauds, after it has been performed, the remainder of the contract relating to the division of the proceeds will be enforced. (Page 152.)
4. SAME—CONTRACT NOT TO BE PERFORMED WITHIN YEAR.—In order to bring a contract within the statute of frauds as one not to be performed within a year, it must be one that by its terms is not to be performed within a year. (Page 153.)

Appeal from Lawrence Chancery Court; *George T. Humphries,* Chancellor; affirmed.

Sam H. Davidson and *Morris M. Cohn,* for appellant; *L. B. Poindexter,* of counsel.

1. Contracts for the sale of lands or any interest in or concerning are void under the statute of frauds. Kirby's Digest, § 3654, clause 4; Browne on Stat. Frauds, § § 385-7; 21 Ark. 533; 16 *Id.* 364; 76 *Id.* 237; 45 *Id.* 17; 70 *Id.* 351, etc.

2. The contract was not to be performed within a year, and was void. *Ib.* § 3654, clause 6; 46 Ark. 80; 1 McArthur (D. C.) 485; 47 Am. Dec. 320; 1 Hilton (N. Y.) 305.

3. The evidence does not sustain the chancellor's finding of facts.

W. A. Cunningham, for appellee.

1. This was simply a contract to share in the profits or proceeds of the sale of land, and is not within the statute of frauds. 29 Am. St. Rep. 134; 71 Ark. 326.

2. No time is specified in which the contract was to be performed. Such a contract is not within the statute. 46 Ark. 84; 71 Ark. 326.

3. The findings of the chancellor are not against the preponderance of the evidence.

McCULLOCH, C. J. About forty years ago the plaintiff, Howell Winters, discovered, or thought he discovered, a valuable lead of zinc ore on a tract of land in Sharp County, Arkansas, containing 320 acres, then owned by a man named Street. He promised Street to say nothing about it and, keeping the secret, he afterwards removed from that locality. Street sold the land, and afterwards died, and the land finally became by purchase the property of the defendant Sullivan.

Sometime in the year 1903, while the plaintiff was living in Polk County, Arkansas, he called to mind his former discovery, and decided to take the matter up and see if he could not make something out of it, and some correspondence took place by letter between him and the defendant. The letters have been lost, and there is some conflict as to their contents, but that is immaterial, as the rights of the parties depend upon an oral contract subse-

quently made between them. It does not appear whether or not at that time the plaintiff knew that the lands were owned by Sullivan, but he afterwards ascertained that fact.

In September, 1903, the plaintiff returned to Sharp County, and went to see the defendant at his home for the purpose of renewing negotiations. He then informed the defendant that it was upon the latter's land that the discovery of zinc had been made. They thereupon entered into an oral contract whereby it was agreed that the plaintiff should proceed with his investigation and develop to a certainty whether or not there was zinc ore in paying quantities on the land, and that when the land should be sold the plaintiff should share in the proceeds of the sale. There is a serious conflict between their several contentions as to what proportion of the proceeds of sale the plaintiff should have. He contends that he was to have one-half of the proceeds, but the defendant contends that according to the agreement the plaintiff was only to share equally in the proceeds of sale after deducting the market value of the land for agricultural purposes.

The plaintiff, and another person associated with him in the work, proceeded with the development of the mineral prospect, and did considerable work in the way of opening up shafts and cuts and taking out mineral. According to the testimony, considerable zinc was found on the land. In 1907 the defendant sold 160 acres of the land to Vaughan & Estell for $6,000, and the plaintiff instituted this action against the defendant to recover one-half of that sum, alleged to be due him under the contract. The defendant, in his answer filed in the case, denied that he had entered into any contract with the plaintiff agreeing to pay him any portion of the proceeds of sale of the land; but in his testimony it is admitted that such a contract was made, and they differ as to the terms thereof, as already stated.

On motion of the defendant, and without any objection on the part of the plaintiff, the cause was transferred to equity, where it proceeded to final decree upon the pleadings and proof. The court sustained the contention of the defendant as to the terms of the contract, and found that a fair market value of the lands for farming purposes, not considering the mineral thereon, was $20 per acre, or $3,200 for the tract sold, leaving a profit of $2,800 on the sale, one-half of which was decreed to plaintiff. The de-

fendant appealed to this court, and afterwards the plaintiff cross-appealed. Both parties contend here that the chancellor erred in his finding of facts, the plaintiff contending that the findings were erroneous as to the terms of the contract and also as to the value of the land for agricultural purposes. The defendant also contends that the land was of greater value for agricultural purposes than the amount found by the chancellor.

We are of the opinion that the findings of the chancellor were correct throughout, or, at least, after a consideration of all the testimony, which is voluminous, we cannot say that the findings are against the preponderance thereof. The direct testimony as to the contract between the parties is nearly even balanced; but, considering the statements of a number of witnesses who testified as to the admissions made by the plaintiff, we think that on this issue the scales turned in favor of the defendant's contentions. that the value of the land for farming purposes was to be deducted.

The finding as to the value of the land for this purpose was not strictly in accord with the testimony of either of the parties, but the court fixed the value between the two extremes. Most of the defendant's witnesses testified that it was worth $25 per acre, whilst those introduced by the plaintiff put the value at far less than that amount per acre. The court fixed it at $20 per acre, and we are not prepared to say that this assessment of the value was against the preponderance of the evidence.

The defendant also pleaded the statute of frauds in bar of the plaintiff's right of recovery. Two sections of the statute are pleaded: The one relating to contracts "for the sale of lands, tenements or hereditaments, or any interest in or concerning them;" and the clause relating to contracts not to be performed within a year from the making thereof. The oral contract in question, which was one for the division of the proceeds of a sale of land to be thereafter made, is not within the statute of frauds. *McClintock* v. *Thweatt,* 71 Ark. 323; *Trowbridge* v. *Weatherbee,* 11 Allen 361; *Linscott* v. *McIntire,* 15 Me. 201; *Hess* v. *Fox,* 10 Wend. 436; *Bunnel* v. *Taintor,* 4 Conn. 568; *Bruce* v. *Hastings,* 41 Vt. 380; *Benjamin* v. *Zell,* 100 Pa. St. 36.

If that part of the contract relating to the sale of the land be held to be within the statute of frauds, it has been fully per-

formed, and the only unperformed portion is that relating to the division of the proceeds. *McClintock* v. *Thweatt, supra.*

The evidence does not show that the contract was not to be performed within a year. No definite time was agreed upon within which the contract should be performed, and it may have been performed within a year. In order to bring a contract within the operation of the statute of frauds, it must have been one that, by its terms, was not to be performed within a year. Browne on the Statute of Frauds, § § 273, 274; *Linscott* v. *McIntire, supra; Trowbridge* v. *Weatherbee, supra; Peters* v. *Westborough,* 19 Pick. 364; *Lyon* v. *King,* 11 Metcalf 412.*

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

*See also *Railway Company* v. *Whitley,* 54 Ark. 199; *Sweet* v. *Desha Lumber Co.,* 56 Ark. 629. (Rep.)

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* SANDERS.

Opinion delivered June 7, 1909.

1. COVENANT TO BUILD LEVEE—ASSIGNABILITY.—A covenant of a railway company to build a levee which will protect the covenantees' field from overflow is a covenant which runs with the land. (Page 159.)
2. SAME—WHO MAY ENFORCE.—Where a railway company covenanted with a husband to build a levee which would protect from overflow a field owned by the husband and wife as tenants by the entireties, and after the husband's death the wife conveyed an undivided half interest in such field to another, the wife and her grantee are entitled to recover for breach of such covenant. (Page 160.)
3. SAME—BREACH—MEASURE OF DAMAGES.—For breach of a covenant to construct a levee which would protect land from overflow, the measure of damages is what it will reasonably cost to build such levee. (Page 160.)
4. SAME—INSTRUCTION AS TO MEASURE OF DAMAGES DISAPPROVED.—In an action for breach of a covenant to construct a levee which would protect certain land from overflow, it was error to instruct the jury that the plaintiff could recover the market value of a crop destroyed by overflow or the rental value of the land in case the crop destroyed had no market value. (Page 161.)

Appeal from Marion Circuit Court; *Brice B. Hudgins,* Judge; reversed in part.

E. B. Kinsworthy, Lewis Rhoton and *Horton & South,* for appellant.

When one declares for a breach of special contract, it is incumbent on him to prove substantially the material allegations of the declaration. 21 Ark. 301; 11 *Id.* 733; 2 *Id.* 397; 41 *Id.* 399; 76 *Id.* 333. Exhibit A should have been stricken out. It is void for uncertainty of parties and subject-matter. 5 A. & E. Enc. Law (1 Ed.) 432-9; 9 *Ib.* (2 Ed.) 132, (2); 2 Parsons, Cont. (2 Ed.) 515; 60 Ark. 489; 22 *Id.* 64; 41 *Id.* 501; 7 A. & E. Enc. Law (2 ed.) 289. There is no proof that the right-of-way agent did or could delegate his authority. 70 Ark. 354. The initials are meaningless. A patent ambiguity cannot be supplied by parol. 41 Ark. 501; 35 *Id.* 164; 81 Ark. 1-3; Parsons, Cont. (6 Ed.) Vol. 2, 560, 575, 576; 2 A. & E. Enc. Law (2 ed.) 289. Where a contract is reduced to writing, it is the only evidence. 30 Ark. 186. It cannot be varied by parol. 67 Ark. 62; 65 *Id.* 333; 73 *Id.* 431. A covenant running with the land inures to the benefit of the legal representatives and assignees of the grantee only. 49 Ark. 418. The estate of A. F. Hampton was not an estate of inheritance and descended to no one. 3 Words and Phr. Jud. Defined, tit. Estate by Entirety, pp. 24, 90; 66 Ark. 308; 44 Am. St. 97. Hampton had only a life estate.

2. A contract cannot rest partly in writing and partly in parol. 9 Ark. 506; 29 *Id.* 547; 35 *Id.* 164. The evidence of Mrs. Sanders was incompetent, as were the letters. Lee Estes was the husband of one of the plaintiffs and incompetent to testify. 34 Ark. 673. He could not prove his own agency for the wife. 56 Ark. 206; 44 *Id.* 213; 43 *Id.* 293. Mech. on Ag. 63, note 3. Wilber's testimony was also incompetent. Mech. on Ag. 100-1-2.

3. This was an action on a contract, and cannot be treated as one for negligence in costruction. 76 Ark. 333. It was a proper case to take from the jury and instruct for defendant. 69 Ark. 568; 75 *Id.* 408; 57 *Id.* 461.

4. Only privies of estate can sue on a covenant running with the land. 2 Min. Inst. 715, 716-17-18. The remedy was by action

for each separate overflow. 49 Ark. 423; 63 *Id.* 253; 52 *Id.* 250; 44 *Id.* 439.

5. Instructions must be consistent. 72 Ark. 31; 59 *Id.* 104; 55 *Id.* 397. Here two different rules for the measure of damages were given. 72 Ark. 32-41; 59 *Id.* 104; 35 *Id.* 397.

6. The measure of the damages was the value of the right-of-way. 75 Ark. 89.

Jones & Seawel and *Hamlin & Seawel,* for appellees.

1. The contract is sufficiently explicit and definite; but if it were uncertain as to parties, subject-matter and interest, extrinsic evidence was admissible to make certain. 2 Pars. on Cont. (8 Ed.) 665; 17 Cyc. 710; 68 Ark. 326; 65 *Id.* 51; 75 *Id.* 55. A party may sue on a promise made to another if made for his benefit. 85 Ark. 59; 46 *Id.* 132; 31 *Id.* 155; 33 *Id.* 107; Mechem on Agency, § 769. The contract was made for the benefit of the land, and was a covenant running with the land. 49 Ark. 418, 423. The contract was a proper exhibit. Kirby's Dig., § 6129; Bliss on Code Pl., § 306; 4 Sandf. 696; 33 Ark. 593. The contract, having been made by Hampton for himself and as agent of his wife and being a covenant running with the land, vested in plaintiff a right of action on the death of her husband. 49 Ark. 418; 86 Ark. 251; 11 Cyc. 1099 (11). Such right would pass by conveyance. 49 Ark. *supra.*

2. Even if ambiguous and uncertain, the contract was admissible, as it could be aided by extrinsic evidence, and thereby be rendered definite and certain. 33 Ark. 107; 37 Ala. 619; 11 Cyc. 363-4. The genuineness of the contract was not denied under oath. Kirby's Dig., § 3108; 82 Ark. 105; 85 *Id.* 269. Taken in connection with all the other evidence, the contract in connection with the deed was admissible. 17 Cyc. 708-11, 739 (II); 63 Ala. 284.

3. As a party for whose benefit a contract is made may sue on it, certainly evidence to show that fact is admissible. 17 Cyc. 708 (23 a and b.) The letters were admissible to show that appellant had notice of the contract and failure to perform; also ratification. 73 Conn. 341; 17 Cyc. 410-11; 109 Ill. App. 520; 135 Iowa 181; 71 Kans. 441; 105 Md. 211; 37 Tex. Civ. App.

512; 59 W. Va. 46; 56 Ark. 37; 145 U. S. 285; 78 Ark. 318; 80 *Id.* 15; 83 Ark. 403; 86 Ark. 309.

4. The evidence of Estes was admissible to show that he was acting for his wife as agent for her and Hampton. 90 Ark. 104; 80 Ark. 231; 29 Minn. 322; Mechem on Agency, § 721. A general objection to the competency of a witness is not sufficient if any of his testimony is admissible. 65 Ark. 106-110; 67 *Id.* 112; 86 Ark. 130; 77 Ark. 431; 58 *Id.* 446; 56 *Id.* 37; 22 *Id.* 80.

5. Wilber's testimony was admissible as a circumstance to show a written admission by the company that DeGraw was its agent. 43 Ark. 275; 16 Cyc. 943 (b).

6. The weight to be given evidence is for the jury, and their verdict is final. 82 Ark. 372.

7. Appellees were the proper parties, one an original covenantee, the other a grantee of the land. 78 Ark. 68; 49 *Id.* 418; 86 Ark. 251.

8. The measure of damages was what it would cost to perform the specific work. 13 Cyc. 162 (6); 39 Ark. 344; 72 *Id.* 3; 220 Ill. 256; 99 S. W. 341; 86 N. Y. Supp. 112; 204 Pa. 488; 75 Ark. 89.

BATTLE, J. During the year 1904 A. F. Hampton and his wife, Nancy, owned the east half of the northeast quarter and southwest quarter of the northeast quarter of section five, in township eighteen north, and in range seventeen west, in Marion County, in this State, as an estate in entirety, and on the 15th day of April, 1904, R. X. DeGraw and W. P. Smith procured from them a deed conveying to the railway company a right of way over these lands, and executed to them an instrument of writing as follows:

"April 15th, 1904.

"It is hereby agreed by the St. Louis, Iron Mountain & Southern Railway Company that it will construct a good sufficient levee at the crossing of Crooked Creek in the S. W. ¼ N. E. ¼ of sec. 5-18-17 to fully protect the field owned by A. F. Hampton; said levee to be constructed within 30 days from date hereof.

"R. X. DeGraw, Asst. R. of Way Agt.
"W. P. Smith. D. E."

The sole consideration expressed in the deed for right of way was one dollar. Crooked Creek flowed along by the lands of Hampton and his wife, and the levee mentioned in the contract was to protect the lands against overflow. The railway company constructed its roadbed on the right of way conveyed to it by Hampton and his wife, and at the same time built a small levee at the place stipulated in the contract, but it proved insufficient, and in the year 1906 Crooked Creek overflowed the field of the Hamptons and washed away the soil, growing crops and fences thereon. Hampton then notified A. W. Jones, assistant engineer of the railway company, of the condition and deficiency of the levee, and he (Jones) promised to build a new, or repair the old, levee, but before the work was completed Hampton died in December, 1906, intestate, leaving Nancy, his widow, and his daughter, Harriet, his only heir. The last work undertaken after it was completed also proved insufficient. In 1908 Crooked Creek again overflowed the lands and washed away the soil, crops and fences. No other levee was constructed or rebuilt. The widow of Hampton married Robert Sanders, and his daughter, Harriet, married Lee Estes. Nancy Sanders conveyed one undivided half of these lands to her daughter, Harriet, and they brought an action against the railway company to recover damages caused by the failure to construct a levee according to its contract, including the damages from overflows.

The defendant answered, and admitted that, on or before the 15th day of April, 1904, the plaintiff, Nancy Hampton Sanders, then Nancy Hampton, and A. F. Hampton, her then husband, owned the land mentioned in the plaintiff's complaint as joint tenants with the right of survivorship, having an estate therein by entireties, and that on said day they conveyed to the defendant by a proper deed therefor a right of way on which to build its railroad across the lands; and that A. F. Hampton departed this life on the 19th day of December, 1906. It denied that it executed the foregoing instrument of writing, or authorized any one to execute it; that it had notice of its existence at the time the railway company accepted the deed for right of way over the lands mentioned; and, if it was made with A. F. Hampton, denied that he was acting for himself and plaintiff, Nancy.

It alleged that, if the foregoing instrument of writing was a

valid contract, "it was personal to A. F. Hampton, and binding the defendant only to protect his field, and did not require it to build a levee to protect the property of the plaintiffs, and, the said A. F. Hampton having since departed this life, and his estate in said field having ceased, and plaintiffs not holding title to said lands under him, denied that it is liable to plaintiffs in any sum whatever for any breach of said contract, if the same has been broken."

The defendant moved to strike out the instrument in writing sued on, and said that it is void as evidence of a contract, because: "1. Said contract is void for uncertainty in the description of the persons between whom and for whose benefit it was made, for uncertainity as to the subject-matter, and does not show the plaintiffs had any interest therein. (2.) Said pretended written contract does not show with whom the defendant contracted. (3) Said complaint shows on its face that the plaintiffs do not hold under A. F. Hampton, the only name used therein, because, they say, said complaint alleges that said A. F. Hampton had an estate in entirety in said lands with the plaintiff, Nancy Hampton Sanders, as his joint tenant. (4) Said pretended contract purports only to be for the interest of the field owned by A. F. Hampton, whose title and interest in said field ceased with his death, and did not descend to the plaintiffs. (5.) That said pretended contract is void as to the description of the field of said A. F. Hampton. That for these reasons said Exhibit A is void as evidence of a contract inuring to the benefit of the plaintiffs, and is void as evidence of any contract whatever."

The motion was overruled.

Evidence was adduced in the trial by the parties, and instructions were given by the court. The jury returned a verdict in favor of the plaintiffs for $1,040 for breach of contract, for $70 for damages by overflow of 1906, and for $40 for damages by overflow of 1908, amounting in the aggregate to $1,150, for which the court rendered judgment; and the defendant appealed.

So much of the evidence and instructions as is necessary to state will be set out in the opinion.

Appellant insists that the writing sued on is insufficient to constitute a valid contract. It contends that it is uncertain as to the parties and subject-matter, and does not show that either of

the plaintiffs has any interest therein or right to maintain an action for a breach of the same.

The deed for right of way executed by A. F. Hampton and his wife and the contract sued upon were executed on the same day and form a part of the same contract, each writing containing the undertaking of only one party, and both being necessary to constitute a complete contract. The contract was made in the name of appellant; the language of the contract being, "It is hereby agreed by the St. Louis, Iron Mountain and Southern Railway Company," etc. They refer to the same land. Crooked Creek, mentioned in the contract, flows along the lands mentioned in deed for right of way and the contract. The railroad was constructed on the right of way over these lands and across the creek. The levee was required by the contract to be constructed at this crossing to protect the field of A. F. Hampton against floods. The field to be protected was evidently that exposed to these floods, which was the field on the lands owned by A. F. Hampton and his wife as an estate in entirety, and it is thus shown that the contract was made for their benefit. When the railroad was constructed on the lands of the Hamptons, a levee was built at this crossing which proved insufficient to protect their lands against overflows, and another was built at the same place, and this also failed in the same manner. The consideration expressed in the deed for the right of way was only one dollar. The instrument of writing, construed in connection with the deed as a part of the same contract, furnishes the true consideration of the latter, and each furnishes the consideration of the other. The language of the instrument of writing and of the deed, read in the light of these facts, shows that the appellant, in consideration of that right of way, contracted with the Hamptons to build a levee at the crossing of Crooked Creek by its railroad sufficient to protect the field on their lands. Thus interpreted, it is a valid contract. The facts do not add to or vary the contract, or change it, but show the crossing and field meant by the contract, and the parties thereto are necessarily implied by the deed and contract.

There was evidence tending to prove that R. X. DeGraw, assistant right-of-way agent, and W. P. Smith, division engineer, had authority to make the contract entered into by them on

behalf of the appellant, or, if they did not have, it was ratified by their principal by attempting to perform it.

Letters of A. W. Jones, assistant engineer of appellant, directed to A. F. Hampton, in his lifetime, in which he promised in behalf of appellant to repair or rebuild the levee at the crossing of railroad on Crooked Creek, admitted as evidence over objections of appellant, were admissible to show authority for or ratification of the contracts of DeGraw and Smith.

Lee Estes, the husband of one of the plaintiffs, was allowed to testify against the objection of appellant as to the contract with appellant. But that related to his being in possession of such contract, and was not prejudicial, as the existence of such a contract was shown by undisputed evidence. He did not pretend to say that it was entered into by authority of appellant. He was allowed to testify as to letters of A. W. Jones, assistant engineer of appellant, being in possession of the plaintiffs. We hardly think that this was prejudicial. He never saw Jones write, and did not know his writing. He knew only that the letters were in possession of Hampton, and after his death in the hands of plaintiffs. That is not a disputed fact.

Mrs. Sanders, being a party to the contract sued on, is entitled to sue and recover damages. She conveyed one undivided half of the land to Mrs. Estes, and this establishes a privity of the estate between them, and the latter by virtue thereof is entitled to recover. *St. Louis, Iron Mountain & Southern Railway Company* v. *O'Baugh,* 49 Ark. 418. And the measure of the damages they are entitled to recover is what it will reasonably cost to build the levee that appellant undertook to construct. *Varner* v. *Rice,* 39 Ark. 344; *Plunkett* v. *Meredith,* 72 Ark. 3.

Appellant contends that a different rule of damages was established by *St. Louis & North Arkansas Railroad Company* v. *Crandell,* 75 Ark. 89, and *St. Louis, Iron Mountain & Southern Railway Company* v. *Berry,* 86 Ark. 309. But that proves nothing. The measure of damages is not the same in all cases, but it is intended to be compensatory for losses sustained, and varies according to the facts and circumstances of each case. For a breach of contract the damages recoverable should "be such as may fairly and reasonably considered as arising naturally therefrom, that is, according to the usual course of business, or such

as may reasonably be supposed to have been in the contemplation of both parties at the time that the contract was made, and as a probable result of the breach." In the first case cited Crandell, in consideration that the railroad company would locate and build a depot on a certain tract of land, purchased a part of the tract for the railroad, and gave it to the company, and also gave the right-of-way over his own land. The grantee constructed its road on the right-of-way given and built a depot on the tract purchased, and, after it had been established and maintained for a short time over a year, erected a passenger station 500 yards distant, and abandoned it as a passenger depot. Before the abandonment Crandell erected various improvements upon his property suitable to its then location close to the station. He recovered the amount paid for the tract, the value of the right of way through his land, and the loss in value of the property built by him near the depot. Such was the loss sustained by him by the breach of his contract. He could not recover the value of the depot, for it was not built or intended for him, but for the public. In the second case cited a right of way across certain land was conveyed to a railroad company in consideration of its placing a depot on the land, and the company failed to do so. It was held that the grantor was entitled to recover the value of the land so taken and appropriated, as damages. That was the loss he sustained by reason of the breach of his contract. He was not entitled to the value of a depot for the reason given in the first case. In the case at bar the appellee was entitled to a certain levee under his contract, and the reasonable cost of constructing it was what he lost by the breach of his contract.

The court instructed the jury over the objections of the appellant, as follows:

"3. If you find for the plaintiff on the second paragraph of their complaint, and further find that a part of the crop of the year 1906 was injured or destroyed, the measure of damages would be the actual value of the interest of plaintiff, Nancy Hampton Sanders, in the crop at the time of said injury, if any, with six per cent. interest from the date thereof."

"4. If you find for the plaintiff on the third paragraph of their complaint, and further find that a part of the crop of 1908 was injured or destroyed as alleged, the measure of damages

would be the actual value of the interest of plaintiff in the crop, if any, at the time of the injury, with six per cent. interest from the date thereof."

"6. Even if you should find for the plaintiff, yet the measure of damages to crops would be only the rental value of the land upon which crops were growing and were destroyed, plus the reasonable value of the labor in planting and cultivating such part of such crops as were damaged, provided such crops at time of the damage were so immature that they did not have a market value at the time."

The court erred in giving these instructions. The reasonable costs of constructing the levee is a full compensation for the failure to construct the same. If the appellees wished to avoid other damages from the same source, they could have done so by constructing the levee and putting themselves in the condition in which a performance of the contract would have placed them. *Varner* v. *Rice,* 39 Ark. 344.

Appellant insists that the damages assessed by the jury were excessive. It failed to construct a levee according to its contract, and one witness testified that cost of such a levee would be $2,000. The jury returned a verdict for $1,040.00 for that damage. The judgment of the trial court for that amount is affirmed, and is reversed as to damages awarded for overflows.

PARKER v. CARTER.

Opinion delivered May 17, 1909.

1. CONTRACTS—SIGNATURE OF PARTY.—A contract, not required to be in writing, may be evidenced by writing signed by one party and accepted or adopted by the other party. (Page 167.)
2. LIMITATION OF ACTIONS—WRITTEN INSTRUMENT.—A deed signed by the grantor alone, when accepted by the grantee, becomes the mutual contract of the parties, and any promise of the grantee, therein provided for, is governed by the provisions of the statute of limitations respecting written instruments, and not the statute relating to verbal contracts. (Page 167.)

3. COMPROMISE—DEBTS INCLUDED.—A contract which provided for a settlement of all debts due from one party to the other at the time it was entered into did not apply to any debt barred by limitation. (Page 167.)
4. PAYMENT—CROSS DEMAND.—Before a cross demand can constitute a payment, it is indispensable that an agreement to that effect shall be proved. (Page 168.)
5. LIMITATION OF ACTIONS—RECOVERY OF ATTORNEY'S FEE.—The period of limitation to a suit to recover an attorney's fees is three years from the time the fee is payable. (Page 168.)
6. SAME—ACKNOWLEDGMENT OF DEBT.—In order that a written acknowledgment shall be sufficient to remove the bar of the statute, it must import an unqualified acknowledgment of the debt as one that is due and binding. (Page 170.)
7. REFORMATION OF INSTRUMENT—MISTAKE.—To entitle a party to reform a written instrument upon the ground of mistake, it must be shown beyond reasonable controversy that the mistake was mutual. (Page 171.)

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

C. E. Pettit and *Ratcliffe, Fletcher & Ratcliffe,* for appellant.

Where two written instruments, constituting one transaction, are executed and delivered at the same time, they will be construed as one instrument. 34 Am. Dec. 684; 47 *Id.* 335. Where a contract is prepared in writing, assented to and acted upon by both parties, though signed by only one of them, the other will not afterwards be permitted to deny the binding force of the contract. 104 Cal. 310; 42 Cal. 245; 30 Fed. 225; 77 Wis. 33; 125 Ind. 19; 24 N. E. 756; 130 Ill. App. 131; 129 Ill. 101. A suit could have been based on the deed alone, and the five-year statute of limitations would apply. 84 Miss. 509; 101 Mich. 409; 30 Ark. 872; 78 Ky. 475. When one has five years in which to bring a suit, four years' delay is not laches. 75 Ark. 382. An acknowledgment of the payment of the purchase money in a deed may be contradicted by parol; and if proved not to have been paid it is a promise in writing to pay it, and the statute of limitations applicable to written instruments applies. 84 Miss. 509; 77 Miss. 872; 73 Miss. 665. The writing does not have to be signed, if it shows the debtor agreed to settle. 74 Cal. 60; 4 Houst. 14. A promise to settle at a future day will remove the statute bar. 30

Miss. 40. "I will settle in a few days" removes the bar. 18 N. C. 18; 32 N. C. 86. That he would settle and make all right removes the bar. 49 N. C. 510. Promise to settle a note is equivalent to a promise to pay it. 8 Wend. 600. A simple promise to settle is sufficient. 38 Vt. 159; 16 Vt. 297; 15 Vt. 560; 13 Vt. 574. Although a debtor denies the indebtedness, yet if he agrees to settle it if established, and the indebtedness is proved, the bar is removed. 18 Vt. 485.

C. F. Greenlee, for appellee.

To take a case out of the operation of the statute, there must be an acknowledgment of the debt as due at the time, and a promise to pay it. Such acknowledgment and promise must be unqualified and unconditional. 10 Ark. 134; 12 Ark. 595; 11 Ark. 666. If there be any condition attached to the promise, it will not remove the bar. 52 Ark. 456; 12 Ark. 762; 26 Ark. 540; 20 Ark. 293.

FRAUENTHAL, J. The plaintiff, H. A. Parker, instituted this suit against the defendant, H. A. Carter, on October 28, 1903, in the Monroe Circuit Court, alleging that the defendant was indebted to him in the sum of $887.87 upon a promissory note, and also alleging that there was a long account existing between the parties, but giving no items and filing no statement of any account. He asked for judgment for $887.87.

The defendant filed an answer, in which he denied the execution of any note, and denied that he was indebted to plaintiff on any note or on any account, and pleaded the statute of limitations against any such alleged indebtedness. He also alleged that plaintiff had on February 21, 1889, executed to him a note for $400, upon which there was a balance unpaid of $44.21.

Thereafter the plaintiff filed an amended complaint, in which he alleged that defendant was indebted to him for various items of attorney's fees, beginning in 1882 and extending to 1894; and also alleged that on February 14, 1898, he sold to defendant certain real estate in Brinkley, Arkansas, for the sum of $2,000, which was paid in the following manner: defendant conveyed to certain parties for plaintiff's benefit some lots in Brinkley, and of the balance he paid $550 by check, and the remainder of $565.00 was to be paid in the manner set out in a writing which

was signed by plaintiff at the time of the execution of the deed by him and is as follows:

"This memoranda made and entered into this the 14th day of February, 1898, by and between H. A. Carter on one part and H. A. Parker of the other, as follows: Said Parker has this day sold the J. M. Folkes property to H. A. Carter for a certain sum in money and property. Now, H. A. Carter this day pays H. A. Parker $550.00 in cash, and owes said Parker a balance of $565.00, which is to be paid at the end of the year; and note is to be given when Parker and Carter settle up their other matters. H. A. Parker is to execute deed to Carter. This agreement is signed in duplicate.

"H. A. Parker."

This instrument is the writing upon which plaintiff instituted this suit. He alleged that this instrument was executed in duplicate, one being retained by him and the other by defendant. Plaintiff in the amended complaint also asked for an accounting between the parties. Upon the motion of the plaintiff the cause was transferred to the chancery court. The defendant denied every material allegation of the amended complaint, and pleaded the statute of limitations against each item of said alleged indebtedness.

The cause was tried by the chancery court upon the pleadings and depositions filed in the case; and that court found that, if plaintiff, who is an attorney at law, ever had a cause of action for the matters set out in the complaint and amended complaint, it was barred by limitation, and thereupon dismissed the same. And from that decree the plaintiff prosecutes this appeal.

It appears from the testimony that the defendant employed the plaintiff to attend to a number of suits and matters involved in litigation from time to time extending from 1882 or 1883 to 1893 or 1894. The plaintiff claims that for his services in attending to a great number of these suits the defendant had not paid him. The defendant testified that he had paid plaintiff for all his services as such attorney in all these matters. A great deal of testimony was taken relative to these items; but, however the preponderance of the testimony may be as to the respective contentions of the parties, it appears that the claims of plaintiff were separate and independent items of charges for these different ser-

vices, and that there was no running mutual account between the parties; and the last item of charge for said service was in 1894. On February 21, 1889, plaintiff borrowed from defendant $400, and on that day executed his note to defendant for that sum due December 1, 1889, with ten per cent. interest per annum from date till paid. On July 13, 1893, by agreement of both parties and at the direction of plaintiff, a credit of $150 was indorsed upon the note in payment of attorney fees of the plaintiff.

Upon February 14, 1898, the plaintiff sold to defendant certain real estate in Brinkley, Arkansas, and on that day executed to him a deed, the descriptive part of which is as follows:

"Know all men by these presents: That we, H. A Parker and May B. Parker, his wife, for and in consideration of the sum of two thousand dollars ($2,000) to us in hand paid by H. A. Carter, Sr., of which amount the sum of $1,295 is paid in hand, and the residue is paid in property, to-wit: Two houses and one lot in the town of Brinkley, which houses and lot are deeded to one L. J. Folkes on this date." And at the same time the plaintiff drafted the writing set out above in said amended complaint in duplicate and signed the same. He testified that it was understood that defendant should also sign the said writing in duplicate, but by oversight he did not do so. The defendant denies that it was agreed or understood that he was to sign the writing. But it is undisputed that plaintiff delivered to defendant one of these written instruments duly signed by plaintiff, and that defendant accepted and took same and retained it from that day to the trial.

The plaintiff contends that this was the written evidence of the agreement between the parties, and, being accepted and acted on by the defendant, was a written contract binding upon him, although it was not actually signed by him; that his account for fees was sufficient to pay off the note executed by him to defendant, and that the defendant owes the amount represented by this writing. And it is upon this written instrument that the cause of action of the plaintiff is founded.

The defendant testified that he purchased the real estate from the plaintiff for which he gave him the check for $550, and conveyed certain property for his benefit, and that the balance of $565

was to go in payment of the note which he held against plaintiff.

The preponderance of the testimony establishes that the above writing, signed by plaintiff in duplicate, was executed at the time of the execution of the deed, and that one of these written instruments was accepted by the defendant and retained by him, and that it was understood at the time by the parties that it was the written evidence of their agreement. The contract of the sale of the land was executed, and not executory, and was thus performed by the defendant taking possession of the land under the deed; and this writing was but the evidence of the manner of the payment of the consideration. It thereby became a contract between the parties founded upon a writing, though signed by only one of the parties. As is said in 1 Page on Contract, § 50: "A written contract by one party may be accepted by the other party assenting to it and acting upon it, even if he does not sign it."

A written contract, not required to be in writing, is valid if one of the parties signs it and the other acquiesces therein. The contract or agreement is thus evidenced by the writing, and where the party accepts and adopts the writing as the evidence of the contract he becomes bound by its terms. And in a great many jurisdictions it is held that a deed poll, when accepted by the grantee, becomes the mutual contract of the parties, and the promise of the grantee, therein provided for, is not a verbal one, so as to be governed by the statute of limitation respecting verbal contracts; but that the acceptance of the deed by the grantee makes it a written contract, and the obligations created by it are evidenced by a writing and governed by the provisions of the statute of limitation respecting written instruments. *Washington* v. *Soria,* 73 Miss. 665; *Fowlkes* v. *Lea,* 84 Miss. 509; *Elliott* v. *Saufley,* 89 Ky. 52; *Midland Ry. Co.* v. *Fisher,* 125 Ind. 19; *Bowen* v. *Beck,* 94 N. Y. 86; *Goodwin* v. *Gilbert,* 9 Mass. 510; *Schumacker* v. *Sibert,* 18 Kan. 104; *Huff* v. *Nickerson,* 27 Me. 106.

The above writing, although signed alone by plaintiff, was intended by the parties as an evidence of the agreement therein set out, and was accepted as such and acted on by the defendant. It was therefore an instrument in writing governed by the pro-

visions of the statute of limitations respecting written contracts. And any obligation assumed by defendant as shown by said writing was not barred at the time of the institution of this suit. But by the terms of the contract thus entered into by the parties on February 14, 1898, it was provided that there should be a settlement of the indebtedness due at that time by the parties, one to the other; but that settlement, under the agreement, could apply and actually did apply only to such indebtedness as was at that time legally enforceable and existing, and did not and could not apply to any debt at that time not enforceable because barred by limitation.

The plaintiff claims that he had performed services for the defendant as his attorney in the prosecution and defense of numerous suits and proceedings, amounting in the aggregate to a sum exceeding the amount that was due at that time with interest upon the note given by him to defendant in 1889. But the preponderance of the testimony does not tend to prove that any of these items of charges for fees, except the gross item of $150 of date July 13, 1893, was to go as a payment on said note or that the defendant made any agreement of that kind. So that the charges in favor of plaintiff against defendant for fees constituted an independent account, which could only be used as a set-off and not as a payment. Before there can be a payment on an indebtedness, it is not only essential that there should be a delivery of the property by the debtor thereon, but there must also be an acceptance thereof by the creditor. 30 Cyc. 1180. Before a cross demand or set-off can constitute a payment, it is indispensable that an agreement to that effect shall be proved. *Hill* v. *Austin,* 19 Ark. 230; *Quinn* v. *Sewell,* 50 Ark. 380.

In this case the evidence does not prove that there was an agreement between the parties that these fees should go as a payment or as payments on said $400 note. The last item of these fees was charged and was therefore payable in 1894; and each item became barred after three years. Therefore on February 21, 1898, each of these items of fees claimed by plaintiff was barred by the statute of limitation. *Higgs* v. *Warner,* 14 Ark. 192; *McNeil* v. *Garland,* 27 Ark. 343; 25 Cyc. 1081.

The note for $400 which was executed by plaintiff to defendant on February 21, 1889, was not barred on February 14,

1898, for the reason that by the agreement of both parties a payment of $150 was made thereon by plaintiff on July 13, 1893. That was the only payment made on the note; and, as it bore ten per cent. interest per annum from date until paid, there was more than $565 unpaid thereon on February 14, 1898; and therefore it fully paid and extinguished the amount named in the said writing of February 14, 1898, as due to plaintiff.

It is contended that the following letter written by defendant to plaintiff was a sufficient written acknowledgment to make a new point from which the statute of limitation should run as to all the claims of plaintiff for said attorney's fees:

"Brinkley, Ark., April the 3d, 1900.

"H. A. Parker, Clarendon, Ark.

"Dear Sir: Your favor containing statement from you as regards our settlement, with statement as it were from beginning to end of the whole matter, as you suppose. I would say to you to come up and see me, and let us settle like gentlemen, as you know I have always tried to treat you right. I hold your statement and our settlement of July 23, 1893, which stands as a cr. on your note of borrowed money from me. And then I hold protested check for $100 on Bank of Helena, Ark., dated March the 15, 1894, which I at that date give your note cr. for, and on the 18th of March I received notice of your check to me being protested, and I notified you either on the 18th or 19th that the check was protested. It was on the 20th. I have looked it up. Now, I would say, if you will come up, you and I will try and see what we can do. You stated some rather sarcastic things in your letter and assertions, but I have a few things to say as regards the whole matter, and it would in my opinion be better for us to meet and try and settle like gentlemen, as we have had dealings a long time. So let us meet and settle. I would have answered or rather written you sooner, but was in Memphis when it came, and I have been sick; hardly able to be up now. So let me hear from you as regards the matters, and oblige.

"Yours &c.

"Would say it was understood that we were to settle the matter between us when I bought the Fowlkes property of you.

"Yours &c.

"H. A. Carter."

It is contended that because in this letter there appears a written agreement "to settle" this is sufficient to remove the statute bar. But this language in the letter is not equivalent to an agreement to pay. It is not a recognition of the debt claimed; it is an offer to adjust matters; and the tenor of the letter clearly shows that it is rather a denial of any indebtedness. In order that a written acknowledgment shall be sufficient to remove the bar of the statute, it must import an unqualified acknowledgment of the debt as one that is due and binding. *Beebe* v. *Block,* 12 Ark. 134; *Smith* v. *Talbot,* 11 Ark. 666; *Harlan* v. *Bernie,* 22 Ark. 217.

It is contended by plaintiff that there was a mistake made in the amount of the balance as named in the above writing sued on, and that instead of $515 it should have been $745. He claims that the total amount of the consideration in said deed from him to defendant was $2,000; that part thereof was paid by property, leaving $1,295 as set out in said deed; that of this balance $550 was paid by check, and thus left a remainder of $745, instead of $565.

But the defendant testified that the value placed on the property which defendant conveyed, together with the $550 check, left the balance of $565, and that there was no mistake in this amount. Nowhere in the testimony does it appear clearly what value was placed on the property conveyed by defendant. When the plaintiff instituted this suit on the above writing, he only claimed that it was for $565; and nowhere in his pleadings does he set out that there was a mistake made in this amount; and he does not ask for a reformation of the written instrument in this particular.

When the plaintiff first gave his testimony in the case, he testified that the amount of $565 as set out in this writing was correct, and it was only on being recalled, and ten years after the date of the execution of this instrument, that he for the first time claimed that there was a mistake made therein. If, under the pleadings in this case, it could be held that this written instrument could be reformed, we do not think that the proof is clear and decisive that a mutual mistake was made by both parties in the amount of this balance. If a mistake was made, it may have been in the amount of $1,295 named in the deed.

To entitle a party to reform a written instrument upon the ground of mistake, it must be clearly shown that the mistake was common to both parties, and that the instrument does not express the agreement as understood by either; and such mistake must appear beyond reasonable controversy. *McGuigan* v. *Gaines,* 71 Ark. 614; *Goerke* v. *Rodgers,* 75 Ark. 72; *Arkansas Fire Ins. Co.* v. *Witham,* 82 Ark. 226; *Varner* v. *Turner,* 83 Ark. 131; *Cherry* v. *Brizzolara,* 89 Ark. 309.

We have carefully examined the testimony in the case, and we are of the opinion that all the indebtedness claimed by the plaintiff against the defendant, and which is not set out in the written instrument dated February 14, 1898, was barred by the statute of limitation before the 14th day of February, 1898, and that this statute bar has not been removed; and that all indebtedness claimed by the plaintiff against the defendant under and by virtue of said written instrument was paid and extinguished by indebtedness due by the plaintiff to the defendant on said note.

It follows therefore that the decree of the chancellor in dismissing the complaint and cross-complaint was correct. The decree is affirmed.

McDANIEL v. ORNER.

Opinion delivered June 21, 1909.

1. INJUNCTION—BREACH OF CONTRACT.—Wherever a contract is one of a class the performance of which will be specifically enforced, a court of equity will restrain its breach by injunction, if this is the only practical mode of enforcement which its terms permit. (Page 173.)
2. SAME—BREACH OF CONTRACT TO AWARD PRIZE.—Where a newspaper publisher undertook at the end of a stated time to award a piano as a prize to the successful contestant in a popularity contest, but no particular piano was set apart to be awarded, the remedy of the successful contestant at the end of the time named is at law to recover judgment for the value of the prize wrongfully withheld, and equity will not enjoin the publisher from prolonging the contest to a later date or awarding the prize to another contestant, even upon allegations of the publisher's insolvency. (Page 174.)

Appeal from Nevada Chancery Court; *James D. Shaver,* Chancellor; affirmed.

Hamby & Haynie, for appellant.

1. The complaint alleges facts sufficient to constitute a cause of action. The agreement was a lawful one. 6 Words & Phrases, 5612, "Prize."

2. The court had jurisdiction. There was no adequate remedy at law. Appellees were trustees for contestants. 27 Am. & Eng. Enc. Law, (1 Ed.) 11 and 12. Chancery always enforces a trust, and interferes to prevent or correct fraud. 75 Ark. 52; 77 *Id.* 570; 37 *Id.* 286; 34 *Id.* 410; 30 *Id.* 86; 33 *Id.* 429; 14 Pet. 114.

3. If the chancery court had no jurisdiction, it should have transferred the cause to the law court. 37 Ark. 286; 27 *Id.* 585; 49 *Id.* 20.

McRae & Tompkins and *D. L. McRae,* for appellees.

1. Courts do not entertain "fishing bills." 51 Ark. 12; 48 Ark. 311.

2. The remedy at law was adequate and complete. 67 Ark. 441; 61 Ark. 515; 58 C. C. A. 97.

3. Equity will not restrain the breach of a contract where it could not enforce specific performance. 20 L. R. A. 433; Bispham, Pr. of Eq., 42.

McCULLOCH, C. J. Appellees are the proprietors, editors and publishers of two newspapers, a weekly and a daily, in the city of Prescott, Arkansas, and in order to swell the list of subscribers to said papers they offered a prize to contestants who should receive the highest number of votes in what was termed a "popularity contest," the privilege of casting a certain number of votes to be accorded to each cash subscriber. The circulation territory was divided into seven districts, and a prize was allotted to each district, and also two grand prizes for the whole territory, the first consisting of a piano, valued at $450, and the second a buggy, valued at $75. The contest was to be closed on September 23, 1908.

Mrs. Lizzie McDaniel, the appellant, was nominated by her friends as one of the contestants for a grand prize, and seems to have received their enthusiastic support, for on the day of the last count and publication of the number of votes cast, which was

just a week before the contest closed, she was found to be considerably ahead of her nearest rival. When the day approached, the appellees announced through the columns of the newspapers that the contest would be continued for thirty days longer, instead of closing on the day named, and on that day the appellant, claiming to be the successful contestant for the grand prize, instituted this suit to prevent the appellees from prolonging the contest or from awarding the prize to any other contestant. In addition to the above recital of facts, she alleged in her complaint and amendments thereto that she had received the highest number of votes, and was entitled to one of the grand prizes; that the appellees were insolvent, and that she had no adequate remedy at law. She also alleged that certain employees of the appellees had, in violation of the terms of the contest, aided another contestant during the closing days of the contest by giving out the number of votes which appellant had received, and also by receiving votes after the hour fixed for closing the contest. The court sustained a demurrer to the complaint as amended, and dismissed it for want of equity.

We need not pass upon the legality of the contract set forth in the complaint, as the case is disposed of on another ground. Mr. Pomeroy stated the following rule, which is applicable to this case: "An injunction restraining the breach of a contract is a negative specific enforcement of that contract. The jurisdiction of equity to grant such injunction is substantially coincident with its jurisdiction to compel a specific performance. Both are governed by the same doctrines and rules; and it may be stated as a general proposition that wherever the contract is one of a class which will be affirmatively specifically enforced, a court of equity will restrain its breach by injunction, if this is the only practical mode of enforcement which its terms permit. * * * The universal test of the jurisdiction, admitted alike by the courts of England and of the United States, is the inadequacy of the legal remedy of damages in the class of contracts to which the particular instance belongs." 4 Pomeroy's Equity Jurisprudence, § 1341.

In *Leonard* v. *Board of Directors of Plum Bayou Levee District,* 79 Ark. 42, we said: "Exceptional cases may be found where courts of equity will afford equivalent relief by enjoining

the doing of any act inconsistent with performance of the contract, thus in a negative way enforcing specific performance. This exception is found, however, in cases dealing with contracts of a special, unique or extraordinary nature, such as that of an actor or singer."

It is seen, therefore, that where a contract is one the specific performance of which a court of equity will compel, and will therefore restrain the doing of any act inconsistent with its performance, the criterion is whether or not there is an adequate remedy at law, for in either event where the remedy at law is adequate and complete the complaining party will be remitted to it. Now, it is plain that a court of equity should not interpose, under any circumstances, to prevent the continuance of a contest such as that described in the complaint, except in so far as it interferes with the performance of the agreement to award prizes at the end of the stated period. So the question arises whether or not the wrongful continuance of the contest interferes with appellant's remedy for the enforcement of her rights, and whether or not her remedy at law for the enforcement thereof is complete and adequate.

Whether the grand prize, for which the appellant claims to be the successful contestant, was a specific article, appropriated and set apart for the purpose of the award, or whether the contract was merely an executory agreement to award an article of that description, in either event appellant's remedy at law was complete. If, as she contends, the contest was at an end according to its terms, and she was the successful contestant, and the defendants refused to award the prize to her, then her remedy at law was complete.

It does not appear from the allegations of the complaint that any particular piano or buggy had been set apart and appropriated to the award, but it appears only that a piano and buggy of certain description were to be awarded. So that appellant's only remedy, if any, was to recover judgment for the value of the prize wrongfully withheld, and she could do this in an action at law.

Appellant is not aided by the allegations as to the insolvency of the appellees, for, even if she should be permitted to proceed to final decree in the suit in equity, and her alleged rights

were thereby enforced, she could only recover damages against the appellees for the value of the prize, and in case of insolvency such a decree in equity could no more be enforced than could a judgment at law.

Upon the whole, we are clearly of the opinion that the complaint stated no cause of action for equitable relief, and the demurrer was properly sustained.

Affirmed.

SELLERS v. STATE.

Opinion delivered June 21, 1909.

1. EVIDENCE—PHOTOGRAPH—It was error in a murder case to admit in evidence a photograph which purports to show the situation of the parties and the place and conditions connected with the final rencounter unless such photograph is verified by some witness in the case. (Page 178.)
2. SAME—GENERAL OBJECTION.—A general objection to a photograph as evidence is sufficient to raise the question of its relevancy. (Page 179.)

Appeal from Saline Circuit Court; *William H. Evans,* Judge; reversed.

STATEMENT BY THE COURT.

The appellant was indicted for the crime of murder in the first degree, was tried and convicted of voluntary manslaughter. Appellant killed one Bus Lawhorn in Saline County, Arkansas, April 13, 1908. Lawhorn was living with his mother on her farm, and appellant was a tenant. On the late afternoon before the tragedy, appellant and Mrs. Lawhorn had a quarrel about supplies. The next morning appellant with one Dowdy went to Mrs. Lawhorn's, and she describes what there took place as follows:

"They went into the lot in the usual way and started to catch the mules to go to plowing. My son told Mr. Sellers that it was too wet to plow. Mr. Sellers made some reply, I do not know what, and my son again told him that it was too wet to

plow, and they began cursing each other. My son rushed toward the lot gate toward Mr. Sellers, when Mr. Sellers drew a pistol and fired at my son. My son threw his hands to his breast and bent forward, and just as he straightened up the defendant shot at him again. There were but four shots fired. After the first shot Mr. Sellers stooped down by the fence and continued firing. My son was killed and fell just on the inside of the yard. My son had no pistol, and did no firing."

Other witnesses for the State, who were not present but heard the firing, and who were on the ground immediately after the killing, described the condition of the body, wounds, etc., and the bullet marks left on the plank and post of the fence.

The record shows the following: Witness Ed Reymo testified as follows: "I am a photographer. I was employed to make photographs showing the situation of the premises where Bus Lawhorn was killed. These photographs were the ones that I took. (Here the defendant objects to the photographs being introduced in the evidence.) I was employed by the relatives of the deceased to take these pictures. The defendant was not present, and had no representative there. I was not present at the killing, and did not know about the situation except as I was told. After taking the pictures I retouched them, that is I marked them with pencil so that they would show more plainly the marks on the fence and the bullet hole in the post. In some instances I retouched the bullet holes, that is, painted them with my pencil before taking the pictures, and in another instance we retouched the picture after it was made. (The court overrules the objection of the defendant as to the pictures and permits pictures marked "A," "B" and "C" to be introduced in evidence and to be considered with the other evidence to show the location in this case where it is alleged that the killing occurred, the position that it is claimed by the State that the parties were at the time, to which ruling of the court the defendant at the time excepted and asked that his exceptions be noted of record, which was accordingly done.) These pictures were taken sometime after the killing occurred. I do not know just how long. The pictures show the marks that were on the fence there at the time. Also the bullet hole in the post. (Defendant asked to have this evidence of the witness, as well as the pictures themselves,

excluded from the jury, which was overruled by the court, to which the defendant excepted, and asked that his exceptions be noted of record, which was accordingly done.)"

On behalf of appellant witness Dowdy, who was present when appellant and Mrs. Lawhorn had the quarrel the day before the killing and also at the time of the killing, testified that Mrs. Lawhorn said to appellant in the quarrel that "he was trifling and worthless, and that she would have her sons kill him before the sun was two hours high next morning." He then proceeds in part as follows: The next morning Mr. Sellers and I went up to Mrs. Lawhorn's to go plowing. We entered the lot on the east side at the gate where we usually went in. We had started to catch the mules. I was a little way ahead of Mr. Sellers, and as we started to catch the mules Bus Lawhorn said it was too wet to plow. Mr. Sellers did not seem to understand what he said, and asked him what he said, and he said that it was too wet to plow, and began cursing Mr. Sellers, and ran toward him and threw the lot gate open and fired twice at Mr. Sellers. Mr. Sellers did not see him when he first threw the pistol on him, and I called Mr. Sellers's attention to it, and told him to look out there, and just as he looked around Bus Lawhorn fired. Fired twice in rapid succession, and then Mr. Sellers ran up to him and begged him to stop shooting. Mr. Sellers pushed him back into the yard and then stooped down behind the fence, or rather the gate post, and the deceased stuck his pistol around the gate post as though he were going to shoot at Sellers again. At that time Mr. Sellers began shooting and there were several shots fired. I do not know just how many. After the last shot Bus Lawhorn fell inside of the yard, and when he fell he dropped his pistol."

The appellant's testimony as to the circumstances of the killing is substantially the same as that of witness Dowdy.

W. R. Donham, for appellant.

The court erred in admitting the photographs in evidence. 75 Miss. 721; 23 So. 710. There was no evidence showing they truly represented the objects and situation portrayed. They prejudiced the minds of the jury.

Hal L. Norwood, Attorney General, *C. A. Cunningham,* Assistant, and *Frank Pace,* for appellee.

1. As a general rule, photographs are admissible when shown to be accurate and correct representations of the matter in controversy and throw light on it. 9 Enc. of Ev., 771; Wharton's Cr. Ev., (8 Ed.) § 544; 118 Mass. 420; 31 Wis. 512; Underhill, Cr. Ev., 62; 149 N. Y. 580; 126 Mo. 597; 48 Pac. 75; 162 U. S. 613.

2. They were not prejudicial. They imparted to the jury a view of the premises and the physical evidences of the conflict. 83 Ga. 92 (9 S. E. 768); 126 Mo. 597 (29 S. W. 577); 111 N. Y. 362 (19 N. E. 54); Underhill, Cr. Ev., 64.

WOOD, J., (after stating the facts). The evidence adduced by appellee tends to show that appellant fired upon Lawhorn as the latter rushed toward appellant, and that appellant stooped down behind the fence and continued firing at him; that Lawhorn was unarmed, and threw his hands to his breast and bent forward at the first shot, and as he straightened up appellant fired again and again till he had fired four shots. The evidence on behalf of appellant tended to prove that Lawhorn drew his pistol when appellant did not see him draw it, and ran toward appellant and fired two shots at him, and that appellant ran up to Lawhorn and begged him to stop shooting, pushed him back in the yard, and then stooped down behind the gate post, when Lawhorn "stuck his pistol around the gate post as though he were going to shoot at Sellers again," before the latter began firing on him.

The testimony for the State thus tends to show that appellant killed his adversary when he, appellant, was in no danger of death or great bodily harm. According to the testimony for the State, there was no excuse or justification for the killing. But, according to the testimony for appellant, he slew Lawhorn in necessary self-defense. In this conflict of the evidence was it error to allow the photographs to be used in evidence? Two of the photographs represent one of the persons as having his coat on and with pistol in hand in a stooping position aiming at the other who is standing in the yard a few feet away in his shirt sleeves with one hand on the gate and the other hanging loosely by his side and making no belligerent demonstrations.

The photographs were taken at the instance of the relatives of Lawhorn. These relatives placed the respective parties to the fatal rencounter in the positions they conceived them to

occupy at the time the fatal shots were fired. The appellant was not present when the photographs were taken, and had no one present to represent him. The photographs might have been considered by the jury as tending strongly to corroborate the testimony of the witnesses for the State.

The court having admitted them, the jury doubtless considered them accurate representations of the positions of the actors in the tragedy at the time the shots were fired. They could have done so, there being no evidence to the contrary. But the photographs were not verified by any witness before their introduction. No one who was a witness to the tragedy testified that they were reproductions of the situation of the parties and the place and conditions connected with the fatal rencounter, which they purported to portray. This was essential primarily to the relevancy of the photographs as evidence. 1 Wigmore, Ev., § § 790-792.

"As a general rule, photographs are admissible in evidence when they are shown to have been accurately taken, and to be correct representations of the subject in controversy, and are of such a nature as to throw light upon it." 9 Enc. of Ev., 771; Wharton's Crim. Ev., § 544; *Blair* v. *Pelham,* 118 Mass. 420; *Church* v. *Milwaukee,* 31 Wis. 512; Underhill on Criminal Ev. 551. The general objection to the photographs as evidence was sufficient to raise the question of their relevancy. Photographs are admissible as primary evidence upon the same grounds and for the same purposes as diagrams, maps and plats. Underhill's Crim. Ev., § 50; 1 Wig. Ev. 792. They aid the jury to understand the evidence of the witnesses by illustrating the situation of the persons, places or things connected with the subject-matter of the inquiry. *People* v. *Buddensieck,* 103 N. Y. 487. The placing of persons about the scene of the rencounter in positions shown by the witnesses to have been occupied by the participants does not render a photograph, showing such positions, irrelevant that in other respects is shown to be relevant. This could be no more hurtful than a witness illustrating his testimony while on the witness stand by pointing out situations and placing persons in the relative positions and attitudes which he testifies were similar to those occupied and assumed by the actors in the real tragedy or occurrence which he is describing, or by

illustrating with the use of a map, plat or diagram the situation of persons, places or things referred to in his testimony. *Ragland* v. *State,* 71 Ark. 65; *Vance* v. *State,* 70 Ark. 272; Underhill on Ev. 64; *Shaw* v. *State,* 83 Ga. 92; *State* v. *O'Reilly,* 126 Mo. 597; *People* v. *Jackson,* 111 N. Y. 362; *Blair* v. *State,* 69 Ark. 558.

The Supreme Court of Mississippi in a similar case holds the photographs inadmissible. *Fore* v. *State,* 75 Miss. 727. But the weight of authority, and the better reason, we believe, sustain the doctrine we have announced.

But, in the absence of testimony showing that the photographs faithfully represented the objects and situations portrayed, they should not have been used in evidence. This having first been shown, they were then admissible in evidence, but subject to impeachment. Underhill on Ev., § 57, and cases cited in note 2.

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

MIDLAND VALLEY RAILROAD COMPANY *v.* HOFFMAN COAL COMPANY.

Opinion delivered May 10, 1909.

1. INTERSTATE COMMERCE—JURISDICTION OF STATE COURTS.—The State courts have jurisdiction of actions brought to recover damages from a railroad company for breach of its common-law or contractual duty when requested to furnish cars for shipment of freight to other States. (Page 187.)
2. REMOVAL OF CAUSES—TIME FOR FILING PETITION.—A petition for removal of a cause to a federal court which is filed after the time allowed by the statutes of the State or the rules of the court for filing answers is too late, and it is immaterial that the defendant may have obtained further time to answer by stipulation with the plaintiff or by order of court. (Page 189.)
3. CARRIERS—FAILURE TO FURNISH CARS—DEFENSE.—A railroad company, when sued for breach of its common-law or contractual duty to furnish cars for shipment of coal, may not defend upon the ground that plaintiff is a member of a pool or trust to regulate and control the price of coal. (Page 190.)

4. SAME—FAILURE TO SHIP FREIGHT—EXPECTED PROFITS AS DAMAGES.—To the general rule that the expected profits of a commercial business are too speculative to warrant a judgment for their loss there is an exception, namely, that the loss of profits from the interruption of an established business may be recovered where the plaintiff makes it reasonably certain what the amount of his loss actually was. (Page 192.)
5. SAME—WHEN EXPECTED PROFITS RECOVERABLE.—Where plaintiff, a coal miner, had an established business, and defendant railway company had contracted to furnish cars for coal shipments as needed, and had bound plaintiff not to ship over a rival road, and defendant knew that plaintiff could not conduct its business unless cars were furnished daily, the net profits of operating plaintiff's mine were in contemplation of the parties as damages for a breach of the contract to furnish cars for the shipment of plaintiff's coal at the time such contract was entered into. (Page 194.)
6. TRIAL—ORDER OF INTRODUCTION OF EVIDENCE.—While it was irregular to permit plaintiff in making out its case to introduce rebutting evidence in anticipation of the defense, such matters are within the court's discretion, and will not be ground for reversal unless prejudice is shown. (Page 194.)
7. EVIDENCE—NET PROFITS OF MINE.—In an action against a railway company for failure to furnish cars at a coal mine for the shipment of coal, it was proper to admit evidence with reference to the effect of the failure to furnish cars upon the expense of maintaining the mine and also as to the cost of mining the coal, such evidence being admissible in arriving at the net profits of the mine. (Page 195.)
8. CARRIERS—FAILURE TO FURNISH CARS—UNPRECEDENTED DEMAND.—In an action against a railway company for failure to furnish cars for the shipment of plaintiff's coal, it was error to charge the jury absolutely that the fact that connecting lines have failed and refused to return defendant's cars is no valid excuse for its failure to furnish cars; the evidence showing that defendant under its contract with plaintiff was bound to furnish cars to be sent off its line, and had adopted regulations to secure their return which were not shown to have been ineffectual, and also showing that there was an unprecedented demand for cars at the time when defendant failed to supply plaintiff's demands. (Page 197.)

Appeal from Sebastian Circuit Court, Fort Smith District; *Daniel Hon,* Judge; reversed.

STATEMENT BY THE COURT.

The Hoffman Coal Company brought this suit against the Midland Valley Railroad Company in the Sebastian Circuit

Court for the Ft. Smith District, to recover damages for an alleged failure of the defendant to furnish cars for shipment of coal from the coal mine of the plaintiff. There was a jury trial, and a verdict for the plaintiff in the sum of $4,500. From a judgment rendered upon this verdict the defendant has duly prosecuted an appeal to this court.

The abstract of counsel for defendant, now appellant, states the substance of the pleadings, with the action of the court thereon, as follows:

"The complaint in substance alleges the following: That defendant was engaged in operating a railroad in Sebastian County, which road reached the coal field of said company, in which were located several coal mines, among them a coal mine operated by plaintiff.

"It is further alleged that the method of mining coal was to shoot down one day a sufficient amount of coal to be loaded on cars the next day, and that it was plaintiff's custom to order, at the end of each day, a sufficient number of cars in which to ship the coal that was shot down at the close of the day on which the cars were ordered; that, in pursuance of this custom, it ordered on the several days set out in the complaint cars sufficient to remove its output, which was alleged to be 250 tons, and that the defendant failed to furnish the cars as ordered. Plaintiff further alleges that the coal was to be shipped to points in Oklahoma, Indian Territory and Texas, under an agreement with the McAlester Fuel Company, with which plaintiff had an arrangement to sell its entire output, and that during the times complained of the said Fuel Company had orders for the said coal in Indian Territory, Oklahoma and Texas, and that plaintiff could and would have sold its entire output through the said Fuel Company at an average profit of seventy-five cents (75c) per ton. After alleging the number of days upon which it ordered cars and that the said cars were not furnished as ordered, the complaint further alleges that defendant failed to use due care and diligence to furnish itself with sufficient equipment to carry plaintiff's coal, and that it could have furnished the cars ordered within a reasonable time thereafter but for the negligence of defendant in not providing itself with sufficient equipment. The complaint concludes with the following allegation of damages:

'That if defendant had used due care and diligence it could have furnished itself with sufficient equipment to carry plaintiff's coal, could have furnished cars within a reasonable time after being requested; but by reason of the default of defendant to furnish cars, as hereinbefore alleged, it lost the sale of, and failed to produce, 30,500 tons of coal, which could and would have been sold at the profit aforesaid during said period, to its damage in the sum of $22,875.'

"Defendant filed petition to transfer the cause to the United States court. Petition is based upon the contention that, as the complaint shows on its face all the coal shipments for which cars were ordered were interstate shipments, plaintiff's cause of action, if any existed, arose under the provisions of the acts of Congress, and involves the construction of the acts of Congress, and especially of what is known as the Interstate Commerce Acts. The court denied the petition, and defendant excepted.

"Defendant then interposed demurrer to the complaint upon the grounds that it did not state facts sufficient to constitute a cause of action, and on its face showed the court had no jurisdiction. The demurrer further challenged the sufficiency of the complaint upon grounds similar to the grounds set out in the petition to remove the cause to the United States court; the demurrer alleging that plaintiff's cause of action, if any, arose under the acts of Congress, and that it cannot bring suit in the State court for failing to furnish cars for interstate shipments, but that complaints of this kind must be first lodged with the Interstate Commerce Commission. The demurrer was overruled, and defendant excepted.

"Defendant then filed motion to require plaintiff to make its complaint more definite and certain. The motion asks that plaintiff be required to state to what points in Indian Territory, Oklahoma and Texas it desired to ship the coal for which the cars were ordered, and to state for what points it ordered cars for the shipment of coal, to what points the cars were to be consigned, and to state the orders it had for the sale of coal which it did not ship, the parties from whom the orders were received, and to set out, by itemized account and bill of particulars, its damage, so that said bill of particulars would show the orders it had for each day defendant failed to furnish cars, from whom the

orders were received, the quantity of coal for which given, the number of cars required, and the places to which shipments were to be made. This motion was overruled, and defendant excepted.

"Defendant then filed answer, denying specifically each and every allegation of plaintiff's complaint.

"The defendant, in the second paragraph of its answer, set up the defense that plaintiff, during the times complained of, was a member of a pool, trust and combination organized to control, regulate and fix the price of coal, and to limit the quantity of production; that the Fuel Company, through which its alleged sales were made, was also a member of the pool and combination, and that no coal was sold by plaintiff, or contracted to be sold by it, except by and through the said trust and combination; that it had no orders for coal except as a member of and through the said trust, and that it made no profit, and could not and would not have made the profit alleged by it, or any profit, except by the unlawful combination of which it was a member. To this paragraph the court sutained demurrer filed by plaintiff, and defendant reserved its exceptions."

The Hoffman Coal Company had a ten years' lease upon 120 acres of land in Sebastian County, under 110 acres of which was a seven-foot vein of coal, which would produce, according to the testimony of the plaintiff, about 7,000 tons per acre, or approximately 700,000 tons for the entire acreage. The Midland Valley Railroad Company began the construction of its line of railroad, and its road was open for traffic in that field in 1903. On the 5th day of December, 1903, the parties to this suit entered into a contract for furnishing cars to appellee for the purpose of transporting its coal.

The contract in substance provided for the building of a spur track to defendant's mine, the coal company agreeing to build a tipple, furnish right of way and the expense of laying track, the defendant to furnish the steel and other necessary appliances to lay the track, and to furnish at the tipple "such a number of cars for the shipment of the coal of the party of the second part, so that the party of the second part should be able to operate its mine not fewer hours per month than ninety (90) per cent. of the hours per month the mines are operated of any

other person or corporation on the railroad of the party of the first part, including the mines of the party of the first part." The contract further provided that all coal mined should be shipped over the defendant's road.

There was then introduced in evidence over the objection of defendant a lease for the land upon which plaintiff's mine was located, made by the Hartford Coal Company to the Hoffman Coal Company, November 1, 1904. This lease was for ten years, and provided for the payment of eight (8) cents per ton royalty on all coal mined.

The method of loading coal was to bring it from the underground workings to the tipple, and from the tipple to dump it into the railroad cars. The capacity of the mine, during September, 1906, was 250 tons of coal per day, which was increased to about 350 tons in July, 1907. The custom of ordering cars was by telephoning defendant's agent at Hartford about four o'clock in the afternoon, telling him the number of cars that would be needed next day.

Such other facts as may be necessary to a proper understanding of the issues presented for our determination will be stated in the respective parts of the opinion to which they are applicable.

Ira D. Oglesby, for appellant.

The complaint shows on its face that the cars ordered, and not furnished, were intended for interstate shipments of coal. The court should therefore have sustained appellant's petition to transfer the case to the United States court. 158 U. S. 98; 201 U. S. 321; 76 Ark. 82; 109 Fed. 831; 42 S. W. 354; Snyder on Interstate Com. Act, pp. 69, 237, 237; sec. 3, Interstate Com. Act. The defendant was not bound to furnish cars for shipments beyond its own line. The demurrer should therefore have been sustained. 46 Ark. 45; 71 Ark. 571; 54 Ark. 22; 74 Ark. 285; 61 Ark. 560; 122 Ill. 506; 31 Fed. 864; Hutchinson on Car., § 1367; Elliott on Railroads, § 1724. Appellee's business being illegal, it cannot complain because a carrier is not prompt in furnishing transportation. Kirby's Dig., § § 1972-1982. Appellant could not be compelled to permit its cars to go to foreign roads. Its request for a peremptory instruction should, therefore,

have been granted. 40 Mo. 491; 99 N. W. 309; 95 S. W. 170; 92 S. W. 531; 52 S. E. 677; 99 Mass. 508; 61 Ark. 650.

Stewart & Gordon, Read & McDonough and *F. A. Youmans,* for appellee; *C. T. Wetherby,* of counsel.

The petition for removal was not filed in time. It was therefore properly denied. 76 Ark. 362. Any shipper may in this State recover at common law the damages suffered by reason of a common carrier's failure to furnish cars. 79 Ark. 59; 76 Ark. 220; 75 Ark. 64; 77 Ark. 35. Such a suit can be maintained in the State court. 115 S. W. 107. Appellee was entitled to have its order for cars filled, although its coal had not been mined. 154 Fed. 112. A common carrier may so hold itself out to the public as to make itself liable for failure to receive and carry goods beyond its own line. 61 Ind. 577; 141 Ind. 267; 38 Ia. 601. The defense that appellee was engaged in an illegal business is not available to appellant. 86 Fed. 674; 184 U. S. 547; 68 Pac. 1086. Recovery can be had in all cases where the plaintiff in his suit is not compelled to rely upon an illegal contract. 145 U. S. 421. Failure of connecting lines to return cars is no defense. 85 Ark. 311. The measure of damages was the loss of profits. 49 Ill. 211; 26 Minn. 256; 44 Md. 268. A common carrier's first duty is to furnish itself with facilities for the transportation of such goods as he holds himself out ready to carry. Hutchinson on Car., § 292; 94 S. W. 176; 57 Pa. St. 301; 10 Interstate Com. Rep., 226. A State court has jurisdiction of a suit to recover the excess of freight charged over and above the amount allowed by the Interstate Commerce Commission upon the ground that it is a suit to recover back a wholly unjust and unauthorized exaction. 131 Ia. 405; 108 N. W. 759; 62 Fed. 24; 35 C. C. A. 62. A corporation does not become an outcast by becoming a member of a trust. 184 U. S. 541.

Ira D. Oglesby, in reply.

The common-law action gives no greater rights than a remedy prescribed by statute. The interstate commerce act supersedes all other remedies. 76 Ark. 83; 158 U. S. 98. A demand for cars for use in shipping coal out of the State is the initial step in an interstate transaction, and falls within the exclusive federal authority. 73 Ark. 373. A railroad company is not

bound to furnish cars to be used for an illegal purpose. The demurrer to defendant's answer should, on this account, have been overruled. 75 Ark. 181; 30 S. W. 956; 59 S. W. 709; 54 S. W. 804; 71 S. W. 691; 48 Am. St. 317; 17 *Id.* 445; 6 Wis. 468; 99 Am. Dec. 580, note; 130 U. S. 396; 155 Ill. 166; 74 Am. St. 189.

HART, J., (after stating the facts). I. Counsel for appellant first challenges the jurisdiction of the State courts. He insists that, as all the cars were to be used for interstate shipments, the court below was without jurisdiction; and that, under the Hepburn amendment to the Interstate Commerce Act, the forum in which appellee should have sought reparation was either the Interstate Commerce Commission, or the United States courts of competent jurisdiction. His chief reliance in support of his contention is based upon the decision of the Supreme Court of the United States in the case of the *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, as applied to the provisions of the Interstate Commerce Act. We do not consider that case applicable to the question now under discussion. In the Abilene Cotton Oil Company case the shipper sought reparation in the State court, and his cause of action was based upon the unreasonableness of an established freight rate. The court held that he could not maintain an action at law in such case prior to a finding by the Interstate Commerce Commission that the rates were unreasonable. In that case it was insisted by the shipper that section 22 of the act of Congress to regulate commerce, viz: "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in adition to such remedies," gave the court jurisdiction. In reference thereto Mr. Justice White, who delivered the opinion of the court, said:

"This clause, however, cannot be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as cumulative, when other

appropriate common-law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act."

The court held that the shipper must seek redress primarily through the Interstate Commerce Commission, where the unreasonableness of an established freight rate was involved, because in that way only could uniformity of rates be preserved. That was the sole ground of the decision, as is emphasized by the later decision of the *Southern Ry. Co.* v. *Tift,* 206 U. S. 428, where it was held that, after a freight rate has been found, upon testimony, by the commission to be unreasonable, the testimony and finding of the commission may be made the basis of a decree in a United States circuit court, sitting in equity, enjoining the carrier from enforcing such unreasonable rate.

In the case of *Danciger* v. *Wells Fargo & Co.,* 154 Fed. 379, which was a suit by a shipper against a carrier to require it to receive and transport property tendered for shipment, the court held it to be one to compel the performance of a duty imposed on it by law, and to be within the jurisdiction of the courts. In disposing of the question the court used this language:

"A further contention made by the defendant is that the court of exclusive original jurisdiction in this controversy is the Interstate Commerce Commission, and that this court has no jurisdiction in the first instance to afford to complainants the relief here sought; and much reliance is placed by the defendants on the case of *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553. From a reading of that case, I do not consider it applicable to the state of facts here presented. If the controversy here was as to whether the defendants were charging excessive or unreasonable rates for the shipments tendered by complainants, the case relied upon would to my mind be in point; but as the ground of relief sought by complainants in the case at bar is the performance by defendants of a duty imposed upon them by law, which they wholly neglect and refuse to perform, I think such question is one for the determination of the courts."

In the case of *Chicago, R. I. & P. Ry. Co.* v. *Clements,* (Tex. Civ. App.) 115 S. W. 664, the court held: "The liability of connecting carriers for breach of their common-law or con-

tractual duty in respect to property received for shipment is not regulated or affected by the interstate commerce act, though the shipment is an interstate one, and therefore an action against them for injuries to the property caused by negligence and delay in transportation, being based on a breach of such duty, and not on any infraction of said act, is properly brought in a State court."

This, too, is the construction placed upon the act by the Interstate Commerce Commission. In the case of *Richmond Elevator Co.* v. *Pere Marquette Rd. Co.*, 10 I. C. R. 636, it is said: "The act to regulate commerce contains no provision which expressly or by proper implication gives this commission jurisdiction in cases merely showing delay or negligence in the receipt, forwarding or delivery of property offered for transportation, and this necessarily includes failure on the part of the carrier to furnish cars for the movement of freight within a reasonable time." To the same effect see *Smeltzer* v. *St. L. & S. F. Rd. Co.*, 158 Fed. 649, by Rogers, Dist. Judge; *Southern Pac. Co.* v. *Crenshaw Bros.* (Ga. App.), 63 S. E. 865, by Mr. Justice Powell.

The case now under consideration involves the liability of the carrier to the shipper for an alleged breach of its common-law or contractual duty for its failure to furnish cars, and does not involve any infraction of the provisions of the interstate commerce act; and we are of the opinion that the suit was properly brought in the State court. This view, we think, is the logical result to be deduced from the reasoning of the authorities cited *supra,* and from the opinion of this court in the case of *Halliday Milling Co.* v. *La. & N. W. Rd. Co.,* 80 Ark. 536. Hence the court properly overruled the demurrer to the jurisdiction of the court.

II. Counsel for appellant urges that the court below erred in not sustaining appellant's motion to transfer the cause to the United States court for the Western District of Arkansas. Assuming that the case was removable, the petition was not filed in time. "A petition for removal of a cause to a Federal court which is filed after the time allowed by the statutes of this State for filing of answers to complaints is too late." *Kansas City So. Ry. Co.* v. *McGinty,* 76 Ark. 356, and cases cited.

The time to file a petition for removal is not extended by an

extension of the time to answer. Moon on Removal of Causes, § 156 and cases cited. In the case of *Ruby Canyon Gold Min. Co.* v. *Hunter,* 60 Fed. 305, the court said that the act of Congress is imperative, and requires the petition to be filed within the time fixed by the statute (where the statute fixes it), or within the time fixed by the rule of court (where the rule of court fixes it), and not within any time that a defendant may obtain by stipulation with the plaintiff, or by order of court."

It follows then that, the petition for removal not having been filed within the time fixed by statute for filing answer, the court was right in denying it.

III. Appellant alleged in one paragraph of its answer that appellee associated itself with others in forming a pool or trust for the sale of coal, and that it sold all its coal through the McAlester Fuel Company, which was a member of the pool or trust, and that such agreement was an illegal combination in violation of the statutes of the State of Arkansas and of the United States. Appellant further alleged that all the profits that appellee made or could have made, had appellant furnished it cars, were made on account of it being a member of the pool or trust to regulate and control the price of coal.

Appellee filed a motion to strike out that paragraph of appellant's answer, which motion was sustained by the court. Counsel for appellant predicates error in the action of the court in that regard. To sustain his contention, counsel has cited the case of *Continental Wall Paper Co.* v. *Voight & Sons Company,* 212 U. S. 227, 29 S. C. Rep. 280. In that case the court held (quoting headnotes):

"1. A recovery upon an account for goods sold and delivered by a corporation created to effectuate a combination of wall paper manufacturers, intended and having the effect directly to restrain and monopolize trade and commerce, in violation of the anti-trust act of July 2, 1890 (26 Stat, at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), cannot be had where the account is made up, within the knowledge of both buyer and seller, with direct reference to, and in execution of, the agreements which constitute the illegal combination.

"2. Defendants in an action for goods sold and delivered are entitled to judgment on a demurrer admitting the allega-

tions of a defense set up by the answer, which in substance disclose that plaintiff is the selling agent of a combination of wall paper manufacturers which offends against the anti-trust act of July 2, 1890; that, in carrying out such combination, defendants were virtually compelled to sign a jobber's agreement, which, in effect, bound them to buy from the plaintiff all the wall paper needed in their business at certain fixed prices, and not to sell at lower prices or upon better terms than those at which plaintiff itself sells to dealers other than jobbers; that the goods in question were ordered pursuant to such agreement and at the prices fixed; that such prices were unreasonable; and that all the transactions between the parties were in furtherance of the illegal combination."

The grounds of the decision in that case are based upon a state of facts essentially different from those presented by the record in the present case. There both parties to the suit were parties to the illegal agreement, and it was held that the courts will refuse to render any assistance in carrying out an illegal agreement on the ground of public policy; and that in no other way could the public be protected. In the instant case appellant was not a member of the pool, and the contract made by it with appellee, an alleged member of the pool, was collateral to the unlawful combination, and not tainted thereby. Neither the common law nor contractual duty of appellant to furnish cars was in any way connected with the illegal combination, and they are therefore unaffected thereby. The rule is that an otherwise legal contract is not affected by another collateral contract, which might be illegal. This distinction is made plain by the decision in the case of *Chicago Wall Paper Mills* v. *General Paper Co.*, 147 Fed. 491. The facts in that case were that a number of wall paper companies combined together to arbitrarily fix the prices of wall paper and to control the sale of the same. The General Paper Company was a member of the combination, and became the exclusive sales agent of the other members, with the exclusive power to determine the extent of the output, and to arbitrarily fix the prices. It sold a large quantity of wall paper to the Chicago Wall Paper Company, and, not being able to obtain payment, brought suit to recover the purchase price of the goods. The same defense was interposed in that case as in the present one. The court held

that "a contract for the sale of merchandise is not rendered illegal by the fact that the selling corporation is a trust or monopoly organized in violation of law, either Federal or State, the contract of sale being collateral and having no direct relation to the unlawful scheme or combination."

This distinction was also recognized in the case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, the court holding that "a violation of the Sherman Anti-Trust Act of July 2, 1890, by the formationn of a combination in restraint of trade, by which a penalty is incurred under the statute, does not preclude the company thus illegally formed from recovering on collateral contracts for the purchase price of goods."

IV. On the measure of damages the court gave the following instruction: "6. If you find for the plaintiff under the instructions given you in this case, then you are to determine what damage, if any, it has suffered by reason of the failure of the defendant company to furnish cars for the disposition of its coal. If you find plaintiff could and would have sold its coal from its mines at a profit to itself, and was prevented by the wrongful act of the defendant from making such sale and earning such profits, then the defendant must compensate it in damages for the amount of the profit or gain which this prevented it from making. In arriving at such amount, you should consider the nature of its business, the condition of the coal, the kind of coal that it produced, the quantity of coal that it produced, its opportunity for selling and the market price at which it could have sold; and the price or prices at which the coal produced by it should and would have been sold, less the cost of producing and marketing such coal, including the royalties to be paid thereon, would be the measure of its recovery. And in this connection I charge you that the cost of production above referred to must be measured and computed on the bases of a reasonable car supply."

Counsel for appellant assigns as error the action of the court in giving this instruction. The general principles applicable to the subject are stated in the case of *Central Coal & Coke Co.* v. *Hartman*, 49 C. C. A. 244, as follows:

"Now, the anticipated profits of a business are generally so dependent upon numerous and uncertain contingencies that their

amount is not susceptible of proof with any reasonable degree of certainty; hence the general rule that the expected profits of a commercial business are too remote, speculative and uncertain to warrant a judgment for their loss (citing cases). There is a notable exception to this general rule. It is that the loss of profits from the destruction or interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was. The reason for this exception is that the owner of a long-established business generally has it in his power to prove the amount of capital he has invested, the market rate of interest thereon, the amount of the monthly and yearly expenses of operating his business, and the monthly and yearly income he derives from it for a long time before and for the time during the interruption of which he complains. * * * One, however, who would avail himself of this exception to the general rule must bring his proof within the reason which warrants the exception. He who is prevented from embarking in a new business can recover no profits because there are no provable data of past business from which the fact that anticipated profits would have been realized can be legally deduced."

In the case of *Baxley* v. *Tallassee & M. R. Co.* (Ala.) 29 So. 451, in discussing the measure of damages in an action by a shipper against a carrier for breach of contract to furnish cars, the court recognized this exception to the general rule, and said: "The special circumstances which we have hypothesized, taken in connection with notice to defendant of them, take the case out of the general rule of damages obtaining in cases of failure by common carrier to carry and deliver, and bring it within the special rule formulated above, on the theory that such damages were within contemplation of the parties."

The exception to the general rule was recognized and applied by this court in the case of *Border City Ice & Coal Co.* v. *Adams,* 69 Ark. 219. See also *Goebel* v. *Hough,* 26 Minn. 252.

In the case of *Atlantic Coast Line R. Co.* v. *Geraty,* 166 Fed. 10, the court held (syllabus): "Where a carrier, having facilities for furnishing shippers of vegetables refrigerator cars in which to transport the same, which cars the carrier did not own as a part of its equipment, had led the plaintiff and other

vegetable growers in the region to expect that, if they raised vegetables, refrigerator cars necessary for their transportation would be obtainable, plaintiff was entitled to recover damages sustained by the carrier's refusal to furnish refrigerator cars for the transportation of plaintiff's cabbages on reasonable demand."

In the case under consideration appellee had an established business, and had been encouraged by appellant to open its mine. Appellant had entered into an agreement to furnish cars to appellee, and bound appellee not to enter into a contract with another line of railway for shipment of its coal. Appellant knew that certain fixed charges had to be met, whether the mine ran or was idle. It knew that the only practical way to mine the coal was, at the close of each day's work, to "shoot down" and separate from the main bed of coal a sufficient amount of coal to keep the employees busy throughout the succeeding day, loading it on the mining cars to be hoisted to the tipple and there be emptied into the railroad cars; that it is not practical to store the coal, but that the mining and transportation must be carried on together.

Tested by the principles announced above, in connection with the special circumstances adduced in evidence and the notice appellant had of these circumstances, we are of the opinion that the net profits of operating the mine as damages for a breach of the contract may fairly be said to have been in contemplation of the parties when the contract for furnishing cars for the shipment of appellee's coal was entered into.

V. Appellee, in making its case, was allowed to introduce evidence to the effect that there was no congestion of traffic on the line of appellant or connecting carriers during the time for which appellant is charged with failure to furnish cars, and that during such period the car service on such connecting lines was good. One of the defenses interposed by appellant was that during such period there was an unprecedented demand for cars, and it adduced evidence tending to show that there was a congestion of traffic on all the connecting lines of appellant. Appellee should not have anticipated its defense, but should have presented testimony in rebuttal to contradict that of appellant. The order of the introduction of the testimony, however, was a matter

in the discretion of the court, and we cannot say that the action of the court was prejudicial to the rights of appellant. *Butler* v. *State,* 83 Ark. 272.

VI. Objection is also made to the admission of testimony on the part of appellee with reference to the effect the failure to furnish cars would have upon the mine as to expense of maintenance and also as to the cost of mining the coal. This evidence was admissible in arriving at the net profits.

Objection was also made to the introduction of certain letters of the officials of the railroad. These letters were competent in so far as they tended to show that the officers of the railroad knew that appellant did not have sufficient cars to meet the ordinary demands of the shippers.

VII. The court gave the following instructions: "4. You are further instructed that the fact that connecting lines have failed and refused to return promptly the cars of the defendant is no valid legal excuse or defense in this case absolving the defendant from its obligation to furnish with reasonable promptness and diligence sufficient cars for the transportation of plaintiff's coal."

"5. You are instructed that, in order for the Midland Valley Railroad Company to avail itself of a defense that it could not furnish plaintiff cars because there was a great congestion of traffic, it must appear to your mind by a preponderance of evidence that there was such an unprecedented and extraordinary amount of freight offered for transportation as that it could not have been reasonably anticipated by the defendant company. And you are further instructed in this connection that it is the duty of the defendant company to keep in touch with natural conditions and with the usual natural developments of the country."

Counsel assigns as error the action of the court in giving the fourth instruction just quoted. A majority of the judges think that under the rule announced in the case of *St. Louis S. W. Ry. Co.* v. *State,* 85 Ark. 311, and in *St. Louis S. W. Ry. Co.* v. *Phoenix Cotton Oil Co.,* 88 Ark. 594, the giving of this instruction was error. A supplemental opinion on this point has been written by Chief Justice McCULLOCH. The writer of this opinion thinks no prejudice resulted from the giving of that instruction. The court in its fifth instruction, just quoted, cor-

rectly instructed the jury on appellant's defense of there being an unprecedented demand for cars. Appellant by its own contract agreed to send its cars off its own line. In the case of *St. Louis S. W. Ry. Co.* v. *State, supra,* the court said: "Until appellant carrier shows reasonable rules and regulations for the interchange of cars, it can not avail itself of those rules of interchange as causing and excusing its default to the public, for the rules here shown have proved unreasonable and inefficient before this default occurred."

So, in the present case the writer thinks that the uncontradicted testimony showed that the rules and regulations had proved inefficient for the purpose for which they were designed before the default herein complained of occurred.

Other assignments of error are urged upon us; but, inasmuch as we have reversed the case for the error already indicated, we have deemed it proper to pass upon only such other assignments of error as seem to us from the present state of the record will necessarily arise on a new trial of the case.

As the majority of the judges are of the opinion that the giving of the fourth instruction above quoted was prejudicial to appellant, the judgment is reversed and the cause remanded.

MCCULLOCH, C. J., (concurring). The basis of the plaintiff's claim for damages in this case is the alleged fact that defendant induced it to open up and operate coal mines under a promise to furnish sufficient transportation facilities, thus supplementing the duty imposed by law upon the railroad company to furnish such facilities and to properly equip itself for that purpose. A failure to furnish cars in performance of that promise and of such legal duty is charged. The evidence shows that there is a market on defendant's line of road for only a small percentage of coal mined thereon, and that the greater percentage of coal shipments go off the line. Therefore, most of the cars required for shipment of coal were to go off the line. This was necessarily in contemplation of the parties, and forms a basis of plaintiff's case that it and the other coal operators were to be furnished cars to be sent off defendant's line. Yet the court, by giving instruction number four at plaintiff's request, refused to allow the jury to consider the fact that cars were off the line, which defendant by the most diligent effort could not regain, in

determining whether or not the defendant was excusable for failure to furnish all the cars demanded. The effect of this instruction was to tell the jury that the failure to get back cars sent off the line could not under any circumstances justify a failure to furnish all cars demanded by shippers. The manifest injustice of giving this instruction (number four) is seen when it is read in connection with the one which precedes it. One tells the jury that defendant was bound to furnish cars to be sent off its line, and the other that the failure to get the cars back afforded no excuse for failing to furnish all cars demanded. They ground the defendant between the upper and nether mill-stones, requiring it to furnish cars to be sent off the line but not allowing it excuse, under any circumstances, for failure to get them back.

These instructions are as follows:

"3. You are instructed that if the proof shows that the defendant, the Midland Valley Railroad Company, induced persons to open coal mines along its line of road, and further induced such persons, including this plaintiff, to enter into contract by which the defendant was to have the exclusive tonnage arising from said mine, and you further believe that in the contract with plaintiff it was provided that it should not ship its coal by another line than the Midland Valley Railroad, and if he did so they should pay a penalty, and if you further believe that only a small percentage of the coal mined on the line of the Midland Valley Railroad should be along such lines, that the defendant knew this, and if you further believe that plaintiff's coal was of such character that it could not be unloaded at the terminus of defendant's line to be taken by a connecting line without serious deterioration in quality and value, then the Midland Valley Railroad Company could not put an embargo on its cars as to this plaintiff, and prevent them from going beyond its own line and upon connecting lines of railway."

"4. You are further instructed that the fact that connecting lines have failed and refused to return promptly the cars of the defendant is no valid legal excuse or defense in this case absolving the defendant from its obligation to furnish with rea-

sonable promptness and diligence sufficient cars for the transportation of plaintiff's coal."

There was testimony tending to show that during the coal shipping season of 1906-1907 (within which time the alleged damages in this case accrued) there was an unprecedented and extraordinary demand for cars for shipment of coal and other commodities, and that the same could not reasonably have been anticipated by the officials of the railroad company; that when the car shortage began the officials of defendant company not only ordered a large number of cars from car builders, but made diligent effort to regain the cars which had been sent off the line from time to time. These officials testified concerning the rules of the American Railway Association, which prescribed a penalty of 50 cents per day for failure to return cars, and also testified that, by interviewing and corresponding with officials, superintendents and traffic managers of other roads, they made persistent efforts to get the cars back, but that on account of the congested condition of traffic they were met with promises which were not fulfilled. They testified that the penalty prescribed by the rules of the Railway Association was ineffectual to cause the return of cars during this time, but how long this penalty had proved ineffectual is not disclosed by the testimony.

This testimony entitled the defendant to have the jury consider, along with other facts and circumstances in the case, the fact that cars were off the line, and that return thereof could not be secured, in determining whether or not the defendant was excusable for its failure to furnish cars to plaintiff at the times complained of.

The fact that cars off the line could not be regained would not under all circumstances afford excuse for not securing others to be furnished to shippers when demanded. Cars wholly beyond the control of a carrier are the same as if not owned at all, and their places should be supplied with others except when the conditions are only temporary and a return to normal conditions may soon be reasonably expected. A railroad company is required to anticipate and provide only for normal conditions of traffic unless it has reasons to anticipate others; and during a temporarily abnormal condition of traffic it would certainly be unjust to a company to require it to furnish a new car for every

one sent off the line in fulfillment of a contract previously made with shippers, even though it had made and was then making every reasonable effort to secure the return of its cars. We find nothing in the case of *St. Louis S. W. Ry. Co.* v. *State,* 85 Ark. 311, which conflicts with the views here expressed. That was a case where the railway company was sued to recover a statutory penalty for failing to furnish cars for intrastate shipments. The finding of the Railroad Commission made out a *prima facie* case against the company for failing to furnish cars, and it attempted to justify the failure by showing that it owned enough cars to supply the demands of its shippers if connecting lines would return its cars, but that its cars had not been returned by connecting carriers. There was a jury trial, and verdict against the railway company. The trial court submitted the case to the jury on unobjectionable instructions as to this question; but the company insisted here that the evidence adduced, which was undisputed, established the fact that on account of the failure of connecting carriers to return cars its stock was depleted, and that this excused it for the failure to furnish cars on the occasion complained of. The evidence showed that the penalty fixed by the rules of the American Railway Association for failing to return cars was ineffectual, and would not accomplish its purpose, and that this had been demonstrated for two or three years prior to the time in question. This court held that the railway company had the choice either to send cars off its line under regulations sufficient to cause a reasonably prompt return or not to send them at all, and that when it acquiesced in a regulation which had been proved to be ineffectual to cause return of cars, it could not set up, as an excuse for failure to provide equipment to shippers, the fact that its cars were on the lines of other carriers.

The difference between the two cases is that in one the railroad had the choice of keeping its cars on its own line unless a better regulation was agreed upon to cause the return of the cars, and in the other the railroad was bound by its contract with coal shippers to furnish cars to be sent off its line; and in one case the undisputed proof showed that the regulation for return of cars had broken down or proved ineffectual for several years,

and in the other case there is no proof when the regulation became ineffectual.

We conclude that in the present case the court erred in giving the fourth instruction requested by plaintiff. All concur in the opinion of Mr. Justice HART on other points, and all concur in this additional opinion except him.

SMITH v. STATE.

Opinion delivered June 28, 1909.

1. PERJURY—FALSE STATEMENT—AVERMENT.—An indictment for perjury which alleges that defendant swore that at a certain time he did not *deliver* whisky to one C., when in truth he did *purchase and deliver* whisky at said time to C., sufficiently negatives the truth of defendant's testimony. (Page 202.)
2. SAME—SUFFICIENCY OF AVERMENT OF MATERIALITY.—An indictment for perjury which alleges that the alleged perjured testimony was material is a sufficient averment of its materiality, without specifying how it was material. (Page 203.)
3. SAME—FALSITY OF TESTIMONY—SUFFICIENCY.—Where an indictment for perjury alleged that defendant falsely swore before the grand jury that he did not deliver whisky to C., but that he did buy whisky from a licensed dealer in another town, for which he remitted by money order purchased at the postoffice in the town of D., evidence from the official records of the postoffice at D., showing that no money order was purchased by defendant, corroborated by evidence that the records were correctly kept, was sufficient to prove the falsity of defendant's testimony before the grand jury. (Page 204.)
4. SAME—MATERIALITY OF TESTIMONY.—In an investigation before a grand jury any testimony is material whose necessary effect is to suspend, if not prevent, further investigation of a subject of inquiry, as where defendant's false testimony prevented the grand jury from investigating whether liquors in a given instance had been sold illegally. (Page 204.)

Appeal from Prairie Circuit Court; *Eugene Lankford,* Judge; affirmed.

W. A. Leach, for appellant.

1. An assignment of perjury must specifically and without uncertainty of meaning designate the particulars wherein the

matter sworn to was false. 54 Ark. 584; 59 *Id.* 113; 51 *Id.* 138; Bliss, Code Pl., § 332. The alleged false testimony must appear to be material on the face of the indictment. 53 Ark. 395.

2. The materiality of the false testimony must be proved as alleged. 64 Ark. 474; 32 *Id.* 192; 30 Cyc. 1450. The evidence must more than counterbalance the oath of the prisoner and the legal presumption of innocence. 51 Ark. 138; 30 Cyc. 1452-3. The falsity of the alleged false testimony is the very gist of the offense, and must be established by affirmative testimony. 85 Ark. 195; 87 *Id.* 564.

Hal L. Norwood, Attorney General, and *Chester A. Cunningham,* Assistant, for appellee.

1. The indictment satisfies all the requisites of the statute as to perjury, and there is no negative pregnant therein as in 54 Ark. 583. Kirby's Dig., § § 1968-1970; 5 Words and Phrases, 4739.

2. The materiality of matter must be proved and not left to inference or presumption. 32 Ark. 192; 53 *Id.* 395.

3. It was proper to allow the statement made by appellant before the grand jury. The testimony was available and the best evidence. Kirby's Dig., § 2208; 4 Wigmore on Ev., § 2363 (b).

4. Official registers of postoffices are competent evidence. 3 Wigmore on Ev., § § 1633, 1643.

BATTLE, J. Al Smith was indicted for, and convicted of, perjury. Judgment was rendered against him on that conviction, and he appealed.

He demurred to the indictment, and his demurrer was overruled. So much of the indictment as is necessary to consider is as follows:

"And the said Al Smith did then and there before said grand jury, upon the investigation of a charge against some persons to the grand jurors unknown for selling ardent liquors without license in the county, district and State aforesaid, on or about the 20th day of February, 1908, did then and there, under the sanction of said oath administered to him as aforesaid, wilfully, corruptly and feloniously state 'that he did not about the 20th day of February, 1908, or at any other time, deliver to Will Copley,

at or near the town of DeVall's Bluff, any whisky whatever; that he and Will Copley together did about the 20th day of February, 1908, order two quarts of whisky from Pete Anderson at Newport, Arkansas, and remitted for same by postoffice money orders procured at the postoffice at DeVall's Bluff,' which said evidence was material in preventing the grand jury as aforesaid from returning an indictment against the party from whom the said Al Smith did purchase the whisky aforesaid, and who is to the grand jurors unknown, for selling ardent liquors without a license, when in truth and in fact the said Al Smith did on or about February 20, 1908, purchase and deliver to Will Copley at or near the town of DeVall's Bluff, county, district and State aforesaid, from some one to the grand jurors unknown, one pint of whisky; and the said Al Smith did not order whisky from Pete Anderson at Newport, Arkansas, and did not remit the money from same by postoffice money orders procured at the postoffice at DeVall's Bluff, which said statements so made by the said Al Smith as aforesaid were feloniously, wilfully and corruptly false, and the said Al Smith knew the same to be false when he made them, against the peace and dignity of the State of Arkansas."

It is shown in the indictment that the grand jury "of the Southern District of Prairie County were investigating a charge against a person from whom Al Smith had purchased whisky, to the grand jury unknown, for selling ardent liquors without license, on or about the 20th day of February, 1908, and that Al Smith, under an oath administered to him, wilfully, corruptly and feloniously stated as charged in the indictment, and that such evidence was material in this, that it prevented them from indicting such person for selling ardent liquors without license, and that the facts were as stated in the indictment."

Appellant insists that the alleged false statement made by him under oath was not sufficiently negatived in the indictment in this, that it is alleged in the indictment that he stated that he did not about the 20th day of February, 1908, or at any other time, deliver to Will Copley, at or near the town of DeVall's Bluff, any whisky whatever, when in truth and fact he did, on or about the 20th day of February, 1908, purchase and deliver to Will Copley, at or near the town of DeVall's Bluff, one pint of whisky. The statement of the contention proves that it is not true. The

indictment affirms what was denied, but affirms more, by saying that he *purchased* and delivered to Will Copley one pint of whisky.

It is alleged that the indictment is defective because it does not show that the alleged false statements were material.

Perjury is defined by the statute as follows: "Perjury is the wilful and corrupt swearing, testifying or affirming falsely to any *material* matter in any cause, matter or proceeding before any court, tribunal, body corporate or other officer having by law authority to administer oaths." Kirby's Digest, § 1968.

Section 1970 of Kirby's Digest provides: "In indictments for perjury it shall be sufficient to set forth the substance of the offense charged, and by what court or before whom the oath or affirmation was taken, averring such court or person to have competent authority to administer the same, together with the proper averments to falsify the matter wherein the perjury is charged or assigned, without setting forth any part of the record, proceeding or process, either in law or equity, or any commission or authority of the court or person before whom the perjury was committed, or the form of the oath or affirmation, or the manner of administering the same."

Under a statute substantially the same as section 1970 it was held in *People* v. *DeCarlo,* 124 Cal. 462, 464, 467, that an averment in an indictment that the false testimony given by the defendant was material to the "issues tendered in said cause" was a sufficient averment of its materiality, without specifying any particular issue upon which it was material or how it was material.

The rule is that in indictments for perjury the false testimony or statement for which the defendant is indicted may be shown by the indictment to be material, either by direct averment, or by allegation from which their materiality appears. "The rule of pleading is satisfied by a direct averment, and with that the question of materiality becomes one of proof of that averment. It is only when there is no averment of materiality that the indictment is insufficient unless it alleges the facts from which the law infers the materiality." *Commonwealth* v. *McCarty,* 152 Mass. 577, 580; *People* v. *Ennis,* 137 Cal. 263; *Greene* v. *People,* 182 Ill. 278; *Flint* v. *People,* 35 Mich. 491; 1 Russell on Crimes

(International Ed. 1896), page 354; 30 Cyclopedia of Law and Procedure, 1435, and cases cited.

Tested by the foregoing rules, the indictment is sufficient as to the materiality of the alleged false statements or testimony of the defendant.

But it is contended that the evidence adduced in the trial of the defendant was not sufficient to prove the falsity or materiality of such statements or testimony. S. E. Bowman, the foreman of the grand jury before whom the defendant testified as alleged in the indictment, testified that the grand jury had heard that Al Smith had been seen with whisky on two or three different occasions, and had given whisky to Will Copley. This was the subject of inquiry at the time Smith was before the grand jury. He was asked if he had given Will Copley some whisky, and about the possession of whisky on a certain day, the object being to ascertain from whom he purchased the whisky. In reply to these questions he testified as follows: "I never at any time delivered any whisky to Mr. Will Copley. William Copley and I did order some whisky together about the time boat was here (DeVall's Bluff) which was about 18th or 20th day of February, 1908. We ordered two quarts of whisky from Pete Anderson at Newport, Arkansas, remitting in two separate money orders. Orders were taken out in postoffice at DeVall's Bluff, and it came in name of Al Smith. I did one time tell William Copley that I knew where I could get some whisky in DeVall's Bluff. When I told Copley this, I thought I was telling the truth. I did one time get some whisky at DeVall's Bluff." This testimony was shown to be false. The official records of the postoffice at DeVall's Bluff were read as evidence, and they showed that no money orders were purchased in that office by Al Smith. This evidence was corroborated by the testimony of a witness who did not make it, which showed that he had examined it and found from information he had outside the record that it was correct. This is sufficient to prove the falsity of Smith's testimony before the grand jury. Was it material? He admits that he received two quarts of whisky in DeVall's Bluff, but falsely accounted for it. The grand jury were endeavoring to find out from whom he purchased it, with the view of ascertaining whether it had been sold by a person without license to sell liquors, within their jurisdic-

tion. This was their duty. His false testimony prevented the investigation.

Bishop, in his excellent work on Criminal Law, says: "Whatever evidence tends to influence the result on the direct or any collateral issue is material within our present doctrine, but what is not thus adapted to affect any result is not thus material. * * * * It is perjury to swear falsely to what, if true, would merely cause the particular proceeding to be abated." 2 Bishop's New Criminal Law, § 1032; *Reg* v. *Mullany,* Leigh & Cave, Crown Cases, 593.

The false testimony under consideration comes within the spirit, if not the letter, of the rule thus laid down; for its necessary effect was to suspend, if not prevent, further investigation of the present subject of inquiry. It was material.

Judgment affirmed.

BURKS *v.* HARRIS.

Opinion delivered June 28, 1909.

1. LOTTERY—DEFINITION.—A lottery is a species of gaming which may be defined as a scheme for the distribution of prizes by chance among persons who have paid or agreed to pay a valuable consideration for the chance to obtain a prize. (Page 208.)
2. SAME—ENFORCEMENT OF CONTRACT.—Where a number of persons join together and purchase land, with the intention of dividing it in an unlawful method, namely, by lot, the test to determine whether the vendor is entitled to recover for the purchase money is his ability to establish his case without aid from the unlawful transaction. (Page 208.)
3. SAME—ILLEGALITY OF CONTRACT.—Where 200 lots of land of varying values were sold to as many different persons at a uniform price, under an agreement that the lots should be apportioned to the purchasers by chance, and that the vendor should convey the lots so apportioned to their respective purchasers, the contract contemplated a violation of law, and was not enforceable. (Page 209.)

Appeal from Benton Chancery Court; *T. Haden Humphreys,* Chancellor; affirmed.

Dick Rice, for appellant.

In order to avoid the contracts, the vice pleaded must go to the substance of the contracts as and at the time executed. If the vice and illegality go only to the mode of execution, which is not a part of the contract at its inception, it is not vitiated. The burden of proof is on the party alleging the illegality of the transaction. 8 Am. & Eng. Enc. of L., 1008 and cases cited in note 2; *Id.* 1010.

McGill & Lindsey, for appellees.

Conceding that the benefits to be derived from the building of the hotel constituted a valuable and legal consideration, the contract is not enforcible because the other consideration is illegal. 21 Ind. App. 347; 69 Am. St. Rep. 360. The method of distributing the lots was a lottery. The drawing being illegal, there can be no recovery. 18 Am. & Eng. Enc. of L., 993; 47 Ark. 378; 67 Ark. 480; 25 Cyc. 163; 19 Am. & Eng. Enc. of L. 591; 144 Ind. 86; 21 Ind. App. 347; art. 19, § 14, Const. 1874; 15 Am. & Eng Enc. of L. 937; 19 *Id.* 592; Kirby's Dig. §§ 1862-3, 1732-3.

McCULLOCH, C. J. At a mass meeting of citizens of Bentonville, Arkansas, the plaintiff, W. A. Burks, proposed, on condition that the citizens of Bentonville should, within fifteen days from that date, purchase from him, at the price of $50 per lot, two hundred lots, fifty by one hundred fifty feet in size each, to be surveyed and platted out of a certain tract of land adjoining said city of Bentonville, to erect near Spring Park, on a tract of land known as "Spring Park Addition," a hotel building of certain dimensions and capacity, and to make certain other improvements on the premises so as to make the place an attractive resort. The lots were to be selected after the plat should be made, and the same were to be paid for as follows: One-half when the walls and roof of the hotel should be completed, and the balance when the whole improvements were completed. A committee was appointed by the assembled citizens to solicit purchasers in order to accept the plaintiff's proposition.

The committee secured a large number of subscribers or purchasers, each agreeing to purchase a certain number of lots at the price named, and out of these the plaintiff selected two

hundred, and they each executed to him an obligation in writing which, after reciting the plaintiff's undertaking with respect to erecting the hotel building, etc., is as follows:

"Now, therefore, in consideration of the above agreement and the benefits arising to the undersigned and the citizens of Bentonville, and the further agreement that the said W. A. Burks is to execute and deliver or cause to be executed and delivered a warranty deed conveying to J. W. Harriss one lot, the particular location to be hereafter determined, each lot to be 50 x 150 feet, situate on the following described tract of land situate in Benton county, Arkansas, to-wit: the S. E. ¼ of the S. E. ¼ of section 19, and the N. E. ¼ of the N. E. ¼ of section 30, township 20, range 30, we, the undersigned, promise to pay the said W. A. Burks the sum of fifty dollars at the Fidelity Savings Bank & Loan Company, in the city of Bentonville, upon the following terms: One-half of said sum when the walls of the said hotel building and roof thereon shall be completed, the remaining half to become due and payable when the said hotel, the dam and the six cottages shall have been completed according to contract. and that this note shall bear interest at the rate of ten per cent. per annum from date when said payment shall fall due until paid."

The plaintiff then caused the tract of land in question to be surveyed and platted into 330 lots, out of which number the committee selected two hundred, to be conveyed to the purchasers as soon as it should be determined what particular lot or lots each purchaser should receive. These lots were of unequal value, some worth practically nothing, and some worth double the price named.

The committee decided to distribute or apportion the lots to the respective purchasers by a chance, each purchaser to take the lot drawn by him, and this plan was accepted and carried out. The plaintiff did not propose this plan, but he acquiesced in it, and was present at the drawing. It was proposed and carried out by the committee who represented the citizens and purchasers. The plaintiff erected the proposed building and other improvements, and demanded payment from the purchasers of their respective obligations. He also executed and tendered to them deeds conveying the several lots apportioned to them in the drawing. Defendants Harriss, Armstrong, Crowell, Duckworth,

Bates, Stevenson, Porter, Maxwell, Hildebranth and Graham each declined to accept the lots so apportioned to them and refused to pay the price. The plaintiff instituted separate suits in equity against them, to recover the several amounts due, and to foreclose his alleged lien on the lots apportioned to them. These suits were consolidated and tried together, and a decree was rendered dismissing the complaint for want of equity, and the plaintiff appealed.

The defense asserted by each of the defendants was, among other things, that the scheme for the sale and distribution was a lottery, in violation of the law. "A lottery is a species of gaming, which may be defined as a scheme for the distribution of prizes by chance among persons who have paid, or agreed to pay, a valuable consideration for the chance to obtain a prize." 25 Cyc. 1633.

The Constitution and statutes of this State make it unlawful to conduct a lottery or to sell or otherwise dispose of lottery tickets, gift concert tickets, or the like. Constitution of 1874, art. 19, § 14; Kirby's Dig., § § 1862, 1863. Contracts for the sale of tracts of land of unequal value, to be apportioned among the purchasers by lot, are held in many cases to be within the statute against lotteries; and it is immaterial that every purchaser is to receive some return. *Paulk* v. *Jasper Land Co.,* 116 Ala. 178; *Elder* v. *Chapman,* 176 Ill. 142; *Lynch* v. *Rosenthal,* 144 Ind. 86; *Den* v. *Shotwell,* 24 N. J. L. 789; *Seidenbender* v. *Charles,* 4 S. & R. 151.

It is insisted, however, that where it is no part of the original contract of sale that the lots shall be divided by chance, and the vendor does not direct or make himself a party to the unlawful distribution, the contract is not vitiated, and that a recovery may be had thereon. The principle thus stated in the contention is undoubtedly sound, for where a number of parties join together and purchase lands, even with the intention of dividing it in an unlawful method, the vendor is not a party to the scheme, and is entitled to recover the agreed price. In that case the unlawful scheme for the division by lot is not a part of the original contract of sale.

In *Martin* v. *Hodge,* 47 Ark. 378, which involved to some extent the same principles which must control here, the court

said: "The test to determine whether a plaintiff is entitled to recover in an action like this or not, is his ability to establish his case without any aid from an illegal transaction; if his claim or right to recover depends on a transaction which is *malum in se* or prohibited by legislative enactment, and that transaction must necessarily be proved to make out his case, there can be no recovery."

Now, in applying that test to the present action, it becomes necessary to inquire particularly as to what the contract was between the parties. It will readily be observed that it was not a joint contract on the part of the subscribers or purchasers to purchase together a quantity of land to be subsequently distributed or apportioned among themselves according to a method of their own selection. If such were the case, each purchaser would be bound by the purchase, and would be obligated to accept and pay for his undivided part of the lands so purchased, and the vendor would not be concerned in the method of its apportionment or allotment between the several purchasers. The contract in this case is in writing and speaks for itself. Each subscriber or purchaser agreed to become the purchaser of a lot, to be thereafter selected, of given dimensions and for a certain stipulated price. There were 200 of these subscribers, and they separately agreed in these contracts to purchase lots of the same dimensions and at the same price, but of unequal value. The sale to each purchaser was not complete until the lot was selected, and the method of selecting the lot was necessarily a part of the contract. It was necessary for the plaintiff to prove the distribution of each lot in order to show a completion of the contract and his right to recover thereon; for the purchaser did not agree to pay until the lot should be apportioned and set aside to him. Applying the test laid down by this court in *Martin* v. *Hodge, supra,* it was necessary for the plaintiff, in order to make out his case, to prove an illegal transaction whereby the lots were set apart and apportioned to the respective purchasers. While the evidence in this case does not establish the fact that the plaintiff selected the method of apportioning the lots, yet the contract itself necessarily made him a party to whatever method was selected, because, until the apportionment of the lots, the contract was not complete and susceptible of enforcement. The obligation

which he accepted from the various purchasers contemplated that the distribution would be entirely by chance, and without reference to the actual value of the lots. It was not susceptible of the interpretation that a lawful method would or could be adopted whereby the lots were to be distributed. It could mean nothing else save that these lots of unequal value should be apportioned among the purchasers without regard to values, for each purchaser agreed to take a lot of the stipulated dimensions, no more, no less, and to pay the uniform price named, no more and no less. It was necessarily not in the contemplation of the parties at the time the contract was made that any regard to value should be had in the distribution of the lots, or that the values should be equalized in distributing them.

There is a decision of the Supreme Court of Iowa which, at first glance, appears to be in conflict with the views we have herein expressed; but, on careful analysis of the facts of that case, we find that it is clearly distinguishable from this. There certain promoters engaged in an enterprise with a packing company to erect its plant at the city or town named, and entered into a contract with the owners of a tract of land that the same should be platted and sold to subscribers or purchasers at a uniform price, and that the same were to be distributed among the subscribers according to methods to be thereafter selected by the latter. The subscribers were procured, and the lots platted and conveyed to the promoters for distribution among the subscribers, and the latter agreed upon and carried out a plan of distribution by drawing, similar to that adopted in the present case. The promoters had nothing to do with the adoption of the method of distribution. The court held that the contract was not vitiated by the agreement between the promoters and the purchasers for a distribution by chance. It is clear from the opinion, however, that the court treated the transaction as a purchase of the whole tract by the promoters, who held the title as trustees for the subscribers. The court said:

"It thus appears that there must be some plan or scheme on the part of the promoters of the enterprise alleged to be unlawful for the sale or disposition of property by lot or chance before it can be said to have the character of a lottery. If the sale is without the purpose that the property, or any part of it, shall

be obtained by the purchaser through chance, and this does not result from the nature of the transaction, then it is not so tainted. The sale of the lots to the subscribers in this case was not in pursuance of any design to promote a lottery, or in evasion of the law." *Chancery Park Land Co.* v. *Hart,* 104 Iowa 592.

The facts of the present case do not fall within the rule announced in that case. Here there was no completed purchase of any particular lot, but as we have already shown, the contract of purchase depended upon a subsequent method thereafter to be agreed upon for the distribution of the lots. In other words, it was not a purchase of an undivided tract and subsequent agreement of a division by chance, but it was a separate purchase by which each subscriber bought lots, the particular identity of which was to be determined by chance.

The correct distinction is, we think, drawn by the Supreme Court of Illinois in *Elder* v. *Chapman,* 176 Ill. 142, wherein it is said: "There is a broad distinction, however, between a division of property by lot and lottery. A partition of property into parts as nearly equal as possible, where owned by joint owners, may be made and a determination had by lot as to which part shall go to each joint owner severally, without coming within the prohibition of the statute. The joint owners being seized of the whole estate before partition, and the object of the lot being to assign to each his particular portion, the whole having been previously divided into parts as nearly of equal value as possible, such partition would not constitute a lottery."

We are of the opinion that the contract of sale contemplated an unlawful method of performance, and that the decree of the chancellor was correct.

Affirmed.

BLUMENTHAL v. BRIDGES.

Opinion delivered June 28, 1909.

1. REAL ESTATE BROKER—RESERVED AUTHORITY OF PRINCIPAL TO SELL.—Where real estate is placed in the hands of an agent or broker for sale in the ordinary way, without stipulation, express or implied, that the agent should have the exclusive right to sell, the principal is not deprived of the right in good faith to make sale himself, free from liability to the agent for his commission. (Page 214.)
2. SAME—WHEN AGENT'S AUTHORITY EXCLUSIVE.—Under a contract of employment of a real estate broker which stipulates that for a definite period of time the broker shall have the right to make sale of certain land, there is implied an exclusive right to sell within the time named, without the right in the principal to revoke the agency, either directly or by making a sale of the property, unless there is a reservation to that effect. (Page 214.)
3. SAME—BREACH OF CONTRACT OF EMPLOYMENT—DAMAGES.—Where an agent's contract of employment to sell his principal's land is wrongfully revoked by the principal, and the agent elects to sue for the probable damages resulting therefrom, the measure of his damages is the profit which he would have realized from the performance of the contract if he had been permitted to perform it within the time named. (Page 217.)
4. SAME—RIGHT TO COMPENSATION.—If a real estate broker, before his contract of employment is revoked, produces a purchaser, he is entitled to the earned compensation, whether the right of revocation existed or not. (Page 217.)
5. SAME—RIGHT TO COMPENSATION.—Upon an unlawful revocation of a real estate broker's contract of employment before its expiration he is entitled to recover if he proves by competent evidence that he could, within the remaining time of the contract, have sold the land at a price which would have entitled him to a commission. (Page 217.)

Appeal from Jefferson Circuit Court; *Antonio B. Grace,* Judge; affirmed.

White & Altheimer and *W. B. Alexander,* for appellants.

1. No exclusive right to sell was given, and appellants reserved the right to make sale themselves. 44 L. R. A., p. 344, note A; 70 Ark. 58; 44 *Id.* 275; 21 Wis. 303; 20 Minn. 126; *Cordova* v. *Baker,* 74 Tex. A principal reserves the right of disposal, even after conferring the power upon an agent, unless the *exclusive* authority to sell is given.

2. Appellants could only be liable for *breach of contract* in such damages as were proved. No proof was made as to the reasonable value of plaintiff's services. 70 Ark. 58; 89 Ark. 412; Mechem on Agency, § 2091.

Taylor & Jones, for appellee.

There is no ground of reversal in this case. It is really settled by 89 Ark. 412. By terminating the contract appellants became liable for the damages sustained, *i. e.,* all over $2 per acre, or $160. *Ib.*

McCULLOCH, C. J. This is an action, instituted by appellee Bridges against appellants, to recover a commission to which he is alleged to be entitled under a contract for the sale of land. The contract is as follows:

"June 24, 1907.

"We authorize R. E. Bridges to sell for us the tract of land in Cleveland County known as the Hense Gibson place for $2 per acre. Whatever he realizes over $2 per acre belongs to him. This list is good until January 1, 1908.

(Signed) "S. Blumenthal & Co."

The appellants sold the land to one Quinn on October 28, 1907, for the sum of $300, without the knowledge, assistance or procurement of appellee, and executed to Quinn a deed of conveyance, which was duly placed on record. In December, 1907, appellee tendered to appellants the sum of $320, and demanded of them that they convey the land to one Gibson, to whom he claimed he had sold the land. Appellee knew at that time that appellants had previously sold the land to Quinn.

Appellee testified that in the latter part of June, after the date of the contract with appellants, he sold the land to Gibson for $3 per acre, and in August, 1907, notified the appellants that he had found a purchaser for the land, but did not inform them who the purchaser was. S. Blumenthal, one of the appellants, testified in the case, and denied that appellee ever told him that he had found a purchaser, but on the contrary told him that he could not sell the land.

The court refused to instruct the jury at appellants' request to the effect that by the execution of the contract in question they did not waive the right to sell the land in question; that the sale

made by them to Quinn operated as a revocation of the contract, and that they had a right to revoke it. The court submitted the case to the jury on the following instruction:

"If you believe from the evidence that the plaintiff at any time between the 24th day of June, 1907, and the first day of January, 1908, in good faith made a verbal agreement with one Hense Gibson for the sale of the land in controversy to him for the sum of three dollars per acre, and that before the first day of January, 1908, plaintiff for the said Hense Gibson tendered to the defendants in money the sum of $320, and demanded of them a deed for the said land to the said Gibson, and that the defendants refused to execute the same, then you will find for the plaintiff in the sum of $160 with interest thereon at the rate of 6 per cent. to the present time from the first day of January, 1908." The jury returned a verdict in favor of appellee for the sum of $160, judgment was rendered accordingly, and appeal was taken to this court.

Appellants contend that the contract was not one for exclusive agency, and that they had the right at any time before a sale was negotiated by appellee to revoke it. They rely upon numerous cases which announce the general rule that where real estate is placed in the hands of an agent or broker for sale in the ordinary way, without a stipulation to the contrary and without specifying any definite period of time within which the agent is to have the exclusive right to sell, this does not deprive the principal of the right to sell the land himself when he acts in good faith toward the agent, and that in such cases there is an implied reservation of the right of the principal to sell, free from any charge or liability for commission. See note to *Hoadley* v. *Savings Bank of Danbury* (Conn.), 44 L. R. A. 321; 23 Am. & Eng. Enc. L., 913. The same rule was announced by this court in *Hill* v. *Jebb,* 55 Ark. 574.

Those cases do not, however, announce the controlling principle in this case, for here the contract expressly stipulated for a definite period of time within which the agent might make a sale. In such case the contract implies an exclusive right to sell within the time named, without the right of the principal to revoke the agency unless there is a reservation to the contrary. *Levy* v. *Rothe,* 39 N. Y. Supp. 1057; *Glover* v. *Henderson,* 120 Mo. 367;

Green v. *Cole,* 127 Mo. 587. That principle was distinctly recognized by this court in *Novakovich* v. *Union Trust Co.,* 89 Ark. 412. The court in that case quoted with approval the following statement of the law, taken from Mechem on Agency, § 210:

"Where no express or implied agreement exists that the agent shall be retained for a definite time, the power and the right of revocation coincide. Such employments are deemed to be at will merely, and may therefore be terminated at any time by either party without violating contract obligations or incurring liability. The law presumes that all general employments are thus at will merely, and the burden of proving an employment for a definite period rests upon him who alleges it. * * But where the agent has been employed for a fixed period, the agency can not be rightfully terminated before the expiration of that period at the mere will of the principal, but only in accordance with some express or implied condition of its continuance. Any other termination of such an agency by the act of the principal will subject him to liability to the agent for the damages he has sustained thereby."

The same author at another place (§ 618) says: "When the agent is employed for a definite term, he can be discharged without liability only when there has been a breach of some express or implied condition of the contract creating the agency."

Now, if the principal cannot, under a contract of this kind, stipulating a definite time within which the sale may be made, revoke the agency directly, it follows that he cannot do so indirectly by making the sale of the property himself, thereby putting it beyond the power of the agent to perform the contract. The revocation of the agency, either directly or by making a sale of the property, is a breach of the contract on the part of the principal, and renders him liable to the agent for damages which the latter sustains thereby. The court in the Novakovich case places a contract of this kind on the same ground as any other contract for employment of an agent to perform a stipulated service, and the same measure of damages must necessarily be applied, so far as the nature of the case makes it applicable. This court in *Van Winkle* v. *Satterfield,* 58 Ark. 621, laid down the following rule, which is sustained by the text writers and by

the adjudged cases, as to the measure of damages which a servant, wrongfully discharged, may recover from his employer:

"First, he may consider the contract as rescinded, and recover on a *quantum meruit* what his services were worth, deducting what he had received for the time during which he had worked. Second, he may wait until the end of the term, and then sue for the whole amount, less any sum which the defendant may have a right to recoup. Third, he may sue at once for breach of the contract of employment."

This rule was subsequently approved in *Spencer Medicine Co.* v. *Hall,* 78 Ark. 336, where it was held that a discharged agent, who had been employed to sell patent medicines, could recover anticipated profits which he could have realized during the pendency of the contract if he had been permitted to perform it. It was also held in the last-named case that where the character of the service stipulated for in the contract did not involve the whole time of the agent during the period named, nor interfere with his carrying on other work, no deduction should be made for the value of the time saved.

The appellee in this case elected not to treat the contract as rescinded and sue to recover on a *quantum meruit* what the services already performed were worth, but he sued to recover the profits which he would have earned upon the sale if he had been allowed to perform the contract within the stipulated time. The question of recovery of anticipated profits gave the court much concern in *Spencer Medicine Co.* v. *Hall, supra,* and the court held that the same could be recovered. We see no reason why, if anticipated profits on a sale of merchandise could be recovered as damages on a broken contract, such profits cannot be recovered on a broken contract for the sale of land. The same principle controls in both kinds of contracts.

Other courts have held that this is the measure of damages for breach of contracts for sales of land similar to the one in this case. *Van Gorder* v. *Sherman,* 81 Iowa 403; *Schultz* v. *Griffin,* 26 N. Y. Supp. 713; *Levy* v. *Rothe, supra; Green* v. *Cole, supra.*

In *Rowan* v. *Hull* (W. Va.) 47 S. E. 92, the following rule was announced, taken from Rinehardt on Agency, § 269; "Where the parties had provided by their agreement what the agent's compensation shall be in case the principal sees fit to

revoke the contract prematurely, such agreement shall form the basis of the agent's recovery." This is the rule which prevailed in *Novakovitch* v. *Union Trust Co., supra.*

In the present case, however, the contract does not stipulate expressly for a measure of the agent's compensation in case the contract should be broken. It only provides for what the compensation shall be when the contract is performed. Therefore, where the agent elects not to treat the contract as rescinded as soon as it is broken and sue for the value of his services, but elects to sue for the probable damages resulting from the breach, the only measure of his damages is the profit he would have realized from the performance of the contract if he had been permitted to perform it within the time named. The court submitted the case to the jury on this measure of damages, and there was evidence sufficient to sustain the verdict.

The instruction given by the court was not strictly accurate, in that it told the jury that appellee, before he could recover, must show that he found a purchaser and tendered to the appellants the price. But this inaccuracy was not prejudicial to appellant, for it imposed an additional burden on appellee which it was not necessary for him to sustain in order to entitle him to a recovery. If, before the revocation of the contract, he produced a purchaser, ready, willing and able to purchase the property, then he was entitled to the earned compensation, whether the right of revocation existed or not. And, even if he had not produced a purchaser before the revocation, he would have been entitled to recover by proving by competent testimony that he could, within the remaining time of the contract, have sold the land at an advance over the price named in the contract. This he might have shown by proving that the lands were of sufficient value in the market, and that his opportunities for finding a purchaser were such that he could have found a purchaser at an advanced price if he had been permitted to do so.

We conclude upon the whole that the case was fairly tried and that the verdict should not be disturbed.

Affirmed.

McCOMB v. JUDSONIA STATE BANK.

Opinion delivered June 21, 1909.

1. FRAUDULENT CONVEYANCE—SALE SUBJECT TO LIENS TO BE DECLARED.—A bill of sale of lumber which is made in good faith is not fraudulent as to creditors of the vendor because it provides that, if any liens are declared against said lumber, said amount shall enter into and become a part of the purchase price of said lumber. (Page 222.)
2. SALE OF CHATTELS—ENFORCEMENT OF SPECIFIC ATTACHMENT.—The statutory remedy authorized by Kirby's Digest, § § 4966, 4967, in favor of a vendor of chattels, to enforce payment of the purchase money, is not a lien, and cannot be enforced where the property has passed into the hands of a purchaser for value, even though such purchaser had notice that the purchase money had not been paid. (Page 223.)

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

S. Brundidge, Jr., and *Cypert & Cypert*, for appellant.

1. The mortgage is void as to rights of third parties because the acknowledgment was taken before a notary who was president of the bank, the mortgagee. 68 Ark. 166; 70 *Id.* 309; 63 N. E. 1049; 96 Va. 138; 36 Fla. 575; 13 Mich. 329; 87 Iowa 363; Jones on Mortg., § 249; 50 N. E. 594.

2. The mortgage was fraudulent as to creditors because the mortgagor was left in possession and continued to sell the property mortgaged for nearly thirty days. 50 Ark. 97.

3. The bill of sale was a subterfuge, not final, but only an unrecorded mortgage of no validity as to third parties and creditors.

4. Failure to pay by the terms of the lease worked a forfeiture, and Austin did not own anything to sell to the bank. Forfeitures are not favored in equity, yet where a forfeiture works equity and protects the rights of parties equity will enforce it. 86 Ark. 489; 80 Pa. St. 142.

5. Where anything remains to be done between vendor and vendee of personal property to ascertain the quantity or price, there is no such delivery as passes title, though the price be partly paid. 5 Ark. 161; 19 *Id.* 566; 25 *Id.* 545. The bill of sale was too indefinite and vague.

Rachels & Robinson, for appellee.

1. The acknowledgment by a stockholder or director, who is a notary of a corporation of a mortgage to the corporation, is good. 97 Tenn. 285; 56 Ark. 511; 93 Va. 101; 24 S. E. 899; 9 Mont. 323; 23 Pac. 718.

2. Parol evidence cannot be used to impeach or destroy an acknowledgment to a deed which fails to disclose upon its face that the officer who took the acknowledgment had some interest. 50 Tex. 224.

3. Taking possession by the mortgagee was an appropriation to the mortgage debt with the debtor's consent, and makes the title good against subsequently acquired rights. Jones on Chat. Mortg., § 178; 50 Ill. 444; 105 U. S. 401; 3 S. W. 405; 49 Ark. 279; 52 *Id.* 385; 26 Kan. 625; 51 Ill. 198.

4. Where personal property is incapable of actual delivery, a bill of sale or other evidence of title is sufficient to pass title and possession. 31 Ark. 163; 31 Ark. 121; 54 *Id.* 305; 60 *Id.* 613; 90 Ark. 131; 80 Ark. 572; 76 *Id.* 506; 68 *Id.* 307.

5. The recorded mortgage was a lien on all the lumber subsequently sawed, though not in existence when the mortgage was executed, until the account was finally settled, notwithstanding the property remained in possession of the mortgagee and he sold part of the lumber. 72 Ark. 390; 68 Ark. 307.

6. The property was realty, not personalty. 76 Ark. 273. A vendor's lien (so called) on personal property cannot be enforced after it has passed into the hands of third parties. 52 Ark. 450, 458; 76 *Id.* 273.

7. There was no fraud. 64 Ark. 180.

8. The sale was complete, and the title passed to Austin. 9 Ark. 478; 19 *Id.* 573; 23 *Id.* 253; 35 *Id.* 190.

9. A vendor's lien on chattels is unknown to our law. 45 Ark. 136; 52 *Id.* 450; 71 *Id.* 344; 77 *Id.* 14.

HART, J. On the 18th day of August, 1907, A. C. McComb, by an instrument in writing, leased his sawmill and machinery to S. E. Austin, who was at the time doing business under the firm name of the Young Land & Lumber Company, and the same instrument also contained a contract whereby McComb sold to Austin the timber from certain of his lands.

On November 1, 1907, Austin sent to McComb at Oshkosh, Wis., his check for $767.57 on the Judsonia State Bank in pay-

ment for timber cut off said lands. The bank refused to pay the check and returned it.

On the 16th day of November, 1907, McComb brought suit in the White Circuit Court against S. E. Austin and the Young Land & Lumber Company to recover said sum of $767.57, alleged to be due for the purchase price on said timber, and sued out a specific attachment under sections 4996 and 4967 of Kirby's Digest, and caused it to be levied on the said timber, which was then at Austin's mill, and which is now the subject of this litigation.

On January 22, 1908, S. E. Austin, by his attorney, H. P. Cleveland, filed his answer to the suit, in which he admitted the indebtedness to McComb, and asked for a dissolution of the attachment on the ground that he had given a chattel mortgage to the Judsonia State Bank on said property, and that after the execution of said mortgage, on the 14th day of November, 1907, he had given said bank a bill of sale of said property.

On December 7, 1907, the Judsonia State Bank filed its complaint in the White Chancery Court against A. C. McComb *et al.*, in which it asked for a receiver to take charge of said property, and also asked that its mortgage be foreclosed. Afterwards, by order of the court, S. E. Austin was made a party to the suit, and through H. P. Cleveland, his attorney, entered his appearance to the action.

On January 23, 1908, the Judsonia State Bank asked to be made a party to the suit of McComb *v.* Austin, pending in the White Circuit Court, and at the same time asked that the cause be transferred to the chancery court and consolidated with its suit to foreclose its mortgage. The transfer was made, and the causes were consolidated.

On March 14, 1908, McComb filed his answer to the chancery suit brought by the bank, in which he set up collusion between the bank and Austin, and asked to have his attachment sustained, and his debt for purchase money of the logs paid to him before any part of the money arising from the sale of the logs should be paid to the said Judsonia State Bank.

Will Darden was appointed receiver to take charge of and to sell the property in controversy. The property was sold by him for the sum of $2,042.68, and the sale was duly confirmed by the court. The bill of sale by Austin to the bank reads as follows:

"Know all Men by These Presents:

"That the undersigned, S. E. Austin, being indebted to the Judsonia State Bank in the sum of twenty-one hundred forty-five dollars and sixty-eight cents, which is secured by deed of trust on certain lumber, ties and logs now on the mill yard at the mill near Barber Lake, in the county of White, better known as the McComb mill, and for the purpose of avoiding the expense of advertising and selling the same, and further for the purpose of avoiding the excitement that will naturally follow with the laborers, I, this day, for and in consideration of the said sum of ($2,145.68), the sum due the Judsonia State Bank, and for the further sums due for labor which will be by law declared a lien against the lumber, ties and logs, sell, transfer, assign and deliver to the Judsonia State Bank all the lumber, ties and logs now located at the mill yard at the McComb mill near Barber Lake, to it to have and to hold as its own forever, with the distinct understanding that, if any liens are declared against said lumber, ties and logs for labor, said amount shall enter into and become a part of the purchase price of said lumber, ties and logs.

"S. E. Austin."

"The foregoing instrument was signed in my presence on the 14th day of November, 1907.

"H. P. Cleveland."

The chancellor found that the bill of sale was valid, and that the attachment sued out by McComb was subsequent to the date of the bill of sale.

A decree was therefore rendered, in which the attachment of McComb was dissolved, and his cross complaint dismissed for want of equity. McComb has duly prosecuted an appeal to this court.

The first contention made by his counsel is that the mortgage from Austin to the bank is of no validity, as far as the rights of McComb are concerned, for the reason that the ac-

knowledgment to it was taken by C. M. Erganbright, who at the time was president of the bank, its business manager and one of its directors and stockholders. Assuming their contention to be correct, it does not help them any. The decree of the chancellor was based upon the bill of sale from Austin to the bank and not upon the mortgage.

The chancellor found that the bill of sale was valid, and was prior in point of time to the suing out of the attachment by McComb, and we can not say that his findings are against the weight of the evidence. The evidence clearly shows that, on the 16th day of October, 1907, when the mortgage was executed, Austin was indebted to the bank in the sum of $800; and that on the 14th day of November, 1907, the date of the exectuion of the bill of sale, his indebtedness to the bank amounted to $2,145.68.

The testimony on the part of the bank shows that the bill of sale was at once delivered to H. P. Cleveland, who was then the attorney for the bank, and that the bank, through Claud Taylor, immediately took possession of the property embraced in the bill of sale. Taylor, up to the time of the execution and delivery of the bill of sale, had been an employee of Austin, but it is not shown that he had any interest, either in the sawmill or in the property involved in this controversy. The attachment of McComb against the property was not sued out until the 16th day of November, 1907.

It is also contended by counsel for McComb that the bill of sale was of no effect for the reason that at the time of its execution the bank did not know how much it was paying for the property, and that Austin did not know how much he was receiving. In support of their contention, they rely upon that clause of the bill of sale, which reads as follows: "With the distinct understanding that, if any liens are declared against said lumber, ties and logs for labor, said amount shall enter into and become a part of the purchase price of said lumber, ties and logs."

In the case of *Flask* v. *Tindall,* 39 Ark. 571, the court held: "A sale of goods, to be fraudulent as to creditors, must be made with the fraudulent intent to cheat, hinder or delay them, and there is no fraud in selling and delivering a stock of goods at

cost, leaving the aggregate price to be ascertained by an inventory. The delivery completes the sale."

So, in the present case how much was due for labor which had been performed on the property was capable of definite ascertainment. Moreover, the statutes gave the laborers a lien for their services performed in getting out the logs and manufacturing them into lumber, which could not have been defeated by the terms of the bill of sale.

Again, it is urged by counsel for McComb that the rights of Austin under his contract with McComb had been forfeited. In support of this contention, they rely upon the provisions of the contract which provide that Austin shall remit to McComb the money for the timber cut on the first of each month, and that "if the second party (Austin and the Young Land & Lumber Company) fails to do so on the first of each month he and they forfeit all rights hereto, and invalidates this lease and contract." It is not necessary to decide whether this language is sufficient upon which to base a right of forfeiture, for no forfeiture was declared or attempted to be asserted by McComb. As stated in *Braddock* v. *England,* 87 Ark. 393, there can be no *nunc pro tunc* forfeiture.

Instead of declaring the contract at an end when default was made under it, McComb was endeavoring to assert his rights thereunder by suing out a specific attachment against the property under sections 4966 of Kirby's Digest. Before this proceeding to impound the property had been instituted, the property had been sold to the bank for a valuable consideration.

In the case of *Neal* v. *Cone,* 76 Ark. 273, the court held: "The statutory remedy authorized by Kirby's Digest, § § 4966, 4967, in favor of the vendor of chattels, to enforce payment of the purchase money, is not a lien, and can not be enforced where the property has passed into the hands of purchasers for value, even though they may have had notice before their purchase that the purchase money had not been paid."

Finding no prejudicial error in the record, the decree is affirmed.

HENDERSON v. STATE.

Opinion delivered June 21, 1909.

1. CRIMINAL LAW—SUFFICIENCY OF WARRANT OF ARREST.—A warrant issued by a justice of the peace for the arrest of a person, charging him with having carried a pistol as a weapon, is sufficient to admit proof of his having carried as a weapon a pistol such as is not used in the army or navy of the United States, or of having carried as a weapon a pistol such as is used in the army or navy of the United States in any manner except uncovered and in his hand. (Page 227.)
2. CARRYING ARMS—INSTRUCTION.—Where a charge of carrying a pistol as a weapon was broad enough to cover the offense either of carrying such a pistol as is not used in the army or navy or of carrying such a pistol as is used in the army or navy but not uncovered and in the hand, it was error to instruct the jury to acquit the defendant unless the pistol was such as is used in the army or navy of the United States. (Page 228.)
3. INSTRUCTIONS—HARMLESS ERROR.—Appellant cannot complain because the jury ignored an instruction given at his request that was more favorable to him than the law authorized under the facts in proof. (Page 229.)
4. SAME—WHEN CONFLICTING INSTRUCTIONS HARMLESS.—Where the court gave two conflicting instructions upon a certain question, one of which was correct, appellant cannot complain if the jury adopted the correct instruction as the law. (Page 230.)
5. CARRYING ARMS—LENGTH OF TIME.—Kirby's Digest, § 1609, prohibiting the "wearing" or "carrying" of a pistol as a weapon, does not require, to constitute the offense, that the pistol should be carried for any length of time. (Page 231.)

Error to Drew Circuit Court; *Henry W. Wells,* Judge; affirmed.

STATEMENT BY THE COURT.

The appellant was arrested on a warrant issued by a justice of the peace which reads in part as follows: "It appearing that there are reasonable grounds for believing that Hosia Henderson has committed the offense of carrying a pistol as a weapon, you are commanded forthwith to arrest him and bring him before me to be dealt with according to law."

The appellant was tried and convicted in the justice's court, and on appeal to the circuit court was tried on the charge contained in the warrant of "carrying a pistol as a weapon."

The evidence on behalf of the State tended to show that "at Gaines Park, in Drew County, Arkansas, on July 29, 1908, where the colored people were having a barbecue, appellant left his shooting gallery and went to the 'barbecue stand.' While he was at the stand, one Ed Willis threw a beer bottle at him, whereupon appellant 'dodged down,' and when he raised up he pulled a big gun out of his pocket and commenced shooting at Willis. The pistol was a 32 Special." Another witness testified: "He took a pistol out of his side pocket before he got in the stand."

When appellant was arrested after the shooting, he was asked where the gun was, and replied that he left it at Miller's, that the pistol was Miller's, that he got it out of Miller's stand.

The evidence on behalf of appellant tended to prove that Ed Willis struck two women, one of them appellant's wife, who were in the barbecue stand; that when appellant heard the women he went into the stand and asked Willis what he was doing. Willis had a large knife in his hand; he "grabbed a bottle and made three motions" at appellant. Appellant "dodged down and raised up and threw his hands under the table and shot twice. He did not pull the pistol out of his pants pocket."

When the shooting was over, appellant laid the pistol down in a chair, and left it there. One of the witnesses testified as follows:

"I was standing talking to Henderson at his shooting gallery at the barbecue, when we heard Ed Willis cursing and a woman holloing. I told Henderson to go and see what was the matter with his wife, and he walked right over to the stand where Willis was, and went inside the stand. I did not see any pistol about Henderson when he left, or anything to indicate that he had any pistol. Willis had a knife open, and when Henderson told him he ought not to treat his (Henderson's) wife that way, Willis cut at Henderson. Henderson dodged down, and Willis throw a bottle and struck him on the head. Henderson then raised up and shot. There was a towel hanging to the pistol when Henderson grabbed it. I afterwards wrapped this towel around Henderson's head where he was hit with the bottle and knocked nearly crazy. Henderson did not take the pistol out of his pocket, nor turn his pocket out. I was right against the stand when the shooting started."

The court instructed the jury as follows:

"1. Any person who shall wear or carry in any manner whatever as a weapon any pistol of any kind whatever, except such pistols as are used in the army or navy of the United States, shall be guilty of a misdemeanor; provided, officers whose duties require them to make arrests or to keep and guard prisoners, together with persons summoned by such officers to aid them in the discharge of such duties, while actually engaged in such duties, are exempt from the provisions of the law against carrying a pistol as a weapon; provided further, any person may carry such weapon when upon a journey or upon his own premises."

"2. Any person, excepting such officers and persons on a journey and on their own premises, who shall wear or carry such a pistol as is used in the army or navy of the United States, in any manner except uncovered and in his hand, shall be deemed guilty of a misdemeanor."

"3. The jury are instructed that any person who carries a pistol as a weapon who is not an officer or upon a journey or on his own premises, unless he carries it uncovered and in his hand, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than fifty nor more than two hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than three months, or by both fine and imprisonment."

The appellant objected to the giving of instructions numbered two and three.

The appellant made the following requests for instructions:

"1. The court instructs the jury to return a verdict of not guilty."

"2. The court instructs the jury that the law of the State of Arkansas is against 'wearing or carrying' a pistol, as a weapon. If, however, a person who is then engaged in an encounter with another picks up a pistol which happens to be at hand and uses it in defense against the assault of the other person, and as soon as the difficulty is over he lays the pistol down at or near the place he found it, this is not such a wearing or carrying of a pistol as a weapon as is contemplated by the law, and such use of a pistol is not in itself, against the law of the land."

"3. The court instructs the jury that the burden is on the State to prove that the pistol was not such as is used in the army and navy of the United States, and this fact must be proved by testimony offered in this case, and not left to be presumed or arrived at by the jury from the general knowledge of the members of the jury; and unless the State has proved by competent evidence in this case, beyond a reasonable doubt, that the pistol in question was not such as is used in the army or navy of the United States, the jury will acquit the defendant."

The court refused prayer number one and granted numbers two and three. The jury returned a verdict of guilty, and assessed the fine at $75. The appellant duly preserved his exceptions to the rulings of the court, and assigned these as errors in his motion for new trial, which the court overruled, and appellant duly prosecutes this appeal.

Williamson & Williamson, for appellant.

1. No proof whatever was offered as to the kind of pistol used in the army or navy of the United States, nor whether or not the pistol was such. 3 Ark. 1; 77 Ark. 139; 83 Ark. 26; 84 Ark. 332.

2. Defendant was on trial for carrying a pistol as a weapon under section 1609 of Kirby's Digest, which is a distinct and separate offense from that of section 1610. 83 Ark. 30; 36 Ark. 222.

3. The State must prove that the pistol was *not* such as is used in the army or navy. 62 Ark. 489.

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellee.

The negative averment is the essential part of the offense and the burden of proving it was on the State. There was no such proof, and the allegations of the charge were not proved. 19 Ark. 143; 83 Ark. 26; 84 Ark. 332.

WOOD, J., (after stating the facts). First: As early as *Watson* v. *State,* 29 Ark. 299, this court said: "The only purpose of the warrant is to have the person charged with the commission of the offense arrested and brought before the justice, or other officer issuing it, to be dealt with according to law; and when that is done it has performed its function, and has no

operation whatever upon the subsequent proceedings. The object in naming or stating in it the offense charged is only that the person to be arrested may at the time be informed for what he is arrested; but if it does not then sufficiently appear, it can have no such effect as releasing him when brought before the magistrate."

The warrant contained the charge generally that appellant had carried a pistol as a weapon, and this was sufficient to admit proof of carrying, as a weapon, a pistol such as is not used in the army or navy of the United States; or of carrying, as a weapon, a pistol such as is used in the army or navy of the United States in any manner except uncovered and in his hand. The warrant, and the arrest under it, gave the court jurisdiction, and it was then a question to be determined by the evidence, as to whether the appellant had carried a pistol as a weapon such as is not used in the army or navy of the United States, or whether he had carried as a weapon an army or navy pistol in his pocket, or in some other manner than in his hand and uncovered. See *Blacknall* v. *State,* 90 Ark. 570; *Searcy* v. *Turner,* 88 Ark. 210; *Burrow* v. *Hot Springs,* 85 Ark. 396, and cases there cited.

In instruction number 3 given at the request of appellant the court told the jury "that the burden was on the State to prove that the pistol was not such as is used in the army or navy of the United States, and that this fact must be proved by testimony offered in the case, and not left to be presumed or arrived at by the jury from their general knowledge; and, unless the State has proved by competent testimony in the case, beyond a reasonable doubt, that the pistol in question was not such as is used in the army or navy of the United States, the jury will acquit the defendant." This instruction was in accord with the doctrine of this court announced in *Vaughan* v. *State,* 84 Ark. 332; *McDonald* v. *State,* 83 Ark. 26; *State* v. *Ring,* 77 Ark. 139, and other cases.

Under this instruction appellant would have been entitled to a verdict of not guilty as matter of law upon the authority of the above cases, if the only charge against him had been that of carrying a pistol as a weapon such as is not used in the army or navy of the United States, for there was no proof that the

pistol was not such a pistol as is used in the army or navy of the United States.

In the cases of *State* v. *Ring, McDonald* v. *State* and *Vaughan* v. *State, supra,* the charge was by indictment under section 1609 of Kirby's Digest. The proof had to correspond with the allegations of the indictment. The indictment could not be amended to correspond with the proof.

But in this case, as we have seen, the warrant and arrest brought the appellant before the court to be tried for the offense of carrying a pistol, as a weapon, in any manner that the evidence might show that he committed that offense, whether by carrying as a weapon such pistol as is not used in the army or navy, or by carrying as a weapon such pistol as is used in the army or navy in some other manner than uncovered and in his hand. In other words, the charge under this warrant was tantamount to a charge of the offense of carrying a pistol as a weapon in the alternative, and brings the case well within the rule announced in *Blacknall* v. *State, supra,* and *State* v. *Bailey,* 62 Ark. 489. It follows that the latter clause of instruction number 3 given at the request of appellant was more favorable to him than the evidence warranted, for it told the jury to acquit "unless the State has proved by competent evidence beyond a reasonable doubt that the pistol in question was not such as is used in the army or navy of the United States." But, under the evidence, the appellant was not entitled to acquittal if the State proved that he carried in his pocket, as a weapon, a pistol, even though it was such a pistol as is used in the army or navy of the United States. The State adduced evidence tending to prove that the appellant drew the pistol from his pocket which he used as a weapon. Therefore appellant can not complain because the jury ignored an instruction given at his request that was more favorable to him than the law authorized under all the facts that the evidence tended to prove.

This instruction number three at the request of appellant was based on one phase of the evidence only, to-wit, that there was no evidence to show that the pistol was not such as is used in the army and navy of the United States. But the verdict shows that the jury grounded their verdict upon the evidence which tended to show that the appellant "pulled a big

gun out of his pocket" which he used as a weapon. It was within the province of the jury to accept this evidence on behalf of the State.

On the theory presented alone by this evidence, the jury was correctly instructed in instructions numbered 2 and 3, given at the request of the State. These instructions were in irreconcilable conflict with instruction number three given at the request of appellant, since that allowed the jury to consider only as to whether the pistol was not such pistol as is used in the army or navy of the United States. But, if the jury had found that the pistol was not such as is used in the army or navy of the United States according to instruction number three given at the request of appellant, they could only have returned a verdict of not guilty. The fact therefore that they returned a verdict of guilty shows that their finding was based on the charge of his carrying a pistol as a weapon such as is used in the army or navy, in a manner except uncovered and in his hand.

The conflict in the instructions could not have confused the jury. The propositions covered by them were entirely distinct, and the verdict shows which view of the evidence the jury must have adopted, and that such view was necessarily based upon the correct instructions in the cause. The erroneous instruction was in appellant's favor and invited by him, and therefore he can not complain because such instruction is in conflict with other instructions that are correct.

Second. The second instruction given at appellant's request is not the law. The statute inhibits "wearing" or "carrying" "in any manner whatever as a weapon any pistols except such as are used in the army or navy of the United States" (Kirby's Dig., § 1609), and makes it unlawful to "wear" or "carry" any such pistol as is used in the army or navy in any manner except uncovered and in his hand. Kirby's Dig., § 1610.

To "wear" or "carry" "in any manner as a weapon" is broad language. The statute "takes no note of the time" the pistol shall be carried. The purpose is to prevent the "wearing" or "carrying" about the person any of the pistols mentioned under the circumstances detailed in the statute as weapons, *i. e.*, to be used aggressively or defensively. The length of time it may be carried for such purpose is wholly immaterial.

Other inhibited conditions existing, the use of a pistol in fight, though but for a moment or second, is evidence that it was carried as a weapon in the sense of the statute. See *Lemmons* v. *State,* 56 Ark. 559; *Carr* v. *State,* 34 Ark. 448.

The court has correctly declared the law applicable to the charge of carrying a pistol such as is used in the army or navy of the United States. Therefore it was not error to refuse this as applied to that kind of pistol.

Finding no prejudicial error, the judgment is affirmed.

GILBERT *v.* SHAVER.

Opinion delivered June 21, 1909.

1. INJUNCTION—UNLAWFUL USE OF ANOTHER'S PROPERTY.—A taking of private property for private use, as where a sawmill company undertakes to build a tram or log road across another's property without his consent, may be restrained at the suit of the injured party. (Page 237.)
2. APPEAL AND ERROR—ORDER TRANSFERRING CAUSE.—An appeal will not lie from an order of the chancery court transferring a cause to the circuit court. (Page 238.)
3. SUPREME COURT—JURISDICTION TO AWARD MANDAMUS.—Where a chancery court erroneously decides, under a mistake of law, and not as a decision of fact, that it has no jurisdiction in a case, and declines to proceed in the exercise of its jurisdiction, a mandamus to proceed will lie from the Supreme Court, unless there is a specific and adequate remedy by appeal or writ of error. (Page 238.)
4. EMINENT DOMAIN—TAKING PROPERTY FOR PRIVATE USE.—Where a railroad company institutes an action at law to condemn land for its right of way, an answer and cross-complaint which denies that plaintiff is seeking to condemn the land for public purposes, and alleges that the appropriation of defendant's land is for the purpose merely of hauling logs across defendant's land, and asks that plaintiff be restrained from interfering with defendant's ownership, states a good defense in equity, and the cause should, on motion, be transferred to that court. (Page 239.)

Mandamus to Howard Chancery Court; *James D. Shaver,* Chancellor; writ granted.

W. C. Rodgers, for petitioner.

1. The answer and cross-complaint state facts entitling defendant to relief in equity. (1) Fraud. 29 Ark. 612, 617. Relief by injunction. 29 Ark. 139, 141; 74 Ark. 421, 425; 77 Ark. 221. All the necessary allegations are made. 46 Ark. 96, 102; 48 Ark. 312, 316; 56 Ark. 93-95.

2. A railroad cannot exercise the right of eminent domain for private use. 57 Ark. 359; 74 Ark. 425. If it attempts it, it may be enjoined. 76 Ark. 239; 43 Ark. 11.

3. As the chancery court had jurisdiction, it should administer complete and adequate relief, legal and equitable. 77 Ark. 570-6; 83 Ark. 554-61; 84 Ark. 140-5; 46 Ark. 34; 52 Ark. 414; 37 Ark. 292; 75 Ark. 55, etc.

4. Petitioner is without remedy unless the court grants relief upon the allegations in the answer and cross-complaint, not by what may be shown in evidence at the trial. The writ should be granted, as it does not control the judicial discretion of the court. Const. 1874, art. 2, § 13, art. 7, § 4; 74 Ark. 352; 7 Ark. 262; 13 Ark. 41; 44 Ark. 100; 45 Ark. 346; 66 Ark. 347; 77 Ark. 585.

Sain & Sain and *John S. Kirkpatrick,* for respondent.

1. The DeQueen & Eastern Railroad Company is a railroad corporation, seeking a right of way on making compensation to the owner. The only question is one of damages, and it is entitled to a jury trial. No issue can be raised as to its right to condemn. Its motives cannot be inquired into. Const. art. 12, § 9; 20 L. R. A. 434; 76 Ark. 243-4.

2. A *procedendo* may be awarded when lower courts delay the parties, or where a cause is removed on insufficient grounds. 19 Am. & Eng. Enc. Law (1 Ed.) 218. No such case is presented here.

BATTLE, J. This is an original action in this court for a writ or order commanding the Hon. James D. Shaver, chancellor of the chancery court of Howard County, in the Sixth Chancery District of Arkansas, for a writ of *procedendo* or order from this court directing and requiring the said chancellor to take cognizance of and try the cause of DeQueen & Eastern Railroad Company *v.* P. S. Gilbert, brought to the February, 1909, term of

the Howard Circuit Court, and by that court transferred to the chancery court of Howard County upon the filing of an answer and cross-complaint by the defendant setting up facts calling for the powers and jurisdiction of a court of equity. The petition, omitting the caption, is as follows:

"Comes P. S. Gilbert, petitioner, and for his cause of action herein states:

"1. That on the 28th day of September, 1908, the DeQueen & Eastern Railroad Company, an Arkansas corporation, filed its complaint in the Howard Circuit Court, alleging that it was a duly incorporated railroad company, organized and existing under the laws of Arkansas.

"2. That the defendant, P. S. Gilbert, is the owner of the S. W. ¼ of S. W. ¼ of Sec. 32, Tp. 8 S., R. 28 West, in Howard County, and that, in order to successfully prosecute its business and fulfill the obligations of its charter, and in order that it may properly enjoy the benefits of its charter, it is obliged to construct its line of railroad over and across the above described land, and is obliged to secure the right of way across the same. That defendant refuses to sell to plaintiff the right of way across said tract, or to permit the railroad to be constructed over his said land.

"3. That said land is only partially improved, and that a very small part thereof is in cultivation.

"Prayer that a jury may be impaneled to determine the question of the amount of damages the defendant is entitled to receive for the right of way across said land, and that costs be adjudged against defendant.

"As supplemental to the complaint, the said DeQueen & Eastern Railroad Company presented to the Hon. James S. Steel, judge of the Ninth Judicial Circuit of Arkansas, in vacation, its petition setting up the fact that the complaint had been filed and summons issued, and asking that he make an order in vacation designating an amount to be deposited by said railroad company, for the purpose of making compensation when the amount thereof has been ascertained by the proceedings instituted.

"Upon hearing said petition in vacation the said circuit judge directed the said railroad company to deposit in the Bank of Dierks $55 for the purpose of making compensation to the de-

fendant for damages for right of way across the land mentioned when the same shall have been ascertained according to law.

"In due time the defendant in that cause, and petitioner in this, filed in the Howard Circuit Court his answer and cross-complaint, in which he admitted that he was the owner of said tract, and alleged that the plaintiff had taken possession of part thereof and constructed across same a tram railroad. In addition to the land mentioned in said complaint as belonging to petitioner herein, he alleged that he owned the following tract in section 31, immediately adjoining said section 32, to-wit: Beginning at the southwest corner of said section 31 and running thence west to Sand Creek; thence in a northeast direction up and along the channel of said creek to the line of said section 31; thence south to point of beginning. He denied that, in order to successfully prosecute its business and fulfill the obligations of its charter, and in order that it may properly enjoy the benefits of its charter, the said DeQueen & Eastern Railroad was obliged to construct its lines of railroad over and across the above described land or any part thereof. He denied that plaintiff was obliged to secure the right of way across the same or any part thereof. He admitted that plaintiff had offered to buy the right of way across his said land mentioned in plaintiff's complaint, and that he had refused to sell same. Further, that he still refuses to permit plaintiff to enter any part of his land for the purpose of building said tram or spur track or any other track. He alleged, moreover, that plaintiff is not a common carrier over his said land or any part thereof, and never was, nor does it ever intend to be. The plaintiff has tortiously and in disregard and defiance of the rights of plaintiff, *vi et armis,* entered upon the said land and built a tram over same. That in constructing the said tram the plaintiff, acting without the law and beyond any right of eminent domain, entered upon said land of defendant, made excavations and embankments through and upon which the said tramroad was to run. That they cut up the said land and diverted the natural courses of the water so as to greatly damage his said land. That the direction of the tramroad is angling across the said land, thereby greatly damaging it for agricultural purposes and making the use of same inconvenient and of greatly less value than before the construction of said tramway.

That, by reason of said construction of said tramroad, the defendants have been damaged in the use, value and enjoyment of said land in the sum of two hundred dollars.

"The defendant further alleged that the purpose and object in building the said tramroad or spur over and across his land is to reach certain logs of the Dierks Coal & Lumber Company. That this spur or tram has been laid and constructed over and upon said land of defendant for no other purpose. That the DeQueen & Eastern Railroad Company has a number of spurs or trams in Howard County, used only for the purpose of hauling logs for said Coal & Lumber Company. That the said tramway has been constructed since about October 1, 1908. That it has, since that time, been continuously used by the said plaintiff as a log road and for no other purpose. That the plaintiff does not carry any passengers or freight for the public, or otherwise carry out the duty imposed by law on common carriers on or over the said tramroad or any part thereof. That it has never done so and does not intend to do so. That the appropriation of said land for use of said tram is not in good faith as a railroad company and common carrier of freight and passengers over the same or any part thereof. That plaintiff is attempting to misuse the power of eminent domain, and has not even attempted, in building and maintaining the said tram or spur, to comply in good faith or otherwise with the duty imposed by law on railroad corporations vested with the right of eminent domain. That plaintiff is seeking the aid of the courts in evading the laws of this State, and is tortiously taking and appropriating, over the continual objection and protest of defendant and in defiance of his rights in the quiet and peaceable enjoyment of the property, the land in controversy.

"Making his answer and all the statements and allegations thereof his cross-complaint, defendant prayed that the cause be transferred to equity; that he recover of plaintiff $250 damages to his land; that the plaintiff, its agents, servants, representatives and assigns and all and every one of them be perpetually enjoined and restrained from passing over, going upon or in any way interfering with the said land and every part thereof; that the title and claim of the defendants be forever quieted and assured; that the defendant have judgment against plaintiff for all costs, and have all other equitable and general relief.

"At the February, 1909, term of the Howard Circuit Court, the cause was transferred to equity. At the May, 1909, term of the chancery court of Howard County, the court, upon motion of the plaintiff, remanded the cause to the Howard Circuit Court.

"The chancery court was of the opinion that the facts set up in the answer and cross-complaint were not sufficient to justify a chancery court in taking jurisdiction, held that defendant had an adequate remedy at law, and refused to take jurisdiction and remanded the cause to the lower court.

"The foregoing are all the pleadings in the case and all the orders of the Howard Circuit Court and the chancery court of Howard County therein.

"The petitioner further states that the Hon. James D. Shaver refuses to try the said cause; that he contends that the defendant has an adequate remedy at law, and that he is not entitled to come into equity for relief under the foregoing pleadings. Further, that the said chancellor will not now nor at any future time take cognizance or jurisdiction of said cause and try the same on the merits unless directed and required so to do by this court.

"Premises considered, petitioner prays this court that, by virtue of its general superintending control over all inferior courts of law and equity, and by virtue of the appellate and supervisory jurisdiction vested in it by the constitution and the power given it to issue all remedial writs and to hear and determine the same, as well as by virtue of its inherent and common law powers as an appellate court, this court issue its writ of *procedendo,* or such other writ or process to which petitioner is entitled under the facts, commanding, requiring and directing the said James D. Shaver, chancellor of the Sixth Chancery District of Arkansas, to take and assume jurisdiction of said cause and try and determine the same, to the end that petitioner may have full and adequate relief and a complete remedy for all the wrongs he has suffered in the premises at the hands of the said DeQueen & Eastern Railroad Company, and that he have all other relief to which he may be entitled.

"*W. C. Rodgers,* for petitioner."

The respondent filed his answer to the petition, and denied that petitioner was entitled to the relief which he asks.

The effect of the answer and cross-complaint, filed by petitioner in the proceeding instituted by the DeQueen & Eastern Railroad Company in the Howard Circuit Court, was to show that the railroad company was seeking to condemn a right of way over petitioner's lands solely and exclusively for a private use, and to ask for an order to prevent it so doing.

In *Mountain Park Terminal Railway Co.* v. *Field,* 76 Ark. 239, the railway company sought to have lands of defendant condemned for right of way. The defendant answered and alleged facts which showed that the railway company was seeking to have his lands condemned exclusively for private use. Plaintiff filed a motion to strike the answer from the files of the court, which the court overruled. After hearing all the evidence, the court found the allegations of the defendant's answer to be true, and dismissed the petition of the plaintiff for right of way. In that case this court said:

"But are the defendants without a remedy? Property cannot be taken from its owner without his consent, even under an act of the Legislature, and appropriated solely and exclusively to the private use of another person or corporation. Courts have the power to determine whether a particular use for which private property is authorized by the Legislature to be taken is in fact a public use. As an incident to this power, in the absence of a statutory remedy, a court of equity has the power to restrain a railroad corporation from taking property for a private use.

* * * * * * * * * *

"So, individuals cannot combine as a railroad corporation, and convert property of individuals solely and exclusively to their private use. That would be an abuse of the power to form such corporations under the statutes, and contrary to their spirit and intent, and 'may be restrained by private suit by those injured or about to be.'"

In that case this court reversed the judgment of the circuit court, and remanded the cause with leave to appellee, the defendant, to amend his answer so as to invoke equitable relief; and with directions to the court, when so amended, to transfer the cause to the proper chancery court.

In DeQueen & Eastern Railroad Company *v.* P. S. Gilbert, the petitioner in the case before us filed an answer and cross-

complaint, as before stated, and asked that the cause be transferred to the Howard Chancery Court, and the circuit court granted the motion, and made the transfer, and the chancery court refused to exercise jurisdiction, and ordered that the cause be remanded to the circuit court.

No appeal can be taken from the order to transfer to the circuit court. *Womack* v. *Connor,* 74 Ark. 352. What is petitioner's remedy? It has often been held that "where a court declines jurisdiction by mistake of law, erroneously deciding as a matter of law," and not as a decision of fact, that it has no jurisdiction, and declines to proceed in the exercise of its jurisdiction, the general rule is that a mandamus to proceed will lie from any higher court having supervisory jurisdiction, unless there is a specific and adequate remedy by appeal or writ of error. In re *Grossmayer,* 177 U. S. 48; In re *Connaway,* 178 U. S. 421; *Cahill* v. *Superior Court,* 145 Cal. 42; *De la Beckwith* v. *Superior Court,* 146 Cal. 496; 26 Cyclopedia of Law and Procedure, 190, and a long list of cases cited.

In re *Grossmayer,* 177 U. S. 48, the court said: "The objection to the form of remedy cannot be sustained. A writ of mandamus, indeed, cannot be used to perform the office of an appeal or writ of error, to review the judicial action of an inferior court. A final judgment of the circuit court of the United States for the defendant upon a plea to the jurisdiction cannot therefore be reviewed by writ of mandamus. But if the court, after sufficient service on the defendant, erroneously declines to take jurisdiction of the case or to enter judgment therein, a writ of mandamus lies to compel it to proceed to a determination of the case, except where the authority to issue a writ of mandamus has been taken away by statute."

In *Cahill* v. *Superior Court,* 145 Cal. 44, the court said: "This court has held that where the jurisdiction of the superior court to try a cause or hear an appeal depends on the evidence of certain facts, and that court has, upon evidence consisting either of affidavits or of the record, made its determination as to the facts, although erroneously, this court cannot in mandamus proceedings go behind this determination, and itself consider from the evidence whether or not the jurisdiction existed." The court, after giving cases as illustrations of the rule, said:

"The distinction between this class of cases and the case at bar is this: In all these cases the superior court was called upon to consider either the sufficiency of certain facts established by the record, or certain facts determined by that court upon evidence properly addressed to it, to give it jurisdiction to proceed with the particular case then before the court, and with its decision, after such consideration, this court cannot interfere by mandamus. In the case at bar there was no question of fact involved, and the superior court decided that, as a matter of law purely, it could not in any case vacate an order made under the provisions of section 1465 of the Code of Civil Proceedure setting apart a homestead. This was a proposition not dependent on any facts whatever, but wholly upon a consideration of the powers of the court as defined by the Constitution and by statute. * * * The law specially enjoins upon the superior court, and upon the judge thereof, the duty of hearing and determining all matters which are within its jurisdiction and which come properly before it. The motion under consideration did come properly before that court, but the judge decided as a matter of law, and upon the statute and Constitution only, that the court had no power in any case to make orders of the kind there applied for, and upon that ground only refused to proceed to the merits of the application. If the person holding the office could thus decide what were the duties pertaining thereto which the law specifically enjoins him to perform, the writ of mandamus would be practically useless. The decision refusing to act which gives occasion for the writ would also furnish sufficient cause for denying it. As was well said in *Temple* v. *Superior Court,* 70 Cal. 211, 'the court cannot, by holding without reason that it has no jurisdiction of the proceedings, divest itself of jurisdiction and evade the duty of hearing and determining it.' "

In the case before us the determination of the jurisdiction of the court did not depend upon the finding of facts. They were stated in the pleading, in the answer and cross-complaint of the defendant. The jurisdiction of the court was purely a question of law. The court, having erroneously decided that in the negative, may be compelled by mandamus to proceed to exercise it.

It is therefore ordered that the clerk of this court issue a writ of mandamus in accordance with prayer of petition.

GUION MERCANTILE COMPANY v. CAMPBELL.

Opinion delivered June 28, 1909.

1. SALES OF CHATTELS—WHEN TITLE PASSES.—The title to personal property will pass and the sale be complete if it is the intention of the parties to transfer the title on the one part and to accept same on the other, even though something remains to be done; as, for example, the fixing of the quantity or value of the property or the payment of the purchase money. (Page 242.)
2. INSTRUCTION—REPETITION.—It was not error to refuse to give instructions fully covered by other instructions given. (Page 242.)
3. SAME—APPLICABILITY.—It was not error to refuse to give instructions which were inapplicable to the evidence adduced in the case. (Page 242.)
4. EVIDENCE—DECLARATIONS OF VENDOR AND VENDEE.—Upon the issue whether a certain sale of chattels was ever completed, it was not error to admit proof of statements of the vendor and vendee with reference to the sale if they were made at or about the time the sale was made and prior to the delivery of the chattels to the vendee, even though they were made in the absence of defendant, who subsequently purchased the chattels from the vendor. (Page 242.)

Appeal from Izard Circuit Court; *John W. Meeks*, Judge; affirmed.

J. B. Baker, for appellant.

1. The burden was on plaintiff to prove title. The sale was imperfect and incomplete, as something remained to be done between buyer and seller. 19 Ark. 573. There was no delivery. Replevin does not lie for part of a lot of ties in which only an individual interest is claimed. 44 Ark. 447. Where chattels are sold to two different purchasers by sales equally valid, he who first take possession will hold as against the other. Benjamin on Sales, § 675 n. d; 97 Mass. 46-48. The conditions precedent to vest title in Campbell had not been performed when appellant purchased from Sonchersee. The title was never to vest in Campbell until the ties were hauled, counted and paid for. 21 Am. & Eng. Enc. Law (1 Ed.), 633, (4), 634 (b); 5 *Id.* 433; 22 Ark. 64; 60 *Id.* 489. Where there is any evidence to support the contention of a party, he has the right to have the question submitted to the jury. 70 Ark. 231; 52 *Id.* 47; 22 *Id.* 477; 31 *Id.* 699; 14 *Id.* 530.

2. The court erred in allowing witness P. B. Campbell, his daughter and Marchant to testify relative to statements made by Sonchersee, a person not a party to the suit, in the absence of any member of defendant firm. It was simply hearsay.

3. Replevin will not lie for an individual share of one partner unless first separated from the mass and identified. 44 Ark. 447; 40 Ark. 75; *Ib.* 551.

P. B. Campbell, pro se.

1. The evidence shows a *sale* of the ties, and that they were paid for by Campbell.

2. They were delivered in the woods. Nothing was left undone. The sale was complete. 21 Am. & Eng. Enc. L (1 Ed.), 484.

3. Appellant acquired nothing by his second purchase, whether he had notice or not. 62 Ark. 84.

4. The second instruction is the law. 62 Ark. 84.

FRAUENTHAL, J. This is a replevin suit brought by the plaintiff, P. B. Campbell, against the defendant, the Guion Mercantile Company, for the recovery of one hundred cross ties. It was instituted in a justice of the peace court, and an appeal was taken from the judgment of that court to the circuit court; and in that court a jury returned a verdict in favor of the plaintiff for the cross ties.

The evidence tended to prove that about December 10, 1907, the plaintiff entered into a contract with one Sonchersee by which the latter, in consideration of certain supplies furnished him by the plaintiff, agreed that he would sell to plaintiff all the cross ties which he cut and made on his land and would deliver them to plaintiff at that place in the woods; and they agreed that plaintiff should pay twenty-four cents for each cross tie. The plaintiff furnished to him supplies amounting to $17.80, and thereafter in the same month Sonchersee, under the above agreement, delivered to plaintiff in the woods on the land the 100 cross ties in controversy; and the plaintiff then hauled and placed them on the railroad right of way. The plaintiff did not sell the cross ties, on account, as he claimed, of no immediate demand for same, and he did not pay the balance of the purchase money to Sonchersee, and still owes said balance. Thereafter, on January 1,

1908, Sonchersee sold the ties to defendant, who paid him therefor.

It is urged by the defendant that a sale is not complete as long as anything remains to be done between the buyer and seller in relation to the goods, and on this principle the sale to plaintiff under the evidence was not complete. Under the evidence on the part of the plaintiff, the only thing that remained to be done between him and Sonchersee was for plaintiff to pay him the remainder of the purchase money; the ties were sold and delivered to plaintiff. As is said in *Beller* v. *Black,* 19 Ark. 573: "The purchase money may remain to be paid, and yet the sale may be complete, if the goods be delivered." The title to personal property will pass and the sale be complete if it is the intention of the parties to transfer the title on the one part and to accept same on the other, and in pursuance thereof a delivery is made, even though something remains to be done; as, for example, the fixing of the quantity or exact value of the property or the payment of the purchase money. *Chamblee* v. *McKenzie,* 31 Ark. 155; *Gans* v. *Holland,* 37 Ark. 483; *Shaul* v. *Harrington,* 54 Ark. 305; *Lynch* v. *Daggett,* 62 Ark. 592; *Priest* v. *Hodges,* 90 Ark. 131.

However, in this case, under the evidence on the part of the plaintiff, the price was agreed upon, and the plaintiff simply owed to Sonchersee a balance of the purchase money. Under that evidence the sale was complete, and the title to the ties was in plaintiff. After that Sonchersee could not transfer a good title to the ties to defendant. *Jetton* v. *Tobey,* 62 Ark. 84.

The issue in the case, therefore, was whether Sonchersee had sold and delivered the ties to plaintiff. The court presented that issue to the jury by instructing them, in substance, that before the plaintiff could recover it devolved on him to prove by a "preponderance of the evidence that Sonchersee sold and delivered the ties in controversy to the plaintiff."

The defendant requested the giving of certain instructions which were refused. But those instructions were fully covered by the ones given on the part of the plaintiff, or were inapplicable to the evidence adduced in the case.

The court permitted certain witnesses to testify to the statements made by Sonchersee and plaintiff in making their alleged contract of sale in December; and defendant urges that this tes-

timony was incompetent because the statements were made in the absence of defendant. But these conversations related to the sale at or about the time it was made and prior to the delivery of the ties by Sonchersee to the plaintiff. Such testimony was competent. *Phipps* v. *Martin,* 33 Ark. 207; *Seawell* v. *Young,* 77 Ark. 309.

The statements or declarations of a vendor are only inadmissible in evidence if made subsequent to the sale and delivery of the property, to such vendee, and in the absence of the other claimant. *Humphries* v. *McCraw,* 9 Ark. 91; *Finn* v. *Hempstead,* 24 Ark. 111; *Smith* v. *Hamlet,* 43 Ark. 320; *Crow* v. *Watkins,* 48 Ark. 169; *Hughes Bros.* v. *Redus,* 90 Ark. 149.

We find no prejudicial error in the trial of this case. The verdict of the jury being sustained by the evidence, the judgment is affirmed.

EDLAND v. STATE.

Opinion delivered June 28, 1909.

1. STATUTES—EFFECT OF AMENDMENT.—The effect of an amendment to an act is to so change the former act as to make it read in the same manner it would have read and to give it the same effect it would have had if it had been originally enacted as amended. (Page 245.)
2. FISH AND GAME—EFFECT OF AMENDING STATUTE.—Under Acts 1903, c. 162, § 11, the county of Mississippi was exempted from the operation of the act prohibiting nonresidents from hunting and fishing in this State. By Acts 1905, c. 185, this exemption was repealed. *Held,* that the effect of the amendment was to put Acts 1903, c. 162, in operation in Mississippi County. (Page 245.)

Appeal from Mississippi Circuit Court, Chickasawba District; *Frank Smith,* Judge; affirmed.

R. P. Taylor, for appellants.

Act No. 185 of the Acts 1905 is invalid because it is ambiguous, and its construction is meaningless. 36 Ark. 331; 47 Ark. 404; 59 Ark. 237. Invalid also because it is violative of art. 5, § 22, Const. Under this constitutional provision the act of

1905 neither amends the section nor repeals the proviso. Section 1 of the act is to be looked to to see if it does either. What follows it is entirely disconnected from it, separately paragraphed and numbered as a separate section. It cannot, therefore, be viewed as a re-enactment of sec. 11, act No. 162, Acts 1903, 122 Pa. 627, 1 L. R. A. 361; 126 Cal. 291; 87 Ala. 240, 4 L. R. A. 742; 82 Ala. 209.

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellee.

Where a provision which excepts a class or specific locality from the operation of an act is repealed, the law operates generally over the excepted class or locality. 14 Col. 228; 68 Vt. 338; 12 Wheaton 419, 147 U. S. 494; 1 Lewis' Sutherland Stat. Int. 573; 2 *Id.* 672.

The intention of the Legislature will control the construction of the act, and a mere typographical error in numbering the sections will not defeat the operation of the act. Endlich, Int. Stat. § § 295, 35, 8, 16, 40, 319, 329; 3 Ark. 285; 11 Ark. 44; 22 Ark. 369; 24 Ark. 165; 25 Ark. 101; 29 Ark. 354; 37 Ark. 495; 48 Ark. 307; 75 Ark. 126; 63 Ark. 576; 67 Ark. 566; 69 Ark. 376.

BATTLE, J. On the 6th day of November, 1908, appellants, J. E. Edland and J. B. Ullathorne, were arrested and tried before a justice of the peace of Big Lake Township, in Mississippi County, Arkansas, for having hunted within the Chickasawba District of that county, in violation of section 3599 of Kirby's Digest, they being non-residents. They appealed to the circuit court of Chickasawba District, and were again convicted; and they then appealed to this court.

They concede that, if section 3599 of Kirby's Digest is in force in Mississippi County, they were properly convicted.

Section 3599 of Kirby's Digest is as follows: "It shall be unlawful for any person who is a non-resident of the State of Arkansas to shoot, hunt, fish or trap at any season of the year."

The question is, is this statute in force in Mississippi County?

Section 3599 of Kirby's Digest is section four of an act entitled "An act to protect the game and fish of the State and provide for the appointment of game wardens," approved April 24, 1903. Section eleven of that act was as follows: "That all

laws or parts of laws in conflict herewith are hereby repealed, and this act shall take effect and be in force from and after its passage; provided, that the provisions of this act shall not apply to the county of Mississippi."

Appellants contend that this provision is still in force in Mississippi County. But it was repealed by an act entitled "An act to amend section 11 of Act No. 162, approved April 24, 1903, entitled 'An act to protect the game and fish of the State, and to provide for the appointment of game wardens;'" approved April 19, 1905, which is as follows:

"Be it enacted by the General Assembly of the State of Arkansas: Section 1. That Section eleven of Act No. 162, approved April 24, 1903, entitled 'An act to protect the game and fish of the State, and to provide for the appointment of game wardens,' be amended so that the provisions in said section exempting Mississippi County be, and the same is hereby repealed, and that section be amended so as to read as follows:

"Section 2. That all laws and parts of laws in conflict herewith are hereby repealed, and this act shall take effect and be in force from and after its passage.

"Section 3. That all laws and parts of laws in conflict with this act be, and the same are hereby repealed, and this act shall take effect and be in force from and after its passage."

The figure 2 in the last clause of section one is evidently a mistake. It should be 11. It (last clause) was not an independent section, but a part of section 1.

The effect of the amendment of section 11 of the act of April 24, 1903, by the act of April 19, 1905, was to so change the former act as to make it read in the same manner it would have read and to give it the same effect it would have had if it had been originally enacted as amended, that is, as it would have read with the proviso to section eleven stricken out. *Henderson* v. *Dearing,* 89 Ark. 598; *Mondschein* v. *State,* 55 Ark. 389; *Hempstead County* v. *Harkness,* 73 Ark. 600.

Section 3599 of Kirby's Digest is in force in Mississippi County.

Judgment affirmed.

HOOVER v. GRAY.

Opinion delivered June 28, 1909.

1. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDINGS.—A chancellor's findings of fact are conclusive on appeal unless they are clearly against the preponderance of the evidence. (Page 251.)
2. REFORMATION OF INSTRUMENTS—MISTAKE—SUFFICIENCY OF EVIDENCE.—A deed will not be set aside for mistake unless the evidence of mistake is clear, unequivocal and convincing. (Page 251.)

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

STATEMENT BY THE COURT.

Mrs. James B. Gray, appellee, on January 21, 1908, instituted this suit in the Lonoke Circuit Court against appellant to recover a strip of land off the south half of the northwest quarter, 11, T. 2 S., R. 9 west, four rods in width and one-half mile in length consisting of 4.17 acres. Appellee alleges that she is the owner of the northwest quarter of the northwest quarter and the south half of the northwest quarter of section 11, T. 2 S., R. 9 west; that the land of appellant (the N. ½ S. W. ¼ Sec. 11, T. 2 S., R. 9 W.) adjoins her land; that appellee and appellant deraign title by mesne conveyances from R. C. Walker; that her deed is from J. F. Walker, and calls for the number of acres set forth in the survey of the United States government, whether it be more or less than 120 acres, and the United States government survey calls for 128½ acres. She alleges that appellant is in the unlawful possession of the four acres for which she sues; that same is in a high state of cultivation, and she asks for damages in the sum of $150.

The appellant answered, admitting that he was in possession of the land in controversy, and that it was in a state of cultivation, but denied that his possession was unlawful. He sets up the following: That R. C. Walker purchased the West ½ of 11, 2 S., 9 W., partly with money belonging to J. F. and R. O. Walker, his sons, taking the deed to himself. That the lands were laid off into lots No. 1, 2, 3 and 4, R. O. Walker taking lot No. 1 and J. F. Walker taking lot No. 2; R. C. Walker retaining lots No. 3 and 4. Deeds were made to R. O. and J. F. Walker to their re-

spective tracts, and they were placed in possession of same, but in preparing the deeds ordinary blanks were used, and the lands were described according to the survey calls, and the formal words "more or less" used in connection with the number of acres; but that it was not the intention of R. C. Walker to convey any land other than those embraced in the lots herein above referred to. That subsequently Hoover became the grantee of R. C. Walker to lot No. 3, and a similar mistake was made in the deed to him; that he actually purchased and was placed in possession of the tract lot No. 3, although the deed purported to convey N. ½ S. W., section 11, 2 S., 9 W., containing 80 acres, "more or less." That appellee knew at the time she purchased the tract that she was actually getting the tract of land that had been purchased by J. F. Walker; that he was not in possession of the strip of land in controversy, did not claim the same, and that she was not buying that. That at the time she purchased from J. F. Walker she knew that appellant was in the actual possession of said land claiming title adverse to J. F. Walker. Seven years adverse possession is pleaded.

Appellant prayed that the complaint be dismissed, that the deeds made by R. C. Walker to J. F. Walker and from J. F. Walker to appellee be reformed so as to correctly describe the land sold by R. C. to J. F. Walker, and from J. F. Walker to appellee, that his title be quieted, and for general relief, etc.

The cause, on motion of appellant, was transferred to the chancery court. The testimony showed that R. C. Walker on October 19, 1900, purchased for himself and his sons J. F. and R. O. Walker the west half of section 11, township two south, range 9 west, in Lonoke County, Arkansas. R. C. Walker took the deed in his own name. The proof on behalf of appellant tended to show that soon after the purchase of the land R. C. Walker had a surveyor to lay it off into four lots numbered respectively 1, 2, 3 and 4, that the corners to these lots were designated by iron stakes driven down at the corners of each of the lots, that the Walkers agreed to partition the land among themselves, that according to the agreement J. F. Walker was to have lot 2 as above designated, R. O. Walker was to have lot 1, and R. C. Walker was to have lots 3 and 4. R. C. Walker executed his deeds to his sons to carry out the partition as agreed upon, that

the deed to lot two described the land intended to be conveyed as the S. ½ of N. W. ¼ section 11, township 2 south, range 9 west, containing 80 acres "more or less," but that the parties to this deed only intended by it to convey the lands contained in lot number 2 as it had been designated by the metes and bounds agreed upon; that the deed from R. C. Walker to R. O. Walker conveyed lot number 1, describing it as N. W. ¼ N. W. ¼ and N. E. ¼ N. W. ¼, sec. 11, T. 2 south, range 9 west, containing 80 acres more or less; that the parties to the deed intended that the land contained in lot 1, as designated by them in their partition agreement, should be conveyed by the deed; that R. C. Walker retained, under the agreement, the lands contained in lots 3 and 4, and that on the 3d day of January, 1903, he conveyed the lands contained in lot 3 to appellant, W. L. Hoover, describing it as the north half of the southwest quarter of section 11, township 2 south, range 9 west, containing eighty acres more or less; that appellant went into possession, under this deed, of the land contained in lot 3, as designated by the corners in the agreement of partition between the Walkers; that in 1904 he built a fence on the line between lots 2 and 3, marking the south boundary line of lot 2 and the north boundary line of lot 3, according to the agreement of partition, and that he had cultivated such land every year since. The testimony on behalf of appellant further tends to show that prior to the sale of the land from J. F. Walker to appellee, J. F. Walker and the husband of appellee, who had acted as her agent in the matter, went upon the land, and that J. F. Walker pointed out the division line between appellant and himself.

The testimony on behalf of appellant tends further to show that appellee's husband and agent, before the purchase of the land from Jas. F. Walker and R. O. Walker, offered sixty dollars an acre for the land, and told parties after the purchase that he had paid sixty an acre for it; that the purchase of the lands of Jas. F. Walker by appellee was made in 1905; that appellee's agent knew at that time that appellant was claiming to the fence between his tract and that of Jas. F. Walker from whom appellee purchased, but did not have a survey made to ascertain the exact boundary between the tracts until November 1907; that soon after the purchase appellee had the line run north and south between the

forty acres purchased from R. O. Walker and another forty acres owned by R. O. Walker, but did not take any steps to ascertain the boundary between appellee and appellant.

The testimony on behalf of appellee tended to prove that her husband and agent, Jas. B. Gray, purchased the land described in the deeds to her from Jas. F. and R. O. Walker and containing 120 acres "more or less," according to the United States survey; that she paid $7,200 for the land purchased; that he, Gray, told Jas. F. Walker at the time of the purchase that forty-eight hundred dollars was a high price to pay for farm land, being sixty dollars per acre for his tract of eighty acres, and that Jas. F. Walker remarked that it was true that it was a high price, but that it was good land, all in cultivation, except an acre or so, and that it was a large section, meaning that there was an overplus in the government call in the N. W. of section 11, and that if appellee purchased she would receive more than eighty acres. At the time the land was purchased from Jas. F. Walker he never in any manner intimated that there was any verbal agreement as to the lines. The purchase was made from him according to the government survey, and the deed was executed accordingly. Gray, the agent, went with Jas. F. Walker, to look at the land, saw that there was a fence on the south side running east and west, that had been recently built. Mr. Jas. F. Walker did not say whether it was on the line or not. That, after the purchase, appellee through her agent took possession of the part under fence, and later when the land was surveyed the agent demanded possession of the strip in controversy. Witness Gray explained that he had stated to parties that he had paid sixty dollars per acre for the land. He meant that he had bought one hundred and twenty acres according to the government call, for which he paid $7,200, which would be understood in the regular and ordinary calls of land as $60 per acre that he paid, but the witness explained that he knew and so did Walker that the calls were for more than 120 acres. Witness stated in regard to the survey that it was perhaps negligence for him to wait for the first two or three years while appellant was in possession cultivating the land to have the survey made in order to ascertain the exact lines, but stated further that he had been trying for something like a year to get the surveyor down prior to the time the land was sur-

veyed. The witness also stated that he had notified appellant about the survey, and that he had refused to assist in the survey. It was shown that R. C. Walker and his sons J. F. and R. O. held the lands as tenants in common until the deeds were made to partition the lands among them. It was shown that the draughtsman of these deeds drew them according to the description given by the parties themselves. Also that the deed of R. C. Walker to appellant was drawn according to the description given by the parties to it. It was shown that Jas. F. Walker at the time he executed the deed to Mrs. Gray knew that the deed from his father to him called for the south half of the northwest quarter, sec. 11, T. 2, range 9 west, containing 80 acres more or less; that he gave appellee's agent this deed and did not inform him that there was any mistake in the deed. It was shown that the deed from Jas. F. Walker to appellee described the land in the same way as the deed from his father to him. Appellant's deed from Jas. F. Walker conveyed to appellee lands which according to the calls included the 4.17 acres for which she sues appellant. This was shown to be the fact by a surveyor of the United States government, and a survey made by the county surveyor. The proof showed that appellant had been in possession of the land since January, 1903. The rental value was six or seven dollars per acre. The court found that appellant was in the unlawful possession of the land, and rendered a decree in favor of appellee for the land and $108.08 damages. To reverse the decree is the object of this appeal.

T. C. Trimble, Joe T. Robinson and *T. C. Trimble, Jr.,* for appellant.

The evidence and circumstances show that appellee intended to purchase the land within the fence pointed out to her agent as the boundary and accepted as such for three years; that within the fence are 81.75 acres which the parties intended should pass, and which satisfy the term "80 acres more or less" used in the deed, and do not include the 4.17 acres in controversy. The deeds should be reformed. 10 N. Y. 319; 60 N. Y. 298; 83 Ky. 623; 50 Ark. 179; 169 Ill. 73; 81 Me. 337; 80 Mich. 139; 86 Mich. 121; 46 N. H. 83; 102 Mass. 24; 3 Ch. Div. 779.

Jas. B. Gray, for appellee.

The evidence fully sustains the chancellor's finding. It is elementary that, before a deed will be reformed or revoked, the evidence on the part of the party seeking reformation must be clear, positive and convincing. Again, the findings of fact by a chancery court will not be disturbed unless clearly contrary to the preponderance of the testimony. 85 Ark. 83; 71 Ark. 605; 68 Ark. 314; 77 Ark. 216; 78 Ark. 420.

WOOD, J. (after stating the facts). The decree of the chancellor is certainly not clearly against the preponderance of the evidence. *Bank of Pine Bluff* v. *Levi,* 90 Ark. 166; *Cranford* v. *Cranford,* 85 Ark. 83, and cases cited. On the contrary, the preponderance is with the chancellor's finding. The law is well established that a deed will not be set aside unless the evidence of mistake is clear, unequivocal and convincing. *Marquette Timber Co.* v. *Chas. T. Abeles Co.,* 81 Ark. 420; *Davenport* v. *Hudspeth,* 81 Ark. 166. There is no such evidence in this record. It was purely a question of fact under the evidence as to whether there was any agreement between the Walkers in the first instance for a partition of the lands between them different from that indicated by the deeds. The deeds were intended, as the Walkers, R. C. and Jas. F. testify, to convey the lands according to a verbal understanding by which the lands had been laid off into lots, and these lots defined by metes and bounds. But there was no written agreement indicating that the lands were to be partitioned according to certain metes and bounds. The deeds themselves are very strong evidence, if not conclusive, that the lands were to be partitioned, not by metes and bounds, but by the legal subdivision shown by the government survey. When the draughtsman was asked to write the deeds, the parties to the deed did not furnish him with the description of the lands according to certain metes and bounds which they say had been designated. On the contrary, they furnished him with the description according to the legal subdivisions. He drew the deeds according to the legal subdivisions on government calls furnished by the parties. They gave him no other description. Since section 11 was a "full" or large section, it would be very unreasonable to hold that the parties did not know that a partition by metes and bounds without regard to the government calls would not cor-

respond with those calls, unless by the merest accident. The fact, therefore, that they conveyed by the legal subdivisions tends to show that there was no other partition contemplated or agreed upon. The chancellor was clearly warranted in finding that no other partition was made among the Walkers than that indicated by the deeds, and that therefore appellant by his deed from R. C. Walker acquired no title to the land in controversy, and that his possession thereof was unlawful.

No error being found, the decree is affirmed.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* VANDERBERG.

Opinion delivered June 28, 1909

1. DEFECT OF PARTIES—WAIVER.—Under Rev. Stat. of Missouri (1899), § § 598, 602, where the defendant fails to raise the objection of a defect of parties, either by demurrer if the objection appears upon the face of the complaint or by answer if it does not so appear, the objection is deemed to be waived. (Page 254.)
2. GARNISHMENT—SITUS OF DEBT.—The situs of a debt for the purposes of garnishment is wherever the debtor may be found. (Page 255.)
3. SAME—LIEN.—Service of process on a garnishee creates a lien in favor of the plaintiff on the money due from the garnishee to the defendant, and upon constructive service the court may ascertain the amount due from the garnishee to the defendant, and subject such money to the satisfaction of the plaintiff's claim. (Page 255.)
4. EXEMPTIONS—WHO MAY CLAIM.—A garnishee sued in Missouri could not claim exemptions in behalf of a debtor residing in this State, the privilege being personal and available only by following the statutory procedure. (Page 255.)
5. GARNISHMENT—WHEN DEFENSE TO SUIT ON DEBT.—A railroad company, when sued in this State upon a claim in favor of an employee residing here, may defend on the ground that judgment against it had been previously served in a garnishment proceeding instituted in another State in favor of a creditor of plaintiff. (Page 255.)

Appeal from Monroe Circuit Court; *Eugene Lankford,* Judge; reversed.

STATEMENT BY THE COURT.

The facts as shown by the pleadings and the agreed statement are substantially as follows:

The plaintiff, Vanderberg, and one J. R. Baker were citizens of Woodruff County, Arkansas. The plaintiff owed Baker a debt of $12.55. Baker assigned the debt to one H. J. Miller, a citizen of the State of Missouri.

The plaintiff at the time he contracted the debt was an employee of the defendant, which is a railway corporation, organized under the laws of the State of Missouri, and operated a line of road through the States of Missouri and Arkansas, and had an office and agent in the county of Jackson, State of Missouri, upon whom service in legal proceedings might be had.

The defendant on the 16th day of May, 1908, owed the plaintiff $17.46 for labor on its line of road in Arkansas, as a section hand, and it on that day discharged him. H. J. Miller, an assignee of J. R. Baker, had, however, on the 13th day of May, 1908, instituted an action against the plaintiff before J. R. White, a justice of the peace within and for the county of Jackson, and State of Missouri, and had seized and garnished the wages due the plaintiff by proper proceedings under the laws of that State, and on the 16th day of June, 1908, another summons and writ of garnishment were issued and duly served upon the defendant, and the debt which is owed the plaintiff was again seized and garnished as prescribed by the laws of the State of Missouri.

The plaintiff, Vanderberg, was advised of the institution of this suit. He made no effort to defeat it, or claim his exemptions, but on the 26th day of June, 1908, instituted this action. The justice of the peace court in Missouri at a later date rendered a valid judgment against this defendant for $12.55 and $5.21 costs, covering the entire amount due from the defendant to the plaintiff.

S. H. West and *J. C. Hawthorne,* for appellant.

For the purpose of garnishment the *situs* of a debt is at the domicil of the debtor. Refusal to permit a garnishment in another State to act as a bar to recovery against the debtor by the attachment defendant is a failure to give full faith and credit to the judgment of a sister State. 174 U. S. 710; 175 U. S. 396; 69

Ark. 401; 79 Ark. 384; 127 Mo. 242. Garnishment is in the nature of a proceeding *in rem,* creating a lien in favor of the plaintiff on money due from the garnishee to the defendant. Upon constructive service the court may ascertain the amount due from the garnishee and subject it to the satisfaction of plaintiff's claim. 3 Ark. 509; 69 Ark. 617. Exemption is a personal privilege, available only to the debtor, and cannot be set up by the garnishee. The procedure laid down by the statute, Kirby's Dig., § § 3904-05-06, is exclusive of all others. 25 O. St. 320; 67 Mo. 712; 125 Mo. 450; 79 Ark. 384; 82 Ark. 236; 174 U. S. 710. See also 99 Mo. App. 310; 43 Ia. 385; 25 O. St. 347; 198 U. S. 215.

C. F. Greenlee, for appellee.

1. Every action must be prosecuted in the name of the real party in interest. Kirby's Dig., § 5995. And upon assignment of a thing in action which is not authorized by statute the assignor must be made a party. *Id.* § 6000; 47 Ark. 548; 69 Ark. 66; 80 Ark. 168.

2. The creditor cannot assign his account against the debtor to a non-resident of the State, and thereby defeat the debtor's right and claim of exemptions under the laws of this State. When Vanderberg was discharged, he demanded of the foreman to send his pay to Hunter, Arkansas, and that became the *situs* of the debt. All the work was done in this State. Kirby's Dig., § 6649; 18 Cyc. 1377.

WOOD, J. (after stating the facts). The judgment against appellant under the above facts was erroneous.

First. It is contended by appellee that, inasmuch as Baker, the assignor, was not made a party to the suit by the assignee, Miller, against the appellee, Vanderberg, and the appellant as garnishee, the judgment rendered against appellant in that sum can not defeat appellee's recovery in this suit. Section 598 of the Revised Statutes of Missouri provides: "The defendant may demur to the petition when it shall appear upon the face thereof that there is a defect of parties plaintiff or defendant." Section 602 provides: "When any of the matters in section 598 do not appear upon the face of the petition, the objection may be taken by answer. If no such objection be taken either by demurrer or

answer, the defendant shall be deemed to have waived the same, etc. 1 vol. Revised Statutes of Missouri, 1899, pp. 252, 253.

Appellee failed to raise the objection of a defect of parties in the manner pointed out by these statutes, and has therefore waived same.

Second. The *situs* of the debt sued on for the purposes of garnishment was in Missouri as well as Arkansas, as had been held by the Supreme Court of the United States and by this court. *Kansas City, Pittsburg & Gulf Ry. Co.* v. *Parker,* 69 Ark. 401, and authorities cited; *Stone* v. *Drake,* 79 Ark. 384, and *Chicago, R. I. & P. Ry. Co.* v. *Sturm,* 174 U. S. 710, a parallel case where the principles controlling here are fully discussed. *Wyeth Hardware & Mfg. Co.* v. *Lang,* 127 Mo. 242.

Counsel for appellant correctly interprets our decisions when he says: "Garnishment is in the nature of a proceeding *in rem;* service of the process on the garnishee creates a lien in favor of the plaintiff on the money due from the garnishee to the defendant, and upon constructive service the court may ascertain the amount due from the garnishee to the defendant, and subject such money to the satisfaction of the plaintiff's claim." *Desha* v. *Baker* (1842), 3 Ark. 509; *Johnson* v. *Foster* (1901), 69 Ark. 617; *Stone* v. *Drake, supra,* and *Chicago R. I. & P. Ry. Co.* v. *Sturm, supra.*

Third. The exemption against the debt due Baker and assigned to Miller was a personal privilege which appellee alone could plead and prove. It could not have been set up by the appellant, as garnishee, for the appellee in the suit against appellee and appellant in Missouri.

Exemption can not be pleaded by a garnishee in behalf of a non-resident defendant, and the defendant can only avail himself of his privilege by following the procedure prescribed by the statute. Such is the law here and in Missouri. *Dinkins* v. *Crunden-Martin Woodenware Co.,* 99 Mo. App. 310; Kirby's Digest, § § 3904-6. See also secs. 3162-3, 3158, Rev. Statutes Mo. and in addition to authorities *supra, Baxley* v. *Laster,* 82 Ark. 236; *Conley* v. *Chilcote,* 25 Ohio St. 320; *Osborne* v. *Schutt,* 67 Mo. 712; *Garrett* v. *Wagner,* 125 Mo. 450.

While there is no showing that the judgment against appellant in Missouri had been paid at the time of the trial in this case

below, yet under the Revised Statutes of Missouri it was enforceable against appellant, and must be given the full faith and credit of a valid or enforceable judgment of a foreign State (Rev. Stat. U. S., § 905 (2 Ed.), and thus barring appellees of any right to recover here. Secs. 3443, 3452, 4032, 4039, Revised Statutes of Missouri.

Appellee's contention is that the judgment is invalid, not that it was unpaid or unenforceable. The judgment is therefore reversed, and the cause is dismissed.

ORENE PARKER COMPANY v. EMERSON.

Opinion delivered June 28, 1909.

ADMINISTRATION—AUTHENTICATION OF CLAIM IN FAVOR OF CORPORATION.—Under Kirby's Digest, § 114, providing that a claim against an estate may be verified by an affidavit made by the claimant, his agent, attorney or other person, a claim in favor of a corporation may be authenticated by the affidavit of its attorney or agent.

Appeal from Marion Circuit Court; *Brice B. Hudgins,* Judge; reversed.

S. W. Woods, for appellant.

Under the law of 1838, § § 87 and 88, Dig. 1838, none but the claimant could make the affidavit required to establish such claim. 14 Ark. 237; 24 Ark. 410; 21 Ark. 519. The act of March 5, 1867, sec. 2 acts 1867, p. 210, liberalized the law and facilitated the handling of such business, and applied to all claimants, *including corporations;* but the restriction requiring the affidavit to be made by the claimant or some one "acquainted with the facts sworn to" often made it inconvenient to present claims for allowance. Hence the further amendment by the same Legislature allowing an agent or attorney to authenticate claims of his principal against deceased person's estates by making affidavit that he has made diligent inquiry, etc. Acts 1867, p. 318; 26 Ark. 164. Kirby's Dig., § § 114, 116 and 117 must be construed together. Under section 114, all claims against estates of deceased persons

may be proved by an agent or attorney. If a corporation seeks to prove its own claim, section 116 designates the proper officer to make the affidavit, and section 117 prescribed the manner in which the affidavit is to be made. The affidavit here was in strict conformity to section 114, and the claim should be allowed.

W. S. Chastain, for appellee.

In case of a corporation the affidavit must be made by the cashier or treasurer of the corporation. Kirby's Dig., § 116. Had the act of 1867, Kirby's Dig., § 114, intended to include corporations in the class who could verify by agent or attorney, it would have said so. This court has held that none but the cashier or treasurer of a corporation can verify its claims against the estate of a deceased person. 69 Ark. 68.

BATTLE, J. This case originated in the probate court of Marion County. It is founded on the note and affidavit as follows, to-wit:

"$9.60. "January 5, 1905.

"Ninety (90) days after date I promise to pay to the order of the Orene Parker Company nine and 60/00 ($9.60) dollars. For value received, negotiable and payable without defalcation or discount and with interest from maturity at the rate of 10 per cent. per annum, and, if interest be not paid annually, to become as principal, and bear the same rate of interest.

"No..... Due..... K. J. Hudson.

"State of Arkansas, }
"County of Marion. } ss

"John H. Woods being sworn, states that he is one of the attorneys in this case, for the claimant, the Orene Parker Company, who are non-residents of this State, and are absent from the county; that he has made diligent inquiry, and is acquainted with the facts of this claim, and that he verily believes that nothing has been paid or delivered towards the satisfaction thereof, and that the sum claimed, $9.92, is justly due from the estate of K. J. Hudson, deceased, to said claimants.

"John H. Woods.

"Subscribed and sworn to before me this August 7, 1905.

"J .W. Smith, Clerk."

"The administrator declined to allow the claim, whereupon the administrator was duly served with notice that the demand

would be presented to the probate court for allowance. On presentation of the claim in the probate court for allowance the defendant filed an answer in substance as follows: (1) That neither the defendant nor the estate of Hudson is indebted to the Orene Parker Company, or liable for said demand. (2) That the claim is unjust in that it is founded upon an illegal consideration. (3) That said contract was procured in violation of section 5133 of Kirby's Digest, and is void. (4, 5 and 6) That said debt, being for liquors sold in prohibition territory, is void, etc.

"On the trial in the probate court the claim was allowed. The administrator appealed from the judgment of the circuit court. In the circuit court the administrator filed a motion to dismiss the action in substance as follows: That said demand is not properly verified, the plaintiff being a corporation, and the claim is not verified by the cashier or treasurer as the laws require, and should on that account be dismissed and not allowed. Prayer for dismissal, etc. The court sustained the motion and dismissed the action, to which ruling of the court the appellant at the time excepted and caused the same to be noted of record and prayed an appeal to the Supreme Court, which appeal was by the court granted."

The only question in this case is, is an attorney of a corporation authorized by the laws of this State to make the affidavit necessary to authenticate its claim against the estate of a deceased person?

Sections 87 and 88, c. 4, of the Digest of the Laws of Arkansas, of 1838, are as follows:

Sec. 87. "Before any executor or administrator shall pay or allow any debt demanded as due from the deceased, founded on any judgment, decree, bond, note, bill or account, the person claiming such debt shall make an affidavit 'that nothing has been paid or delivered toward the satisfaction of such debt, except what is mentioned or credited, and that the sum demanded is justly due.' "

Sec. 88. "In case of a debt due a corporation, the cashier or treasurer shall make the affidavit required by the preceding section."

Under the law as it then was, no one but the claimant could make the affidavit required to establish such a claim. It could not

be made by an agent or an attorney. *Beirne* v. *Imboden,* 14 Ark. 237; *Marshall* v. *Green,* 24 Ark. 410; *Saunders* v. *Rudd,* 21 Ark. 519.

Section two of an act entitled "An act to prescribe the mode of proving certain accounts, and for other purposes," approved March 5, 1867 (Acts 1866-7, p. 210), was thereafter enacted as follows: "That the affidavit required in sec. 102, chapter 4, Gould's Digest, to authenticate demands exhibited for allowance against the estate of deceased persons may be made by any person, other than the claimant, who may be acquainted with the facts sworn to, and who is otherwise competent to give evidence in a court of justice; and such affidavit shall have the same force and effect as if made by the claimant."

The affidavit referred to in this section is the affidavit mentioned in section 87 of the Revised Statutes.

The act entitled "An act to amend sections 102 and 103 of Gould's Digest of the Statutes of Arkansas," approved March 13, 1867, provides as follows: "That sections 102 and 103 of chapter 4 of the Digest of the Statutes of Arkansas be, and the same are, hereby amended so as to allow an agent or attorney, who may be cognizant of the facts, to authenticate the claims of their principals against estate[s] of deceased persons, by making affidavits that he has made diligent inquiry and examination, and that he does verily believe that nothing has been paid or delivered toward the satisfaction of the demand, except the amount credited, and that the sum demanded is justly due." (Act 1866-7, p. 318.)

The effect of this act is to allow and authorize the agents or attorneys of all persons, including corporations, to authenticate the claims of their principals against the estate of deceased persons. But appellee cites *Lanigan* v. *North,* 69 Ark. 68, to the contrary. A careful reading of the opinion in that case will show that it was not held in that opinion that agents or attorneys of corporations or persons could not lawfully authenticate the claims of their principals by complying with the acts of 1867.

The claim of appellant was properly authenticated, and should have been allowed.

Reversed and remanded with directions to the court to allow the claim.

ST. LOUIS, KENNETT & SOUTHEASTERN RAILROAD COMPANY v. FULTZ.

Opinion delivered June 28, 1909.

1. NEGLIGENCE—PROXIMATE CAUSE.—In order to warrant a finding that negligence is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. (Page 262.)
2. MASTER AND SERVANT—ACCIDENTAL INJURY.—Where a brakeman, in attempting to alight from a moving freight car, caught his foot in a link hanging from the drawhead of the car, and was run over and killed, the injury was an accident for which the master was not responsible. (Page 262.)

Appeal from Clay Circuit Court, Eastern District; *Frank Smith,* Judge; reversed .

R. H. Dudley, for appellant.

The deceased was a man of more than ordinary intelligence and had had experience in this work. His act in voluntarily standing upon the drawhead of the moving log loader running at the rate of five or six miles an hour, and in jumping off into the center of the track immediately in front of the loader instead of getting off at the side where a place had been provided, was negligence *per se,* and the court should have so held as a matter of law. 14 L. R. A. 552; 88 Ark. 20; 72 Ark. 440; 69 Ark. 489; 128 Fed. 529.

Lamb & Caraway, for appellee.

1. Whether or not Fultz was guilty of contributory negligence was a question for the jury. 79 Ark. 53; 21 S. W. 503; 25 N. W. 104; 21 Pac. 574; 28 S. W. 54; 75 N. W. 704; 70 N. W. 665; 13 S. E. 566; 8 So. 357; 63 N. Y. Supp. 535; 76 N. E. 864.

2. If there was any rule requiring employees to get off at the side of the car, its observance was waived. 48 Ark. 333; 77 Ark. 405. The link in the drawhead was the proximate cause of the injury.

R. H. Dudley, for appellant in reply.

It was a physical impossibility for Fultz to have caught his foot in the link as it was hanging. One cannot by his own fault

and in disregard of his own safety bring on an injury and then recover for it. 36 Ark. 371; 81 Ark. 1. It was Fultz' duty to take notice of the obvious danger of the position he assumed. 82 Ark. 11; 60 Ark. 438.

BATTLE, J. This action was brought by Belle Fultz, as administratrix of Amberson A. Fultz, deceased, against the St. Louis, Kennett & Southeastern Railroad Company, in the Clay Circuit Court for the Eastern District of Clay County, to recover damages for the alleged negligent killing of the deceased by the defendant.

Plaintiff alleged her cause of action, in part, as follows: "That on the 9th of July, 1907, the said deceased was, and for a long time prior thereto, in the employ of the appellant railroad company in the operation of its trains, and on said date was employed as foreman of a logging crew in loading logs at or near Nimmons, Arkansas, and transporting the same by railway, to Kennett, Mo. That, while said train of appellant, upon which deceased was foreman, was at Nimmons, and while the same was being backed from the main line into and upon a siding or switch, and the deceased was upon the top of the rear car of said train, and while the same was being backed in and upon said siding, it became the duty of said deceased to go from the top of said car to the ground for the purpose of opening or throwing a switch, so that said train could back from the main line into and upon the siding; that in the rear end of the car upon which deceased was riding, but in the front as the train was being backed into the siding, was a link and coupling pin used by said appellant company to connect said car with and to attach same to other cars operated by appellant. That, as said deceased was getting down from the top of the car for the purpose of throwing the switch, his foot caught in the link of said car, causing him to fall to the ground, and to be run over and killed by said train of cars. That said deceased, in attempting to get from the top of said cars for the purpose of throwing said switch, was acting in the discharge of his duties as such employee, and was performing such duties in the usual and ordinary way, and in the only manner provided by appellant for so doing."

The defendant answered. A jury was impaneled to try the issues in the action. In the trial which followed evidence was

adduced sustaining the foregoing allegations of the complaint, and it was shown that the link in the end of the drawhead was probably ten or twelve inches long, and at the time of the accident hung down, as witness expressed it, "something like a quarter angle," and the train was running about six miles an hour.

The jury returned a verdict in favor of the plaintiff for $2,000, and the defendant appealed.

The evidence failed to show that any negligence of the appellant was the proximate cause of the accident. "It is generally held that, in order to warrant a finding that negligence * * * is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of attending circumstances." *Ultima Thule, Arkadelphia & Mississippi Railroad Company* v. *Benton,* 86 Ark. 289; *Pittsburg Reduction Co.* v. *Horton,* 87 Ark. 576. The catching of the foot of the deceased in the link, ten or twelve inches long, hanging in the drawhead of a car at, as a witness described, "a quarter angle," as he leaped from the train was improbable, and was one of the consequences that "ought not to have been foreseen in the light of the attending circumstances." It was an accident for which the appellant is not responsible.

Judgment reversed, and action dismissed on the merits.

ROBINSON v. VAN VLEET.

Opinion delivered July 12, 1909.

INFANCY—CONTRACTS.—An infant is bound by the terms of his contract for services which he has voluntarily executed, if the contract is not so unreasonable as to be evidence of fraud or undue advantage.

Appeal from Greene Circuit Court; *Frank Smith,* Judge; affirmed.

STATEMENT BY THE COURT.

This was a suit instituted by the plaintiff as next friend of John Hots, a minor, for the value of services performed by the

minor for the defendant. Defendant has a verdict. In December, 1899, shortly before he became 13 years old, Hots was taken into the home of defendant, where he was almost constantly employed in hauling, farming and clearing in the service of the defendant until September 4, 1907, when he left as a result of a disagreement between him and defendant. Suit was brought for $900, balance alleged to be due for value of the service. Defendant's answer alleged and his proof tended to show that Hots practically became a member of defendant's family.

The court gave among others the following instruction:

"No. 1. One of the defenses to any recovery by the plaintiff in this suit is that the plaintiff entered and became a member of the family of the defendant, and as such was entitled to no compensation other than the common benefits enjoyed by the family. You are instructed that, if you find from the evidence that the plaintiff occupied the position of and became a member of defendant's family and received the common benefits enjoyed by the family, you will find for the defendant, unless you further find that there was an express agreement to compensate the plaintiff."

Appellant excepted to the giving of this instruction. The court also gave the following:

"No. 3. You are instructed that, in order to find for the plaintiff, it will not be necessary for you to find that there was any contract made or existing between the parties, but if the defendant permitted the plaintiff to work for him. and if he received the benefits of his labor, and made no objections to plaintiff's working for him, then under these circumstances the law implies a promise to pay plaintiff a reasonable sum for such labor."

Huddleston & Taylor, for appellant.

The jury ought to have been left free to consider the question whether or not there may have been an implied agreement. The presumption arising from the *quasi* family relationship that the services of the minor are gratuitous does not defeat an implied agreement that they are to be paid for. 56 Ark. 382; 82 Ark. 136; 10 Atl. 722; 90 Mo. 284; 38 Atl. 172; Rodgers on Dom. Rel., § 482.

J. D. Block, for appellee.

The agreement was express, and the question of an implied agreement to pay what the services were reasonably worth does not enter into the case.

WOOD, J., (after stating the facts). The appellant contends that, notwithstanding a family relationship may have existed between him and the appellee, he was entitled to recover if the facts show an implied agreement to pay him for his services, and he contends that the conduct of the parties, as shown by the evidence, raises an implied agreement, which rebuts the presumption that his services were gratuitous. He further contends that instruction number 1 takes away from the consideration of the jury any evidence of an implied agreement. There is really no evidence of any implied agreement in the record. The agreement, according to the testimony of both appellant and appellee, was express, and the effect of it was that appellee should receive appellant into his household as a member of his family, and that if appellant remained until he reached his majority he should receive a horse, bridle and saddle and eighty acres of land. After this, when the parties differed about some work, and agreed to sever the *quasi* family relationship before appellant reached his majority, the agreement was that appellee should pay appellant one hundred dollars in cash for the services already rendered, which appellant accepted, and thereupon left appellee's home, thus abandoning the contract as to horse, bridle and saddle and the eighty acres of land. These facts are established by the uncontroverted evidence, and the court therefore did not err in giving instruction number 1, even if it was meant by it to ignore any implied contract. But instruction number three, given at the request of appellant, did submit to the jury the question as to whether there was an implied contract to pay for appellant's services. Taking the two instructions together, their purport was to tell the jury to find for appellant if they believed from the evidence that there was either an express or implied contract to pay for his services. Instruction number three given at the request of appellant gives him the benefit of an implied agreement if there was one, and was more favorable to him than the evidence warranted.

There was really no evidence to justify the court in submitting to the jury the questions of the right of appellant to recover upon a *"quantum meruit;"* for the uncontroverted evidence shows an express contract for services which had been fully executed. The appellant had done the work, and had received the one hundred dollars, in addition to the necessaries and other valuable consideration given him by appellee. There is no allegation of fraud against appellee in dealing with appellant, and there is no evidence that the amount paid by appellee for the services of appellant was not reasonable under all the circumstances of his employment. Certainly, there was no evidence to show that the amount in necessaries and money received in consideration for his services was so unreasonable as to be evidence of fraud or undue advantage. Appellant did not even ask that such question be submitted to the jury. An infant is bound by the terms of his contract for services which he has executed without dissent, provided such contract, under all the circumstances of his employment, is reasonable, or not so unreasonable as to be evidence of fraud or undue advantage. Judge Cooley, in *Spicer* v. *Earl,* 41 Mich. 191, quoting an earlier case, used the following language: "It is essential to the protection of infants that they should be bound by contracts of this kind after they have been executed; and this idea of protection lies at the basis of the whole law of infancy. Should the law recognize the right of repudiation in such cases, no man could furnish an infant with the necessaries of life in compensation for his services without the risk of a lawsuit; and the minor, though able and willing to earn his support, would often be deprived of the opportunity, and driven perhaps to vagrancy and crime." *Wilhelm* v. *Hardman,* 13 Md. 140; *Hobbs* v. *Godlove,* 17 Ind. 359; 22 Cyc. p. 648.

In view of these principles, which are applicable to the facts of this record, there was no error in any of the rulings of the court prejudicial to the rights of appellant, and the judgment is therefore affirmed.

WOMBLE v. HICKSON.

Opinion delivered July 12, 1909.

DAMAGES—BREACH OF CONTRACT TO BUILD HOUSE.—Where a carpenter agreed to build a house for a sum named, all materials being furnished by the owner, and the latter refused to permit the house to be built, the carpenter is entitled to recover the sum named, less whatever amount he was able to earn during the time required to build such house.

Appeal from Montgomery Circuit Court; *James S. Steel,* Judge; affirmed.

J. I. Alley, for appellant.

The contract was never completed. No plans and specifications were ever attached. 15 Neb. 273. The case of 52 Ark. 117 does not apply. If the contract had been complete, the only damages recoverable would be the profit made on completion of the work. 33 Ark. 545.

Gibson Witt, for appellee.

The contract sufficiently describes the work to be done, without the plans and specifications. 30 A. & E. Enc. Law, p. 1197. The Rowton house was itself plans and specifications sufficient. Instruction No. 1 is the law. 9 Ark. 398; 39 *Id.* 280; 64 *Id.* 257. Where a judgment is right on the facts, it will not be reversed. 64 Ark. 238.

BATTLE, J. The following is the complaint filed in this action (omitting caption):

"Come the plaintiffs, John C. Hickson and Joe Findley, and state that on or about the 15th day of January, 1908, they, as carpenters, entered into a contract with the defendant, O. O. Womble, to build a residence for the defendant on his lot in the town of Womble, Arkansas, and that according to said contract the said defendant was to pay them the sum of $155 for the carpenter work, in a manner and at such times as was to be agreed upon at a later date. The said O. O. Womble was to furnish all material for the construction of said residence. The said contract, together with the specifications and drawings, as provided for, are filed herewith and marked exhibits "A" and "B." That the contract was entered into in good faith by all parties and signed

in the presence by both plaintiffs and defendant. They state further that the defendant, O. O. Womble, has refused to furnish them (the plaintiffs) the said carpenter work; that, according to agreement, they were to begin the work on or about January 18, 1908. That said defendant has placed other carpenters to work on said residence. That plaintiffs have been ready and willing to begin work on said house at all times since the contract was entered into, and that they have been hindered by virtue of said contract from taking other contracts or jobs of work, and that they have been damaged thereby. They pray judgment for one hundred and fifty-five dollars and for costs."

The following is a copy of the contract on which the action is based:

"This agreement, entered into this day by and between John C. Hickman and Joe Findley, house carpenters, and O. O. Womble, all of Womble, Arkansas, is and shall be as follows: The said Hickson and Findley agree to build a residence out of the material furnished by Womble, which will be a duplicate of the Monroe Rowton house in Womble, with the exception that they will build the hall 7 feet wide, will make the cornice 'square style' and build the front and back porches with flat roof to be covered with tin, and it is understood and agreed that Womble is to furnish all lumber, nails and shingles, tin and all other necessary material for the construction of said house. Hickson and Findley agree to put only first-class workmanship in this building, and agree to sandpaper and smooth all finishings such as baseboards, casing, etc. Womble agrees to pay for the carpenter work on said house to Hickson and Findley the certain sum of one hundred and fifty-five dollars ($155) in a manner and at such times as will be agreed on later, which subsequent agreements will be attached and become a part of this instrument. A drawing and specifications of said house is to be attached and become a part of this contract.

Signatures: "John C. Hickson,
"Joe Findley,
"Carpenters.
"O. O. Womble."

The contract was written by Womble, and signed by all the parties. It was not dated. The place where the residence was

to be constructed was not specified, nor the time when it was to be built, but that was understood and agreed upon. A drawing and specifications of the house were to be attached and become a part of the contract, but this was not done, through no fault of the plaintiffs. This was not a condition of the contract, and was not necessary. The house to be built was to be a duplicate of the "Monroe Rowton house" in Womble, with certain specified exceptions, which itself furnished the plans and specifications required. Plaintiffs offered to perform their part of the contract, but were not allowed by the defendant to do so. They made diligent efforts to obtain work in the time required to build the house of the defendant, but were unable to earn in that time exceeding $48.00. The jury impaneled to try the issues in the case returned a verdict in favor of the plaintiffs for $107. It was more favorable to defendant than he was entitled to.

Judgment affirmed.

WARD v. STARK.

Opinion delivered July 12, 1909.

1. HOMESTEAD—WIFE'S JOINDER ON HUSBAND'S DEED.—Where a married woman joined in the granting part of her husband's conveyance of his homestead, and released her dower and homestead interest therein, she will be held to have joined in the execution of such deed within the requirements of Kirby's Digest, § 3901. (Page 272.)
2. LIEN—ENFORCEMENT.—A contract for the purchase of fruit trees, to be planted on a certain farm, which recites that "this agreement is and shall be a lien upon said farm upon which the trees are planted until the said party of the second part shall receive of the said party of the first part the compensation herein above specified," manifests an intention to create a lien upon the land, which will be enforced in equity. (Page 273.)
3. HOMESTEAD—WIFE'S JOINDER IN HUSBAND'S CONVEYANCE.—Where a married woman signed an instrument creating a lien upon her husband's homestead and acknowledged it, though her name does not appear in the body of the instrument, she will be held to have joined in such instrument, within the meaning of Kirby's Digest, § 3901. (Page 273.)

4. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—A chancellor's findings of facts will not be disturbed where the preponderance of the testimony is not against it. (Page 274.)

5. SIGNATURE—ATTESTATION.—The method provided by Kirby's Digest, § 7799, for attesting the signature of a person who cannot write is not exclusive, and the validity of such signature is not affected if the person appears before an officer and acknowledges the execution of the instrument. (Page 274.)

Appeal from Greene Chancery Court; *Edward D. Robertson,* Chancellor; affirmed.

Huddleston & Taylor, for appellants.

1. Mrs. Ward was not present when the instrument was executed, but if she was she did not sign it except by mark, and there were no witnesses to signature. Kirby's Dig., § 7799; 60 Ala. 293.

2. The instrument does not describe the land, and is void for uncertainty. Besides, the fruit tree contract is not a mortgage. Washburn on Real Prop., § 475. There is no granting clause; no habendum clause; no warranty clause or covenants; no defeasance clause. It is nothing more than a pledge, and the record of it is not notice. 33 Ark. 77; 23 Minn. 454; 11 *Id.* 475; 78 S. W. 340.

3. The mortgage was not properly executed nor acknowledged under the homestead act, and is void. 33 Ark. 722; Kirby's Dig., § 3901; 26 Ark. 128; 32 *Id.* 453; 53 *Id.* 53; 57 *Id.* 242; 112 S. W. 892; 66 Ark. 226; 70 *Id.* 166; 82 *Id.* 209; 60 *Id.* 277; 3 Man. & G. 742. The word "stated" is not equivalent to "acknowledged." 4 Mich. 565; 2 S. E. 97; 12 S. W. 820; 40 So. 67; 52 S. W. 318; 52 S. W. 1003.

Johnson & Burr, for appellees.

1. The court's finding on the issue of fact as to whether or not Mrs. Ward signed and executed the first mortgage is supported by the evidence, and will not be disturbed. 115 S. W. (Ark.) 1141; 77 Ark. 305; 68 Ark. 134; *Id.* 314. The evidence to impeach the officer's certificate of acknowledgment must be clear and convincing beyond a reasonable doubt. 1 Am. & Eng. Enc. of L., 2d Ed. 560; *Id.* 561, note 5 and cases cited; 18 Am. Rep. 634. The testimony of both husband and wife is not sufficient

to overturn the officer's certificate. 52 S. W. 909; 115 N. W. 548; 128 Ill. App. 195; 52 S. E. 23; 36 O. St. 644; 45 O. St. 1, 4; 116 N. W. 43. "A person's name signed by another person with his authority is his signature." 25 Am. & Eng. Enc. of L., 2d Ed. 1066; 126 Ga. 305; 88 App. Div. (N. Y.) 65. The acknowledgment, if defective, was cured by act of March 20, 1903, Kirby's Dig., § § 783, 786; 75 Ark. 139; 77 Ark. 57; 118 S. W. 255; 112 S. W. 892. Mrs. Ward is bound, notwithstanding her name did not appear in the body of the mortgage. 112 S. W. 892; 3 Wash. Real Property, c. 4, § 1, sub. 31; 28 N. W. 116; 86 Ky. 653; 26 Miss. 275; 2 N. H. 525; 58 S. E. 828.

2. The omission of the range number by the clerk in recording the mortgage does not operate to prejudice the mortgagee. 28 Ark. 244; 54 Ark. 273. But the record is sufficiently clear to enable a surveyor to identify the land with reasonable certainty. 11 Cur. Law 1057; 40 Ark. 237.

3. The instrument sued on is an equitable mortgage. 3 Pomeroy, Eq., § 1237; 1 Jones on Mort. 168; 31 Cal. 321; 51 Ark. 433; 60 Ark. 595; 11 Am. & Eng. Enc. of L., 2d Ed. 123; 78 S. W. 340.

4. The language employed in the mortgage clearly shows the wife's intention to join in the conveyance of the homestead, and is sufficient for that purpose. 118 S. W. (Ark.) 255.

McCULLOCH, C. J. This is a suit in equity instituted by appellees, Stark Brothers, against G. O. Ward and his wife, N. G. Ward, to obtain foreclosure of two certain instruments of writing, alleged to be mortgages on the same tract of land, which constituted the homstead of G. O. Ward. J. A. Gill, a subsequent purchaser of the land from Ward, was made a defendant in the suit, and he also appeals from the decree of foreclosure.

The first instrument executed is as follows:

"This indenture, made and entered into on this 14th day of October, A. D. 1901, by and between G. O. Ward, of Finch, Ark. (residence 10 miles S. W.), county of Greene, State of Arkansas, party of the first part, and Stark Brothers, of Louisiana, county of Pike, State of Missouri, parties of the second part, witnesseth, that the said party of the first part, in consideration of the parties of the second part selling and shipping to him in the fall of 1901 to Paragould, Ark., railroad charges prepaid,

thirteen hundred (1300) fruit trees, binds himself and his heirs and assigns to carefully plant and care for said trees on his farm containing eighty acres, situated in Greene County, State of Arkansas, and more particularly described as follows, to-wit:

"W. ½ N. W. ¼ of section 14, township 16 N., range 4 east, boundaries (here gives names of adjoining owners) A. Fletcher on N., Bob Treece on E., on south Elen Edwards, on W., W. J. Hyde, and pay to the order of said second parties, their heirs and assigns, as per first party's four promissory notes to be executed by said first party to said second parties when the aforesaid trees are shipped, two hundred and seventy dollars ($270) due and payable as follows: all deferred payments and interest hereinafter particularly specified to date from the first date Nov. 1, 1901 . . . . one-fifth cash on receipt of trees, one-fifth (1-5) in one year, one-fifth (1-5) in two years, one-fifth (1-5) in three years, one-fifth (1-5) in four years, with interest at the rate of six per cent. per annum; and if the interest be not paid annually, the same is to become principal and bear the same rate of interest; to the payment of which sums as the same shall become due the party of the first part binds himself, his heirs, assigns and grantees of and to the aforesaid described lands; the right being reserved to the said party of the first part to pay the full amount remaining unpaid and not yet due, together with accrued interest, at any time he may elect.

"Said first party, for the purpose of obtaining the aforesaid trees, waives all exemptions, and states that the above described real estate is free and clear of all incumbrances, and that he claims the same with a perfect title. And it is also understood and agreed by the parties hereto concerned that this agreement is and shall be a lien upon said farm upon which the trees are planted until the said party of the second part shall receive of the said party of the first part the compensation herein above specified.

"In witness whereof, we have hereunto set our hands and seals this day and year first above written.

"G. O. Ward.
"N. G. x Ward.

Witnessed by

. . . . . .

"State of Arkansas,
"County of Greene.

"Be it remembered that on this day came before me, a justice of the peace duly commissioned and acting, G. O. Ward and N. G. Ward, his wife, to me well known as grantors in the foregoing instrument of writing, and stated that they had executed the same for the consideration and purposes therein mentioned and set forth. In witness whereof I have hereunto set my hand and affixed my official seal at my office in Paragould, the day and year above written.

"Jeff Bratton, J. P."

This instrument was duly filed for record and recorded, and notes were subsequently executed to cover the debt therein described. The second instrument is regular in form as a mortgage, and was duly executed and acknowledged by G. O. Ward. His wife N. G. Ward joined her husband in the granting clause of the deed, and also expressly relinquished dower and homestead. The certificate of her acknowledgment is as follows:
"State of Arkansas,
"County of Greene.

"Be it remembered, that on this day came before me, the undersigned, a justice of the peace within and for the county aforesaid duly commissioned and acting, voluntarily appeared before me the said N. G. Ward, wife of the said G. O. Ward, to me well known, and in the absence of her said husband declared that she had of her own free will signed and sealed the relinquishment of dower and homestead in the foregoing deed for the consideration and purposes therein contained and set forth, without compulsion or undue influence of her said husband.

"Witness my hand and seal as such justice of the peace on the 10th day of August, 1904.

"S. W. Atchinson, J. P."

It is contended that the wife's acknowledgment to this mortgage was an insufficient compliance with the provisions of the statutes (Kirby's Digest, § 3901) concerning conveyances of a homestead. This objection may, however, be disposed of by reference to the recent case of *Gantt* v. *Hildreth*, 90 Ark. 113, which is precisely in point and decisive of this case.

Questions arising on the other branch of this case, involving the first instrument, are, however, more serious. Was it sufficient to constitute an equitable mortgage on the land described? The only language purporting to create a lien is as follows: "It is also understood and agreed by the parties hereto concerned that this agreement is and shall be a lien upon said farm upon which the trees are planted until the said party of the second part shall receive of the said party of the first part the compensation herein above specified." This language in the instrument unmistakably manifested the intention of the parties that a lien should be thereby created on the land, and equity will give effect to this intention by enforcing the lien. *Mitchell* v. *Wade,* 39 Ark. 377; *Bell* v. *Pelt,* 51 Ark. 433; *Williams* v. *Cunningham,* 52 Ark. 439; *Martin* v. *Schichtl,* 60 Ark. 595; *Flagg* v. *Mann,* 2 Sumn. 486; *Pinch* v. *Anthony,* 8 Allen 536; *Stark* v. *Anderson* (Mo. App.) 78 S. W. 340; *Martin* v. *Nixon,* 92 Mo. 26.

"Equity requires no particular words to be used in creating a lien. It looks through the form to the substance of an agreement; and if, from the instrument evidencing the agreement, the intent appear to give, or to charge, or to pledge, property, real or personal, as a security for an obligation, and the property is so described that the principal things intended to be given or charged can be sufficiently identified, the lien follows." *Martin* v. *Schichtl, supra.* Mr. Pomeroy stated the rule in substantially the same language. 3 Pom. Eq. Jur., § 1237.

It is also contended that the instrument now under consideration was not executed in compliance with the homestead statute, and therefore was insufficient to create a lien. The wife's name does not appear in the body of the instrument, but she signed it and acknowledged its execution. It contains no relinquishment of dower, and the wife's execution of it is referable only to an intention to consent to the creation of the lien and to join in the act creating it. In no other way can any effect be given to her signature. *Sledge & Norfleet Company* v. *Craig,* 87 Ark. 371.

Any defect in the acknowledgment of the deed was cured by the two statutes enacted on March 20, 1903. Kirby's Digest, § § 783, 786.

Appellants introduced testimony tending to establish the

fact that Mrs. Ward did not sign the deed or acknowledge its execution; that her name was signed without authority; and that she did not appear before the officer who certified the acknowledgment. The testimony on this point was conflicting, and the preponderance is not against the chancellor's findings.

Mrs. Ward signed by mark, and the person who signed her name did not attest the signature as provided by statute. Kirby's Digest, § 7799. The method provided by statute for attesting the signature of a person who cannot write is not exclusive, but only establishes *prima facie* the genuineness of the signature without other proof of signing. Ex parte *Miller*, 49 Ark. 18. Where a person whose name is signed in this way appears before an officer and acknowledges the execution of the instrument, but the statutory requirement relating to signature by mark is not observed, the validity of the instrument is not affected. An unauthorized signature is ratified by the person appearing before an officer and acknowledging the execution of the instrument. *Goodman* v. *Pareira*, 70 Ark. 49.

There is a defect in the record as to the description of the property on which the lien is created; but the original instrument in writing which was introduced disclosed the fact that there is no defect. The error was that of the recording officer, and the lienor is not responsible therefor. *Oats* v. *Walls*, 28 Ark. 244; *Turman* v. *Bell*, 54 Ark. 273.

Decree affirmed.

CRAIG v. GREENWOOD DISTRICT OF SEBASTIAN COUNTY.

Opinion delivered July 12, 1909.

1. ROADS AND HIGHWAYS—MODE OF ESTABLISHMENT.—A public road may be established by judgment of the county court rendered in accordance with the statute or by voluntary dedication or by prescription. (Page 278.)
2. SAME—COMPENSATION FOR LAND TAKEN.—It is only where a road has been established by judgment of the county court that compensation can be demanded by the owner for the land taken. (Page 279.)
3. SAME—WHEN COUNTY NOT LIABLE FOR LAND TAKEN.—Where a public road running along a river caved in, and the public took possession of plaintiff's adjacent land for use as a road, plaintiff is not entitled

to recover the value of the land so taken from the county, in the absence of an order of the county court establishing a road over his land. (Page 279.)

Appeal from Sebastian Circuit Court, Greenwood District; *Daniel Hon,* Judge; affirmed.

Winchester & Martin, for appellant.

1. Land cannot be taken and used for a public road against the owner's will without remuneration. Const. 1874, art. 2, § § 21, 22; Kirby's Digest, § § 3009, 2901; 45 Ark. 429; 136 U. S. 121.

2. Having appropriated the land for public use without compensation, the county must pay for the land taken as though a road had been established. When the road caved into the river, the county had the right to enter upon land it had not paid for, and is liable under section 3009, Kirby's Digest.

Wm. A. Falconer, for appellee.

1. A road must be established as a public highway, (1) by statutory proceedings, or (2) by dedication, or (3) by prescription. There has been no such establishment by statutory proceedings nor by dedication. Anderson's Law Dict. "Dedication;" 13 Cyc. 437; 14 Barb. 511, 521; 1 Boone, Real Prop. 139; 6 Hill (N. Y.) 407, 411; 42 W. Va. 724; 26 S. E. 532. (3) There has been no establishment by prescription, as seven years public use (47 Ark. 436) nor by supervision, or work by overseer, etc. 23 Ark. 553; 21 S. W. 351; 5 So. 622; 52 Ill. 498; 22 *Id.* 414.

2. No appropriation having been made for the road, the county is not liable. Kirby's Dig., § § 1502, 1505; 54 Ark. 645; 34 *Id.* 356; 67 *Id.* 562; 71 *Id.* 135.

3. The county has committed no act which amounts to taking the road. 52 Ill. 498; 21 S. W. 351; 5 So. 622; 11 *Id.* 375.

4. Destruction of the old road by a river and travel of the new does not make a public highway. 58 Cal. 159; 56 Vt. 487; 7 Cush. 410; 48 Am. Rep. 811; 54 Am. Dec. 728; Waterman on Trespass, 91; Cruise, Dig. 89. Travelers are mere trespassers, and the owner has the right to fence up the new road taken.

Elliott on Roads and St., 12, 13, 14; 2 Doug. 757; Broom's Leg. Max. 1.

5. There being no statute making the county liable, a right of action does not arise. 26 Mo. 272; 68 Ark. 160-2; 4 Oh. Dec 130; 26 Ark. 39; 67 Ark. 562; 71 *Id.* 135; 31 *Id.* 266.

McCULLOCH, C. J. Appellant, Sarah Craig, presented to the county court of the Greenwood District of Sebastian County a claim for compensation for land used as a public road. The claim was disallowed by the county court, and she appealed to the circuit court, where a trial before the court resulted in an adverse judgment, and she appealed to this court.

The case was tried on the following agreed statement of facts:

"In the year 19.... the county court of Sebastian County, Greenwood District, pursuant to the requirements of section ..... of Kirby's Digest, established a public road over the lands of Sarah Craig by definite metes and bounds, thirty feet in width, which road ran along the bank of the Arkansas River, in some places perhaps running as close as ten feet to the bank, and in other places perhaps fifty feet from the bank—as close to the bank as was safe for travel. The road so laid out and defined was paid for by the county court according to the damages fixed by the viewers. From time to time after said road was open to travel, the land caved in along the river bank and destroyed the road in various places, and the travel was forced to go onto the lands of the defendant, and this route so traveled also caved in, so that the public travel again made a route over other lands of defendant adjacent to the bank. The travel is now upon the lands of the defendant and along the bank of the river, and the present route has been so traveled some three or four years, except where it has caved in, and the travel has been diverted upon other lands belonging to the petitioner. The cave-ins began during the second year after the road was open for travel. After the several breaks had occurred and the public travel had been diverted upon her land where the breaks had occurred, Sarah Craig filed in the county court of the Greenwood District of Sebastian County a petition setting out the number of acres so used for travel, and asking that she be paid for same by the Greenwood

District. This petition was not acted upon, and each year thereafter she filed a like petition, none of which were acted upon.

"On the .... day of ..... she filed the petition presented herewith, which recites all the different claims theretofore filed, in which petition she set forth the fact that the road had been destroyed by the river and other lands of hers taken by the public, and prayed (pursuant to section ..... of Kirby's Digest) the appointment of viewers to view out another road, that the county (Greenwood District) pay her for the lands so taken and used, etc. Viewers were by the court appointed, and they filed their report stating that they had viewed the premises, and that the land was worth thirty-five ($35) dollars per acre. When the matter came up for hearing before the county court, upon the report of the viewers, it was held by the court, as a matter of law, that the county was not liable to the defendant for the said land, and defendant's claim was not allowed, whereupon she took an appeal.

"It was further agreed that the land of Sarah Craig, over which the road heretofore referred to ran, is situated in Road District ....., and that they lie in Big Creek Township of Sebastian County, which township, under act of April 18, 1905, was made a separate road district. That the roads in the several townships or road districts are worked or maintained from funds derived from a three-mill road tax levied on the real and personal property in the particular road district in which the said property is located.

"It is further agreed that, after the road as originally laid out along the river bank had caved in, the subsequent routes traveled by the public were traveled without the consent of the county court, as far as any official action was concerned, and with only such knowledge as was contained in Sarah Craig's several petitions asking for pay for the land so used by the public, and that no assurance was ever given to the defendant by any one having a right to bind the county that the county would pay for such roads.

"It is further agreed that no appropriation has been made by the last annual levying court, or any other levying court of said county and district, for the purpose of paying for or establishing a new road on defendant's land. That the evidence does

not show whether or not any road overseer has worked the road now used by the public over defendant's land, but that the public has continuously used this route since the road was established in 19...., though it is agreed that the county court never ordered the said road, as now traveled, worked, nor that it had ever needed any work.

"It is further agreed that by a vote of the last general election, September, 1906, the road tax was put into effect in the Greenwood District of Sebastian County, and the quorum court of said county levied a three-mill tax. That there are twenty-one (21) road districts in the Greenwood District of Sebastian County, each one of which has a road overseer, and each one of which is elected as other township officers are elected, and that the county court has no control over said overseer, and that the funds of each particular road district are separate from all others, and the county court or quorum court has no jurisdiction over same.

"And this was all the testimony introduced by either side."

A public road may be established by judgment of the county court rendered in accordance with the statute or by voluntary dedication or by prescription. It is only when the road is established in the first mode that compensation can be demanded by the owner for land taken. The county cannot be made responsible for the value of land used as a public highway except after judgment of the county court establishing the road. There is no warrant in the statute for liability of the county to be incurred in any other manner, and in the absence of a statute no liability can be imposed. *Granger* v. *Pulaski County,* 26 Ark. 39; *Arkansas County* v. *Freeman,* 31 Ark. 266; *Nevada County* v. *Dickey,* 68 Ark. 160.

Appellant cites the following statute as justification for her claim: "When any county road may be injured or destroyed by the washing of any lake, river or creek, it shall be the duty of the overseer or overseers of the road district or districts in which such injury or destruction may occur to immediately notify the county court in writing of the nature and extent of such injury; and, if said court shall be satisfied that such road has been injured or destroyed to such an extent as to inconvenience the traveling public, the court shall appoint three viewers, who

may, if in their judgment it is necessary, take with them a competent surveyor, and proceed to view and survey a new road upon such ground as will accommodate the traveling public. Such viewers shall determine the compensation to be allowed the owners of the property sought to be appropriated at its true value, and the damages occasioned by such new road, and shall make a report of their doings in the manner pointed out in this act as the duties of viewers of new roads. Appeals may be taken from the appointment and orders of said court, and from the assessment allowed by the viewers as a jury to the owner or owners of property, in the manner provided by this act, within the time allowed by law, after the first regular term of the court thereafter held. The appointment of viewers and order of said court herein provided shall be recorded in the records of the court. The court shall be governed in the reception, approving and recording of said report of viewers in all respects as is prescribed in the case of new roads, except no notice of the destruction or injury to the road shall be required, except as required by this section. All costs, damages and expenses arising under the provisions of this section shall be paid out of the county treasury." Kirby's Digest, § 3009.

But it is sufficient answer to the contention to say that the county court declined to establish a new route for the road over appellant's land. The basis of her claim is, not that the county court established a road over her land and refused compensation, but that the public used her land for a roadway, and she demands compensation for the taking of it in that way. The public had no legal right to take and use her land for a roadway without her consent (except, perhaps, temporarily until the destruction of the road could become known to the traveling public), and such unauthorized use by the public cannot become the basis of a claim against the county for compensation. Appellant must seek some other remedy. The Constitution of the State wisely leaves it to the county court to determine when and where public roads shall be established and, when once established, what alterations thereof shall be made. Expense of care of public highways cannot be forced upon a county, nor can compensation for land taken for such purposes be demanded of a county without the concurring judgment of the county court es-

tablishing the road. *Road Improvement Dist.* v. *Glover,* 89 Ark. 513.

Affirmed.

HART, J., dissenting.

REICHARDT v. HOWE.

Opinion delivered July 12, 1909.

1. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDINGS.—A chancellor's findings of fact will not be disturbed on appeal where there is not a clear preponderance against them. (Page 282.)
2. FRAUDS, STATUTE OF—VERBAL LEASE—PART PERFORMANCE.—A verbal lease of land for a term of years will be taken without the statute of frauds where the lessee was placed in possession and made valuable improvements at his own expense. (Page 282.)
3. LANDLORD AND TENANT—RIGHT OF LESSEE TO CUT TIMBER.—Under a lease whereby the lessee "agrees not to cut any timber except where he clears and improves the land, only for lumber and fence posts to be used on the land," the lessee is authorized to cut timber only where it is necessary to remove it for the purpose of clearing the land, and of the timber so cut he is authorized only to use so much as is necessary for lumber and fence posts for improvements on the land, the residue of the timber belonging to the owner. (Page 283.)

Appeal from Saline Chancery Court; *Alphonso Curl,* Chancellor; reversed.

Cooper & Utley and *Mehaffy, Williams, Cockrill & Armistead,* for appellant.

1. A 3-year lease of land and sale of the growing timber thereon is required to be in writing by the statute of frauds. Kirby's Dig., § 3654; 28 Am. & Eng. Enc. Law (2 Ed.), 540; 69 Ark. 442; 75 *Id.* 336. The writing is void, as there is no description of the lands. 16 Ark. 340-6; 21 *Id.* 533; 45 Ark. 17; 49 *Id.* 306. Part performance does not take out of the statute a contract not to be performed within a year. 48 Ark. 485. It can only be good for one year. 36 Ark. 518-522. Appellee must prove a valid agreement, and the statute of frauds need not be pleaded. 19 Ark. 23-34; *Ib.* 39.

2. The contract referred only to a thirty-acre tract, and must be clearly proved and its terms definitely shown when partial performance is claimed. 39 Ark. 424-9; 44 *Id.* 334-340; 63 *Id.* 100-105. The proof does not satisfy the rule.

3. Even if the lease included the whole tract, it does not give the right to any timber except for lumber and posts *to be used on the land.* Injunction is the proper remedy. 28 Am. & Eng. Enc. L., p. 546.

W. R. Donham, for appellees.

1. Part performance takes a sale or lease of land out of the statute. 16 Ark. 23; 36 *Id.* 518; 42 *Id.* 246; 55 *Id.* 294. See 52 Ark. 207; 69 *Id.* 513; 85 *Id.* 442.

2. The preponderance of the evidence shows a lease of the whole tract was contemplated, and the finding will not be disturbed. 42 Ark. 246.

3. Appellee only sold in good faith the timber he was entitled to under the contract in good faith and in compliance with his lease.

McCULLOCH, C. J. The heirs of Nick Kupferle, deceased, owned a tract of land in Saline County containing 120 acres, and appellant Reichardt had possession and control of it as their agent. Reichardt as such agent entered into the following written contract with appellee Howe:

"Little Rock, Ark., Jan. 18, 1908.

"CONTRACT FOR THREE YEARS' LEASE.

"Party of the first part, Louis Reichardt, agent for the Nick Kupferle estate, and C. W. Howe, party of the second part, hereby agree to fence the following land, to-wit, * * * * with a four-foot barb and woven wire fence, and build thereon a four-room box and ceiled house, barn and all outhouses, and dig well, and also agrees not to cut any timber except where he clears and improves the land, only for lumber and fence posts to be used on said land, said lease to expire December 31, 1910.

"C. W. Howe."

"Louis Reichardt, Agt. Nick Kupferle Est."

The description of the land was omitted at the time, with the understanding that it should be supplied later, but this was never done. Howe took possession of the land and built a wire fence, enclosing about sixty-five acres. He then entered into a written con-

tract with appellee Craine for the sale of all the merchantable timber on the tract, and Craine located a sawmill on the place for the purpose of sawing up the timber. Howe proceeded to cut timber on the land and deliver it to Craine at his mill. He cut and removed a considerable portion of the timber from the land, delivering it to Craine under his contract of sale, and appellant instituted this suit in equity against both Howe and Craine to restrain them from continuing to cut timber. A temporary injunction was granted by the chancellor at the commencement of the suit, but was dissolved on the final hearing, where the complaint was dismissed for want of equity.

Appellant contends, and so alleges in his complaint, that he only intended to lease thirty acres of the land to Howe. There is an old clearing of about ten acres on the tract, and appellant claims that this, together with twenty acres more, was only to be included in the lease. On the contrary, appellee Howe insists that the whole tract of 120 acres was embraced in the lease. The testimony is, we think, about evenly balanced on this issue. It consists mainly of testimony of appellant and Howe, with very little corroboration of either. Both of them are in a measure interested; and, as the chancellor accepted the testimony of Howe, we cannot say that the preponderance is against the conclusion reached.

It is insisted that, as the writing failed to describe the land, it was insufficient to constitute a contract between the parties, and that the whole transaction amounts to no more than a verbal contract, and the statute of frauds is pleaded against it. We conclude, however, that, as there was actual possession taken by Howe under the contract, and valuable improvements made by him at considerable expense, the case was thereby taken out of the operation of the statute. The lessee under those circumstances is in equity entitled to specific performance of the contract. *Brockway* v. *Thomas,* 36 Ark. 518; *Pledger* v. *Garrison,* 42 Ark. 246; *Railway Company* v. *Graham,* 55 Ark. 294; *Phillips* v. *Jones,* 79 Ark. 100.

If the version of appellee Howe be accepted as to the transaction in question, he took possession of the whole tract of 120 acres under the agreement and with the consent of appellant. The reason why the operation of the statute of frauds is avoided

by part performance is that it would be fraud to deny the benefits of the contract to the party who has in part performed it; and where there has been performance of a part, he is entitled in equity to require the other contracting party to perform the whole contract. Justice could not be done by giving the party the benefit of that part of the contract only which he has performed. Proof that the contract has been partly performed is sufficient to prevent the operation of the statute of frauds and to supply the omitted description; but the remaining part of the contract stands for itself, and the rights of the parties must be controlled by it.

The contract does not purport to convey the timber nor to confer upon Howe the right to sell it. His right to use the timber is expressly limited to so much of it as is needed "for lumber and fence posts to be used on said land." He is by the terms of the contract permitted to cut timber upon the lands so far as it is necessary to remove it for the purpose of clearing the land, but only to that extent; and this does not give him the right to cut the timber where it is not done for the purpose of clearing the land, nor does it give him the right to sell the timber, even after he has cut it for the purpose of clearing the land. The title to the timber never passed to Howe. He was not permitted to use any part of it except so much as was necessary for lumber and fence posts on the land. The owners of the land had the right, at any time after they had entered into this contract, to cut and remove the timber themselves, except so much as was necessary for lumber and fence posts for improvements to be made by Howe on the land. Of course, the provision of the contract giving Howe the right to cut the timber for the purpose of clearing the land implied the right to destroy it in order to get it out of the way, so that the land might be cleared if the owners refused to take it off. But he had no right to cut the timber for the purpose of selling it, or to refuse to turn it over to the owner after he had cut it in order to clear the land.

The testimony in this case convinces us that Howe cut the timber for the purpose of selling it, and not for the purpose of clearing the land. The evidence does not show that he was proceeding with any degree of diligence to clear the land, after he had cut the timber, but on the contrary it shows that the matter

of clearing the land was a secondary one with him. The testimony establishes the fact that Howe was insolvent, and unable to respond to appellant in damages. We are therefore of the opinion that the chancellor erred in dismissing the complaint.

The decree is reversed, and the cause remanded with directions to enter a decree in favor of appellant, enjoining the appellee from removing any more timber from the land, except for the purposes indicated in the contract as construed in this opinion.

LINDLEY v. STATE.

Opinion delivered June 28, 1909.

1. CONSTITUTIONAL LAW—ACT RELATING TO SEIZURE OF LIQUORS.—So much of the act of February 13, 1899, as makes it the duty of certain officers to issue a warrant for the seizure of intoxicating liquors, and to destroy same after it shall have been established that such liquors were illegally kept for sale, is not unconstitutional. *Ferguson* v. *Josey*, 70 Ark. 94, followed. (Page 289.)
2. LIQUORS—OVERLAPPING PROHIBITORY DISTRICTS.—Under Kirby's Digest, § 5129, providing in effect that the adult inhabitants residing within three miles of any school house, by complying with its terms, may have the sale of intoxicating liquors prohibited within three miles of such school house, the areas embraced in two or more such prohibitory orders may overlap each other, without impairing the obligation of either order. (Page 289.)
3. SAME—EFFECT OF REVOKING PROHIBITORY ORDER.—An order of the county court revoking an order putting in force the three-mile prohibitory law within certain territory does not affect another prohibitory order then in force, though a part of the same area may have been embraced, in both prohibitory orders. (Page 290.)
4. SAME—THREE-MILE DISTRICT—WHETHER ORDER OPERATIVE IN ANOTHER STATE.—When the point which marks the center of the three miles within which a prohibitory statute has been put in force is less than three miles from the State boundary, only that segment of the circle which is within the limits of the State is affected by the order, and only the adult inhabitants of this State within the territory affected should be considered in determining whether the petition, either for putting in force the three-mile law or for revoking such prohibitory order, contains the requisite majority. (Page 290.)

5. SAME—SUFFICIENCY OF CENTER OF THREE-MILE DISTRICT.—An order putting in force the three-mile prohibitory law in certain territory which describes the school house as a new stone public school house situated in a certain town is not defective because the school is described as being on block 23, instead of block 22, where it is in fact situated. (Page 292.)

Appeal from Fulton Circuit Court; *John W. Meeks,* Judge; affirmed.

STATEMENT BY THE COURT.

On the 6th day of February, 1909, the prosecuting attorney of the 16th judicial circuit of the State of Arkansas instituted separate proceedings against T. B. Lindley and T. V. Marshall, partners under their firm name of Lindley & Marshall, and Joe Lancaster, under the act approved February 13, 1899, alleging that they were engaged in the illegal sale of liquor in a prohibited district, and asked that the same be destroyed. The said Lindley & Marshall and Joe Lancaster answered. They admitted they were engaged in selling the liquors seized in the town of Mammoth Spring in Fulton County, and sought to justify their action by a license to sell the same granted by the county court of said Fulton County, Arkansas, on the 6th day of January, 1909. By consent of the prosecuting attorney and the respective defendants, the circuit court ordered the two proceedings to be consolidated and tried together.

The facts are uncontroverted, and, briefly stated, are as follows: On the 8th day of July, 1905, an order was made by the county court of Fulton County prohibiting the sale or giving away of intoxicating liquors within three miles of the public school house in the town of Mammoth Spring, Fulton County, Arkansas. At its April term, 1908, the county court of said county made an order prohibiting the sale or giving away of intoxicating liquors within three miles of the Mammoth Spring new stone public school house, situated on block 23 in said town of Mammoth Spring. At the general election held in September, 1908, a majority of the votes both in the county of Fulton and in the township in which the town of Mammoth Spring is situated were cast for license.

The new school house was erected in 1908 before the order of the April term, 1908, was made. The two school houses were

within a quarter of a mile of each other. The new school house is situated on block 22 instead of block 23.

At the January term, 1909, the county court of said Fulton County under the statutes applicable thereto duly made an order revoking and nullifying the order of July 8, 1905, aforesaid, and granted license to the said Joe Lancaster and to Lindley & Marshall to run a dramshop or drinking saloon within said town of Mammoth Spring. Their saloons were located within a quarter of a mile of the school house mentioned in the prohibitory order of the April term, 1908, of said Fulton County Court. Both of said school houses were about three-fourths of a mile distant from the boundary line between the States of Arkansas and of Missouri. A majority of the inhabitants living within three miles of each of said school houses resided in the State of Missouri, and they were not considered when said prohibitory orders were made. Upon these facts, the circuit court found that the defendants were engaged in the illegal sale of liquors in said town of Mammoth Spring. Their liquors were condemned and ordered to be publicly destroyed. They have duly appealed to this court.

McCaleb & Reeder and *Morris M. Cohn,* for appellants.

1. The act of Feb. 13, 1899, is unconstitutional. Though this court has heretofore passed upon some questions which relate to the constitutionality of the act, it did not intend to hold that when a sheriff seizes property under a void or illegal warrant his acts are not illegal *ab initio*. Neither will this court say that a general warrant, by whomsoever it may be issued, can justify a sheriff in *seizing* property under it. An act which makes a raid upon a man's property the first step in a legal process is void *in toto*. That the proceeding is civil in form does not change the fact that it denounces forfeitures and penalties of the severest kind. Being civil in form does not determine the true character of the proceeding. 116 U. S. 616; *Id.* 463; 150 U. S. 476; 142 U. S. 560; 3 Wheat. 246; 29 L. R. A. 820; 4 Dillon 128; 28 Kan. 743; 47 Mo. 73. If the statute which provided for it created a forfeiture or penalty for a past offense, it would be clearly *ex post facto*. 4 Wall. 333; *Id.* 277; 16 Wall. 234; 97 U. S. 381; 120 Ky. 737; 106 La. 743; 109 La. 236; 116 U. S. 636. It is unconstitutional in that it provides for unreasonable seizures. Art. 11, § 15; Magna Carta ¶ ¶ 23, 25-28, 35; Barrington, Mag.

Car. 275, 278; 19 Howell's St. Trials 1029; 116 U. S. 625-629; 74 Ark. 302; 69 Ark. 521; 75 Ark. 542; 1 Gray (Mass.) 1; 61 Am. Dec. 381, 384, 385; 65 Ark. 159; 68 Ark. 34; 70 Ark. 329; 74 Ark. 364; 87 Ark. 409; 175 Ill. 101; 13 Gray 454; 99 Mass. 334; 105 Mass. 178; 4 Mich. 125; 68 Mich. 549; 32 Am. Rep. 420; 54 N. H. 164; 25 Conn. 287; 27 Vt. 328. It deprives a man of his property without due process of law. 124 Ind. 308; 61 Am. Dec. 381; 2 Am. Rep. 201; Fed. Cas. No. 5766; 68 Mich. 549; 13 N. Y. 378; 41 S. C. 220; 20 Barb. 168; 82 Ill. 162; 31 How. Pr. 334; 44 Miss. 367; 3 Litt. (Ky.) 37; 10 Wend. 266; 10 O. 31. It conflicts with art. 11, § § 17 and 21, Const. Being unconstitutional, it is not, and never was, a statute; and presence in court, filing a response and contesting proceedings under it does not operate as a waiver. 31 Ark. 701; 43 Ark. 180; 46 Ark. 312; 92 U. S. 531; 50 Ind. 341; 34 La. Ann. 97; 1 Cr. 137; Fed. Cas. No. 18,032; 74 Cal. 112; 6 Pick. (Mass.) 440; 7 N. H. 35.

2. The prohibitory order of July 8, 1905, was in any event effective for two years, and remained, in fact, under the statute, effective until, on a petition of a majority of the adult inhabitants of the district, an order revoking it should be entered. Kirby's Dig., § 5129. A prohibition district thus created is as clearly defined and established as a school district, township or county. 72 Ark. 90; 40 Ark. 290; 41 Ark. 308; 42 Ark. 361; 45 Ark. 458; 56 Ark. 110. The district must be clearly defined by reference to one central point, and takes no note of county limits. 45 Ark. 458; 56 Ark. 110. It was the intention of the lawmakers that a district, when formed, should remain single and unalterable save by legislative enactment, or by petition of a majority of the adult inhabitants therein; and it does not lie in the power of those favoring or opposing license to superimpose one district upon another in whole or in part. 77 Ark. 22; 85 Ark. 306; 73 Ark. 418. The county court's order of January, 1909, revoked the prohibitory order of July, 1905, and thereafter license was issued to appellants. It had jurisdiction, and no appeal was taken. The order is not subject to collateral attack. 55 Ark. 275; 5 Ark. 303; *Id.* 305; 22 Ark. 118; 23 Ark. 121; 31 Ark. 74; 24 Ark. 111; 31 Ark. 175; 50 Ark. 338.

3. The order made at the April term, 1908, forming a district with the new stone public school house on block 23 as a cen-

tral point is void, because (1) That part of the district which was in Arkansas was not composed of an area extending three miles from a central point in all directions. (2) If it did not include such an area, it embraced territory in Missouri. (3) The petition was not signed by a majority within the area. 45 Ark. 458; *Id.* 150; 40 Ark. 290; 59 Ark. 344; 71 Ark. 256; 18 Wall. 457; 161 U. S. 256; 15 C. C. A. 201; 17 *Id.* 138; 36 N. E. 237; 86 Ark. 591; Kirby's Dig., § 5129. The school house mentioned in the order was not on block 23, but there was one on block 22—a material difference. 43 Ark. 150; 40 Ark. 293.

Hal L. Norwood, Attorney General, *C. A. Cunningham,* Assistant, and *C. E. Elmore,* Prosecuting Attorney, for appellee.

1. The county court upon petition of a majority of the adult inhabitants acquired jurisdiction to make the order which it did make at the April term, 1908, prohibiting the sale of liquor within three miles of the "Mammoth Spring New Stone Public School House;" and thereafter it was powerless, for two years, to grant license. Kirby's Dig., § 5129; 40 Ark. 290; 36 Ark. 178; 43 Ark. 361; 35 Ark. 414. The variance in description as to the location of the school house is not sufficient to avoid the order. The statute does not require the petition to describe upon what block or lot a church or institution of learning is situated, but it is sufficient to describe it as an academy, college, university or institution of learning, by whatever name it may be known in the community, so as to identify it with reasonable certainty. Kirby's Dig., § 5129; 36 Ark. 178; 31 Ark. 574.

2. This court has already held the act to be constitutional. 70 Ark. 94; 77 Ark. 439 and cases cited; 72 Ark. 171; Black on Intox. Liquors, § 53 and cases cited; 73 Ark. 163.

3. The statute *supra* refers to adult inhabitants of this State. Citizens of Missouri are not concerned in our police regulations, and have no voice therein.

4. No appeal was taken from the order of April, 1908, and it stands in any event for two years. It cannot be collaterally attacked in this proceeding, and the grant of license in January, 1909, was without authority and void. 71 Ark. 17; 43 Ark. 361; 35 Ark. 414; 5 Ark. 303; 5 Ark. 305; 22 Ark. 118; 23 Ark. 121; 24 Ark. 111; 31 Ark. 175; *Id.* 71; 50 Ark. 338; 55 Ark. 275.

HART, J., (after stating the facts). 1. It is earnestly insisted by counsel for appellants that the act of February 13, 1899, under which the proceedings complained of were instituted, is unconstitutional. No useful purpose can be served either by discussing the reasons given by learned counsel in support of their contention, or in reviewing the authorities cited by them; for this court has heretofore deliberately decided that that part of the act which makes it the duty of certain officers to issue a warrant for the seizure and destruction of intoxicating liquors when, after notice to and hearing of claimants, it shall be established that the liquors seized were illegally kept for sale, is not unconstitutional. *Ferguson* v. *Josey*, 70 Ark. 94; *Kirkland* v. *State*, 72 Ark. 171; *Osborne* v. *State*, 77 Ark. 439.

2. Counsel for appellants also insist that the license issued to the appellants were properly granted. The record shows that the old public school house, mentioned as the center of the circular area of the prohibitory order of 1905, and the new public school house, named as the center of the prohibitory order of 1908, are only a quarter of a mile distant from each other. Therefore, counsel argue that, because the areas embraced in the two prohibitory orders overlap each other, the order made in 1908 was of no effect, and that, the order of 1905 having been revoked, the county court properly granted to appellants licenses for the sale of liquor. We can not agree with their contention.

In the cases of *Robinson* v. *State*, 38 Ark. 641, and *Edgar* v. *State*, 45 Ark. 356, this court held that the retailing of spirituous liquors is not a natural right, and that persons engaging in it must submit to such terms, regulations, and burdens as the Legislature may impose for the public good.

Sec. 5129 of Kirby's Digest provides in effect that the adult inhabitants residing within three miles of any school house, by complying with the terms imposed by the act, may put in force the statute that prohibits the sale of intoxicating liquors within three miles of such school house. Thus it will be seen that the act contemplates that the whole State may be covered by orders putting in force the three-mile statute. Manifestly, this could not be done unless the circular areas could overlap each other. There is nothing in the opinion in the case of *Williams* v. *Citizens*, 40 Ark. 290, that contravenes this construction of the stat-

ute. It was held in that case that it was a statutory proceeding, and that it could not be extended beyond its prescribed limits. The opinion, in effect, holds that it was the legislative intent, as plainly expressed by the terms of the act, to prohibit the sale of liquor within a territory covered by radii extending in all directions three miles from a center marked by a school house or other institution of learning, or by a church house; and that the designation of two points as centers in the same order could not be done because it would either lessen or make greater the area.

The object of the statute, as plainly expressed by its terms, was to prohibit the liquor traffic within certain defined areas in any part of the State. It was the evident intention of the Legislature to make the act applicable to all parts of the State alike. Obviously, the act could not be put in force in all parts of the State if the circular areas could not overlap each other. The revoking of one prohibitory order by the county court in compliance with the petition of a majority of the adult inhabitants residing within the limits of that territory does not revoke a separate prohibitory order which puts in force the statute in a part of the territory embraced in the former. In other words, an order of the court revoking a prohibitory order only means that the particular prohibitory order annulled no longer puts in force the three-mile statute, but it does not affect another prohibitory order putting in force the three-mile statute, although a part of the same area may have been embraced in both prohibitory orders. It follows, then, that the prohibitory order made in April, 1908, not having been revoked or annulled, is still in force, and by its terms extends over the territory in which the appellants had their place of business for the sale of liquors, and they are not protected by the license granted to them by the county court.

3. The record shows that the school house named as the central point of the area in which the sale of liquor was prohibited in the order made in April, 1908, was only three-fourths of a mile distant from the boundary line between the States of Arkansas and of Missouri; and that a majority of the adult inhabitants residing within the three-mile radii extending in all directions from the central point resided in the State of Missouri, and were not taken in account in making the prohibitory order which put the statute in force. Hence counsel argue that the statute was not put in force by the order.

It has been repeatedly held by this court that it is not the order of the county court, but the act of the Legislature, which prohibits the sale of the liquor within the prescribed area; and for this reason, in the case of *Wilson* v. *Thompson,* 56 Ark. 110, it was held that county lines would not be considered in the proceeding for putting the statute in operation. Here the case is different. It is not a question of county lines but of State boundaries.

"Statutes derive their force from the authority of the Legislature which enacts them; and hence, as a necessary consequence, their authority as statutes will be limited to the territory or country to which the enacting power is limited. It is only within these boundaries that the Legislature is lawmaker, that its laws govern people, that they operate of their own vigor on any subject." 1 Lewis' Sutherland, Statutory Construction, § 13, and cases cited.

It follows, therefore that the Legislature of the State of Arkansas could not pass an act prohibiting the sale of liquors in the State of Missouri.

"It is so unusual for a Legislature to intend that its acts shall have such world-wide effect that courts are never justified in putting such construction upon them if their language admits of any other reasonable interpretation." *State* v. *Lancashire Insurance Co.*, 66 Ark 476.

Section 7792 of Kirby's Digest provides that "all general provisions, terms, phrases and expressions used in any statute shall be liberally construed, in order that the true intent and meaning of the General Assembly may be fully carried out." Applying these canons of construction, it will be readily seen that the Legislature only intended that the three-mile law should be effective in the State of Arkansas, and that the territory embraced within the radii extending in all directions from the central point should be territory embraced within the boundaries of the State of Arkansas. The areas thus formed, except when the central point is at or within the three miles of the State boundary, are in the form of circles, but the form is merely descriptive of the territory embraced in the prohibited limits. When the point which marks the center is less than three miles from the State boundary, only that segment of the circle within the limits

of the State is affected by the order, and the adult inhabitants of this State only should be considered in determining whether the petition, either for putting in force the three-mile law or for revoking such prohibitory order, contains the requisite majority.

It is also insisted that the order of April, 1908, is not effective because the new stone school house named as the central point was described as being on block 23, instead of block 22, where it is in fact situated. The school house is described as being situated in the town of Mammoth Spring in Fulton County, Arkansas; and it is further described as a new stone public school house. It was not necessary to mention the number of the block on which it was situated. It was sufficient to describe it in the language of the statute with such reasonable certainty as to identify it as the point marked from which the radii were to extend in designating the territory to be embraced in the order. *Blackwell* v. *State*, 36 Ark. 178.

The case having been submitted and decided upon its merits, it is not necessary to pass upon the rights of appellant for a restraining order, pending the appeal, which was also submitted.

The judgment will be affirmed.

GRIFFIN v. ANDERSON-TULLY COMPANY.

Opinion delivered July 12, 1909.

1. TIMBER AND TREES—RIGHT TO REMOVE TREES CUT.—Under a contract for the sale of growing timber whereby the grantee is authorized to cut and remove timber within a certain period of time, the title to timber cut by the grantee within such period, but not removed from the land, passes to such grantee, together with a right for a reasonable time thereafter to remove them. (Page 296.)
2. PLEADINGS—AMENDMENTS TO CONFORM TO PROOF.—Where evidence is introduced without objection upon an issue not raised by the pleadings, they will be considered as amended to conform to such proof. (Page 297.)
3. SALE OF TREES OF CERTAIN SIZE—DATE OF MEASUREMENT.—Where a timber deed conveyed "all of the cottonwood trees 20 inches in diameter and up at the stump now standing or located" on certain described land, and fixed the time of removal as five years, the title passed only

to those trees which measured the required size at the date of the contract, and not at the date of their severance. (Page 297.)

4. APPEAL AND ERROR—CONCLUSIVENESS OF MASTER'S FINDINGS.—Where, by consent of the parties, the facts of a chancery case are referred to a master for determination, his findings are as conclusive as the verdict of a jury. (Page 298.)

Appeal from Chicot Chancery Court; *Zachariah T. Wood,* Chancellor; affirmed.

J. R. Parker, for appellants.

1. The evidence sustains the findings of the master, and his findings are as conclusive as the verdict of a jury. 85 Ark. 414.

2. The contract specified "all of the cottonwood trees 20 inches in diameter and up at the stump *now* standing or located on the following lands." It is plain and unambiguous, and the size specified referred to the time the contract was executed. 55 L. R. A. 513; *Id.* 524 and notes.

Brown & Anderson, for appellee.

1. The cross-complaint tenders no issue as to timber cut in violation of the contract, *i. e.* under 20 inches in diameter on the 8th day of May, 1902. It nowhere sets up any claim for such timber nor sues for the value of same. The only injury complained of was the removal, after May 8, 1907, of timber which had been cut prior thereto but had not been removed before the expiration of the contract. The only relief prayed for is that all of said cottonwood trees be turned over to the defendants. There is not even a prayer for general relief. 22 Ark. 227; 4 Ark. 302; 25 Ark. 570; 30 Ark. 612; 29 Ark. 500; *Id.* 637.

2. The court erred in its interpretation of the contract in limiting appellee's right to cut only such timber as was 20 inches in diameter and over on May 8, 1902, the date the contract was executed. Properly construed, appellee was given the right to cut timber of such diameter any time within five years from the date of the contract. 39 S. W. 428.

3. The court erred in overruling appellee's exceptions to the master's report and in giving judgment for 76,605 feet of timber in addition to the 174,178 feet shown by the estimate of S. F. Horner. There is no evidence to justify such report of the master.

J. R. Parker, for appellant in reply.

The cross-complaint is sufficient to tender an issue as to timber cut in violation of the contract, especially when considered in the light of the proof. If defectively stated, the appellees might have moved before trial to make the cross-complaint more definite and certain; but pleadings will be treated by this court as amended to conform to the proof where no exception has been saved to the introduction of the proof. 76 Ark. 551; 77 Ark. 1; 75 Ark. 181; 73 Ark. 8; 71 Ark. 562; 70 Ark. 161; 67 Ark. 426; 67 Ark. 455; 65 Ark. 422.

HART, J. The foundation of this suit is the following contract:

"For and in consideration of the sum of three thousand five hundred ($3,500) dollars, cash in hand paid to us by L. W. Snyder, agent for Anderson-Tully Company, the receipt whereof is hereby acknowledged, we, T. K. Lee and J. P. Alexander, described herein as parties of the first part, bargain, sell, convey, transfer and warrant unto Anderson-Tully Company, known herein as parties of the second part, all of the cottonwood trees twenty inches in diameter and up at the stump now standing or located on the following described property, what is known as the Florence Plantation, Chicot County, State of Arkansas, commencing at west line of the Tecumseh Plantation, running to Adams place on the east, the levee is the north line, Mississippi River and Wailer place is the south line. The party of the second part, or assigns, shall have the full, free and undisturbed right of entry on and into said lands for the term of five years from this date to cut, raft and carry away said trees sold to them. Parties of the second part shall have the right with their employees to go in and upon said land and to use and occupy same for such necessary and useful purposes, in order to cut and carry away said cottonwood timber. Also small trees necessary for rafting timber for towing. All the rights herein granted to said Anderson-Tully Company shall include their heirs and assigns.

"In witness whereof the parties have hereunto signed their names, this 8th day of May, 1902.

"Anderson-Tully Company, parties of the second part, agree and bind themselves not to hire any of T. K. Lee and J. P. Alex-

ander's (parties of the first part) plantation laborers, without first consulting parties of the first part, or their agents, and securing their consent thereto.

(Signed) "T. K. Lee,
"J. P. Alexander.

"Witnesses:
"John M. Parker,
"H. W. Langer."

A complaint was filed by the Anderson-Tully Company, a Michigan corporation, in the Chicot Chancery Court, against J. W. Griffin, T. K. Lee and J. P. Alexander Company, Limited, a Louisiana corporation, it being alleged that these defendants had purchased the lands mentioned in the contract since the date of its execution.

On the 8th day of May, 1907, a large number of the trees from said land had been felled and cut into logs; but the logs had not been removed from the land. The amount was estimated to be 400,000 feet. The plaintiff alleged that it had not been able to remove the same on account of high water, and the object of this action was to enjoin the defendants from interfering for a reasonable time with its servants and employees in removing the logs.

A temporary injunction was granted which by the final decree was made perpetual. The defendants answered, denying the title of the plaintiff to the logs remaining on the land at the date of the expiration of the contract, and by way of cross-complaint alleged that the plaintiff had cut a lot of timber, which was under the size of the trees conveyed. They asked that the plaintiff be enjoined from removing any of the timber until their rights could be determined, and that a master be appointed to take an account of the amount of timber cut, which was under the size mentioned in the contract.

By agreement of the parties to the suit, R. D. Chotard, the clerk of the court, was appointed special master to ascertain the amount of cottonwood timber cut on said land by plaintiff and appropriated to its use, which was not embraced in the terms of the contract above set forth. He was given power to summon witnesses and take all necessary proof to ascertain that matter.

The master reported that 250,683 feet of cottonwood logs, less than 20 inches in diameter at the stump at the date of the

execution of the contract, were cut upon the land described in the contract, and that the price of said logs was the sum of $877.39. The report was confirmed by the court, and a decree was entered, in accordance with the report, against the plaintiff in favor of said defendants for said sum of $877.39, with six per cent. interest per annum thereon from the date thereof, viz., April 10, 1909, until paid.

Both the plaintiff and defendant introduced evidence tending to sustain their respective contentions, and both have appealed from that part of the decree against them.

This court decided in the case of *Indiana & Arkansas Lumber & Manufacturing Co.* v. *Eldridge,* 89 Ark. 361, that under a contract for the sale of growing timber, whereby the grantee is authorized to cut and remove timber within a certain period of time, the title to timber cut by the grantee within such period, but not removed from the land, passes to such grantee. Under this decision, the plaintiff owned all the trees embraced within the terms of its contract which had been severed from the soil and cut into logs at the date of the expiration of its contract, and had a right for a reasonable time thereafter to remove them. The evidence shows that at the time the final decree was entered these logs had been removed. Hence the question of whether the court was right in its decree as to the injunction passes out of the case. The logs belonged to the plaintiff, and it removed them before the final decree was entered. The appeal from that part of the decree is therefore fruitless, and the court will not consider whether it was right or wrong. *Wilson* v. *Thompson,* 56 Ark. 115.

Counsel for plaintiff urges that no issue was raised by the cross-complaint as to a violation of the contract by cutting timber under twenty inches in diameter. The following paragraph appears in the answer and cross-complaint:

"Defendants charge that said plaintiff has violated said contract with the defendants by cutting and carrying away about 400,000 feet of cottonwood trees that were less than twenty inches in diameter on the 8th day of May, 1902, the day of their contract; that said 400,000 feet of cottonwood timber is worth $3,000."

The prayer of the answer and cross-complaint is as follows:

"Wherefore defendants pray that the writ of injunction heretofore granted be dismissed, set aside and naught held, and that defendants be granted an injunction against plaintiffs from removing any of said cottonwood logs until the title of said logs is adjudicated by this court. Defendants pray that if the court refuses to dissolve said injunction granted to the plaintiffs, and also refuses to grant an injunction enjoining the plaintiffs from removing said logs, then the defendants pray the court to appoint a receiver or master to take an accounting of said logs and report the same to the court at its November term, 1907. Defendants further pray that, if the court refuses to dissolve said injunction granted to the plaintiffs, the court require the said plaintiffs to give an additional bond in the sum of $10,000. Defendants pray, upon a final hearing of this cause, that all of said cottonwood logs be turned over to them or the plaintiffs be made, by the judgment of this court, to pay full market value for same to defendants, the sum of $6,000."

The defendants and cross-complainants asked for an accounting of the logs taken in violation of the contract, and for judgment for the amount so found. We think this was sufficient to raise the issue. Moreover, proof on this issue was introduced by both sides without objection. In such cases it is the uniform holding of this court that the pleadings will be considered as amended by us to conform to the proof. *Roach* v. *Richardson,* 84 Ark. 37, and cases cited; *White River Ry. Co.* v. *Batesville & Winerva Telephone Co.,* 81 Ark. 195; *Hurley* v. *Oliver, post* p. 427.

Counsel for plaintiff earnestly insist that the question of the size of the trees should be determined as of the date of the cutting, and not as of the date of the contract. In short, they urge that no regard should be taken of the growth of the trees from the time of making the contract until the time of cutting. In support of their contention, they cite the case of *Bryant* v. *Bates* (Ky. App.) 39 S. W. 428. In that case, without any discussion, the court said that plan of measurement was proper because there was no practicable way to ascertain the growth of the tree from the time of the contract and the time it might be cut under the contract. In that case the trees were oak, gum and ash, trees of slow growth, and the time of removal three

years. In the present case the time of removal was five years, and the trees were cottonwood, which grow at the rate of one or one and one-half inches each year. The language of the contract describing the trees sold is as follows: "All of the cottonwood trees 20 inches in diameter and up at the stump now standing or located on the following described property. (Here follows description of land.)" Thus it will be seen that the title passed, according to the plain and express terms of the contract, only to those trees which measured the required size at that date, and not at the date of their severance. The identification of the trees by specifying their size tends to show that the intention of the parties was to include such only as at the time the contract was made answered the description. Their diameter at that time was capable of definite ascertainment. The parties, being timber men, knew that cottonwood was of quick growth, and no doubt knew what would be its probable growth in five years. The soil was extremely rich, and on that account the growth would be quicker. It is not to be presumed that the owner intended to convey that growth unless he expressly did so by the terms of his conveyance. If the purchaser wished to be saved the trouble and expense of measuring and marking the trees at the time of the sale, it should have secured a clause in the contract fixing then the measurement at the time when cut or severed from the soil. This is in accordance with the well-established general rule of the construction of contracts, as well as with the majority of adjudicated cases on this particular subject. 28 Am. & Eng. Enc. Law (2d Ed.) p. 542 and cases cited; note to case of *McRae* v. *Stilwell,* 55 L. R. A. 524.

The record shows that at the April term, 1908, of the Chicot Chancery Court, by consent of all parties, R. D. Chotard was appointed master to determine what amount of cottonwood timber under the size specified in the contract had been cut by the plaintiff on the lands described therein. He was directed to summon witnesses and to take all necessary proof to ascertain that fact. Under such circumstances, his findings of facts are entitled to the same conclusiveness as is given the verdict of a jury or the findings of fact by a court sitting as a jury. *Paepcke-Leicht Lbr. Co.* v. *Collins,* 85 Ark. 414; *Greenhaw* v. *Combs,* 74 Ark. 338.

It is next objected by counsel for plaintiff that there is no evidence to sustain his findings as to a part of the timber. In other words, they contend that some of the timber was estimated twice.

G. F. Horner was one of the witnesses for the defendants. He testified that he made estimates of the amount of cottonwood under 20 inches in diameter on the land described in the contract twice. He said that the first time he only made an estimate of the timber on the north part of the land because at that time he thought the timber on that part was all that was in dispute. The second time he only measured the timber on the remainder of the land. The findings of the master as to the amount of timber on the land under 20 inches in diameter at the stump is warranted by his testimony and by the testimony of other witnesses tending to corroborate it. Of course, this evidence is contradicted by the witnesses for the plaintiff. But because the finding of the master in this regard must be sustained under the rule above announced it will not be necessary for us to set out the evidence on this point.

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

SIDLE v. MICHARK MANUFACTURING COMPANY.

Opinion delivered July 12, 1909.

1. TIMBER AND TREES—RIGHT TO FLOAT LOGS.—Under a deed conveying to the grantee the timber on certain land and authorizing such grantee to enter for the purpose of removing the timber, the grantee is authorized to float the logs out upon a watercourse upon the land, and for that purpose to dam such watercourse temporarily, provided the grantor is not injured thereby. (Page 302.)
2. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—A chancellor's finding of facts will not be disturbed on appeal unless clearly against the preponderance of the testimony. (Page 303.)

Appeal from Crittenden Chancery Court; *Edward D. Robertson,* Chancellor; affirmed.

J. P. Holt, for appellant.

The complaint neither discloses a clear right to the maintenance of the dam nor to an injunction to restrain the cutting. The sole ground alleged for equitable relief is the impossibility of ascertaining damages at law while defendant at the same time is admitted to be solvent. The mere further allegation of "irreparable injury" is not sufficient. No proper ground for equitable cognizance of the action is shown. 2 Beach on Injunctions, § 1126; *Id.* § 1131; *Id.* § 1166; 23 Conn. 421; 26 Fed. 884; 1 Beach on Inj., § § 20, 21. Plaintiff had neither contractual nor legal right to build the dam—no right which had been or was about to be disturbed—hence no right to invoke the aid of the chancery court by way of injunction. The rule is that an injunction will be refused where the injury may be greater from the granting than from the refusal of it. 7 How. (U. S.) 650; 23 Conn. 427; 60 Me. 192; 1 Mont. 561; 22 N. J. Eq. 25; 18 N. J. Eq. 293; 76 N. C. 407; 16 Am. & Eng. Enc. of L. 363-4; 20 Ch. D. 595; 4 Blatchf. (U. S.) 70; 24 N. J. Eq. 277; 29 Abb. N. C. (N. Y.) 384; 2 Tenn. Ch. 238. The terms of a license cannot be extended nor varied. 57 Am. Dec. 295; 35 N. H. 563; 62 Barb. 311; 18 Am. & Eng. Enc. of L., 1139.

J. F. Gautney, for appellee.

1. Having purchased the timber upon the lands and the right to make use of same for operating a logging business, appellees were under no obligation to appellant further than to so use his land as not to injure such as was in cultivation. The manner of the use is not restricted except as to land in cultivation. The term "logging plant" includes tramways, fixed and movable machinery, engines, vehicles, carts, stages, scaffoldings, pumps, dams, etc. 25 Ont. 417-421. Appellees had the right to use the water, and this right implies the right to control or detain it to a reasonable extent by means of dams and other agencies. 79 Am. Dec. 636; and note; 42 Md. 442; 7 H. L. 697; 14 Eng. Rep. 86; 39 Am. Dec. 391; 7 *Id.* 373; 57 *Id.* 85, 89-90; 18 Am. Rep. 102.

2. Injunction afforded the only complete and adequate remedy. 5 Wall. 74-80 (18 L. Ed. 580); 33 O. St. 544; 18 Mich.

196; 39 N. H. 186; 1 Md. 525; 26 Miss. 84; 27 N. J. Eq. 364; 11 Ga. 246; 3 Jones Eq. (N. C.) 179.

HART, J. M. C. Townley, Geo. C. Peters and E. L. Pierce, partners under their firm name of Michark Manufacturing Company filed their complaint in the Crittenden Chancery Court against W. M. Sidle to enjoin him from further injuring or attempting to destroy a temporary dam they had erected on the real estate described in the complaint. The complaint was filed on the 10th day of March, 1908, and in substance alleges that the Pierce-Williams Company, a Michigan corporation, had purchased from the defendant and other landowners all the timber on the lands described in the complaint, and had received deeds therefor; that the Pierce-Williams Company had conveyed by deed all its right and interest to the plaintiffs. The deeds, omitting the formal parts, contain, among others, the following covenant: "We further grant to the said Pierce-Williams Company and to their successors and assigns the free right of ingress and egress to and from said land over any other land owned by us or either of us (except land in cultivation) for the purpose of removing said timber or the products thereof to the railroad to the St. Louis & San Francisco Railroad Company, or for the purpose of operating a logging or manufacturing business on said land." That, pursuant to the terms of said timber contract, plaintiffs had cut about 300,000 feet of cypress logs. That they had constructed in a slough or watercourse upon said lands a temporary dam for the purpose of enabling them to float said logs to a point where they could be conveniently removed and loaded upon the cars. That on the 29th day of February, 1908, the defendant cut and destroyed said dam, thereby disabling plaintiff from further floating said logs. That defendant has threatened to again cut said dam if it is rebuilt, and that unless he is restrained from so doing he will completely demolish and destroy said dam.

A temporary injunction was granted restraining defendant from further interference with the dam.

The defendant admitted cutting the dam, but interposed as set out by his counsel in his abstract the following defenses, viz:

First. That the dams in question were a nuisance, both of a public and private nature.

Second. That the plaintiffs had no right, by contract or otherwise, to erect said dams or maintain them. That said dams were not temporary dams as alleged, but were intended to stand either permanently or long enough to inflict irreparable injury upon defendant.

Third. That the dams flowed the water back upon him and rendered his lands unfit for cultivation.

Upon final hearing of the cause, the chancellor found the issues in favor of the plaintiffs; and a decree was entered perpetually restraining defendant from destroying or attempting to destroy the temporary dams of the plaintiffs on the real estate described in the complaint and set forth in the decree.

The defendant has appealed.

By the terms of the deeds the title to the timber on the lands in controversy became vested in the plaintiffs. In express terms, they were given the free right of ingress and egress for the purpose of removing said timber or the products thereof. The only exception made to this grant was that they should not for this purpose use the cultivated lands. The clause in the deed above quoted, we think, gave plaintiffs the right to float the logs out upon the watercourses upon the lands, as well as to haul them away by land. The only restriction would be that they must not injure the defendant in so doing.

It is claimed by the defendant that the dam caused the water to rise in the slough, and that it was thus backed over his adjoining lands, overflowing those in cultivation and preventing him from clearing other land; for which he already made a contract.

On the other hand, the plaintiffs claim that the dam was so constructed that it could only raise the water five inches, and that when it rose higher than five inches it would flow over and around the edges of the dam. They claim that it was necessary for them to raise the water in the slough five inches in order that they might at all times have sufficient water to float the logs. They adduced testimony tending to establish their contention, and to show that they had carefully measured the stage of the water before and after the dam was constructed, and that after the dam was constructed the water was never raised more than five inches; that the opening left at the ends was sufficient to carry

away all water in times of flood in excess of that. Their evidence also tended to show that they had examined the lands of the defendant after the erection of the dam, and that the water had not been raised sufficient to overflow or to injure them.

The evidence for the defendant contradicted their testimony, but the chancellor found the issue in this respect in favor of the plaintiffs, and we can not say that his findings are against the weight of the evidence.

It has been so often held that a chancellor's finding of fact will be sustained on appeal unless against the preponderance of the evidence that a citation of any adjudicated cases on that point is not necessary. No useful purpose could be served in setting out in detail the evidence on the facts. It is sufficient to say that we have carefully examined it.

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

REED v. DONIPHAN LUMBER COMPANY.

Opinion delivered July 12, 1909.

LEGAL ADVERTISEMENTS—PUBLISHER'S FEE.—In the absence of any stipulation to the contrary, a publisher of a legal notice is entitled to charge the maximum rate fixed by Kirby's Digest, § 4921.

Appeal from Cleburne Chancery Court; *George T. Humphries,* Chancellor; reversed.

STATEMENT BY THE COURT.

The Doniphan Lumber Company brought suit in the Cleburne Chancery Court to quiet title to certain lands in said county, and employed Howard Reed, editor and publisher of *The Jacksonian,* to publish two legal notices in connection therewith. On December 17, 1907, he furnished its attorneys, at their request, proofs of publication without first receiving his pay for

said services. On October 30, 1908, the Doniphan Lumber Company filed its motion in said court, alleging that Howard Reed had charged an exorbitant price for said publication, and moved the court to tax and liquidate the amount which should be paid for said services.

To this motion appellant filed his response to the effect that in August, 1907, appellee employed him to publish the notices in question for seven weeks; that they amounted to 2,870 lines of nonpareil type, or 287 squares of 268 ems each; that his charge for said publication was $1,148 or $1 per square for first insertion and fifty cents per square for each subsequent insertion; that on the 17th day of December, 1907, he delivered proofs of publication to appellee's attorney, informing said attorney that his bill was $1,148 and praying the court to allow him for said publications the sum of $1,148, with interest at 6 per cent. per annum from December 17, 1907.

The evidence on behalf of appellee tended to show that its agent employed appellant to print two notices for publication; that at the time appellee delivered the notices to appellant for publication nothing was said about what the charges would be. The agent did not know what appellant had charged appellee for printing former notices, and did not ask what the charges would be for printing the two notices for which the charge in suit was made. One witness who had been in the newspaper business since 1875 testified: "that $500 would be a big price for publishing the notices; that if he had the opportunity to do such a job $500 would be his bid." But this witness further testified that $1,148 would be the legal rate for publishing the notices referred to. He further testified that the usual price for publishing reading notices was five cents per line. Another witness for appellee, who had been in the newspaper business since 1876, testified that $355 would be a liberal price for publishing the notices in question. His bid would not have exceeded that sum where he made the contract before the work was done. It was not his custom to charge the maximum rates for legal advertisements, which for the notices in question would have been $1,148, the sum appellee charged. He charged five cents a line for reading matter known as pay locals. On the other hand, four witnesses, who were newspaper men of long experience,

testified that they would have charged the sum of $1,148 for such notices; that such was their regular or fixed price to their patrons for such notices. These witnesses show that, unless a contract is made at a certain price in advance by bid or otherwise, the usual price is the legal rate, which makes the amount charged by appellant. The evidence shows that for ordinary reading matter most publishers charge about one-third more than the maximum price fixed by law for legal notices.

The appellant testified in part as follows: "Shortly after the first publication, I informed W. L. Thompson, who was the attorney for the Doniphan Lumber Company, that the bill would amount to $1,208, but I made a mistake in my calculation, and afterwards informed him that it was $1,148. At neither of these conversations did he object to the price charged. During the December term of the chancery court, 1907, W. L. Thompson prepared a special affidavit for proofs of publication, to which I attached copies of said notices and made proof of publication of same. I delivered these proofs of publication to W. L. Thompson, and he received them, and at that time I told him my bill was $1,148, to which price he made no objections at the time, but stated to me that the company had made no provisions for paying the same, and asked me if I would let him have the proofs without payment. I told him that I did not ordinarily deliver proofs of publication without receiving pay for same, but as the company had several thousand acres of land in the county, I considered them good for the amount, and gave him the proofs of publication, and when he received them he well knew the amount of my charge. Ever since I have owned and published *The Jacksonian,* I have charged the same rate for publishing legal notices that I charged the Doniphan Lumber Company, with one or two exceptions, and then there was a special agreement for a less price. In October, 1906, I published two notices for the Doniphan Lumber Company on the patent side of my paper, for which I charged the same rate that I charged in the above mentioned notices. These two notices amounted to $186, which the Doniphan Lumber Company paid. In May, 1906, I published three notices for the Doniphan Lumber Company under a previous agreement of 50 per cent. of full legal rate, or the rates charged for the notices above mentioned. The notices

consisted of two large notices and one small one, and by our agreement the Doniphan Lumber Company took their copy to the newspaper house in St. Louis which was furnishing me my patent sheet, had it printed by that company on the patent sheet, proof read the copy of the same, and relieved me from all liability of error that might occur in the publication. These notices amounted, I now remember, to $376. In order to have sufficient room for the notices in question, it became necessary for me to enlarge my paper from a 7-column 4-page paper to a 6-column 8-page paper, and, in order to insure the receipt of the paper in time, I went to Little Rock and procured another house to furnish the paper to me, superintending the setting of the type, and proof read the same myself, paying an additional expense for said paper of about $1.25 per week.

"The amount of money expended in accomplishing the publication referred to, in addition to what it would have cost to publish a like paper if these publications were not inserted, was less than $100. I would not have enlarged my paper at the time I did had it not been for these notices. At the time I delivered the notices to Mr. Thompson, I knew he was attorney for the Doniphan Lumber Company, and had previously delivered him notices of like character for said company, which were not paid for at the time of delivery, for which I had charged the same rate of publication that I did for these notices, which were afterwards paid for by the Doniphan Lumber Company. I would not have delivered the proofs of publication to Mr. Thompson had I supposed that my bill for publishing the same would have been questioned, or that I would have had to wait any considerable length of time for my pay. The price I charged for this work is less than my regular price charged my regular customers for the same amount of matter set in the regular reading type of my paper and published for the length of time these notices were published. I set the reading matter of my paper in 10-point type, or what is commonly known as long primer, and, had this matter been set in 10-point type as I set my ordinary paid advertisements, it would have made 4,476 lines, for which I would have charged any of my patrons 5 cents per line for each insertion, which would have amounted to $223.80 per week, or $1,566.60 for seven weeks."

The court decreed that appellant, Howard Reed, have and recover from Doniphan Lumber Company the sum of $750 with interest on said amount from December 17, 1907, at the rate of 6 per cent. until paid.

To which ruling and decree of the court the respondent, Howard Reed, excepted and prayed an appeal to this court.

George W. Reed, for appellant.

The construction of the statute involved in this case is one of first impression in this court. Clearly, under it (Kirby's Dig., § 4921) appellant was entitled to receive the amount charged, and was limited to that amount as a maximum reasonable charge, in the judgment of the Legislature. Without such publication and proof thereof appellee's title could not have been confirmed. Kirby's Dig., § § 662, 664, 4924. When the publication was made at appellee's request, and proof thereof received without objection to the charge therefor, there was an implied agreement to pay for it at the maximum rate allowed by statute. Legislative construction justifies this assumption and construction of the above act. Compare Acts 1907, pp. 1256-1258; *Id.* 547; Kirby's Dig. § § 710-11; Acts 1909, No. 10. Kirby's Dig., § 4919, does not apply in *ex parte* proceedings. It contemplates just what is says, *i. e.,* that the party procuring the notice shall pay for it.

S. Brundidge, Jr., for appellee.

Where no contract is claimed by either party, and the testimony shows that there was none, there can be no recovery except upon a *quantum meruit.* Appellant can recover only such sum as is reasonable under the testimony. 105 U. S. 1028; 72 Tenn. 494; 56 N. E. 655.

WOOD, J., (after stating the facts). Section 4919 of Kirby's Digest provides: "When any notice or advertisement relating to any cause, matter or thing in any court of record shall be required by law or the order of any court to be published, the same when duly published shall be paid for by the party at whose instance it was published, which payment, or so much thereof as is deemed reasonable, may be taxed as other costs otherwise allowed by the proper courts in the course of the proceedings to which such advertisement relates."

Section 4921 provides: "When any law, proclamation, advertisements, order or notice shall be published in any newspaper for the State or for any officer on account of the State, or for any county or for any officer on account of any county, or for any legal advertisement for any individual, there shall not be allowed for such publication a higher rate than one dollar per square of ten lines (two hundred and sixty-eight ems) of nonpareil type for the first insertion, and fifty cents per square for each subsequent insertion, fractional squares and parts of squares to be counted as whole squares."

Neither of the above sections prevents any individual at whose instance any legal notice is published from contracting with the publisher to publish such notice at any price they may agree upon. And, as between the individual and publisher, the contract would be binding upon them. The individual in a suit between him and the publisher would be liable for whatever amount he had contracted to pay for the publication. The provisions of the statute were not intended to limit the power of any private individual to pay any amount he might contract to pay for any legal publication that was made at his instance. Section 4919 clearly indicates that, as between the individual at whose instance the publication is made and the publisher, they are left to contract for any amount they may agree upon, which amount the individual having the publication made shall pay. But, after he shall have paid it and asks to have amount so paid by him taxed as other costs by the courts in the course of the proceedings to which such advertisement relates, then the court shall not allow for such publication a higher rate than that prescribed by section 4921, *supra,* which sum the lawmakers evidently deemed a reasonable charge for the character of work prescribed. For it will not be presumed that the Legislature fixed as a maximum charge an unreasonable amount. Taking the two sections together, we are of the opinion that section 4921 was a declaration by the Legislature of the sum that it deemed reasonable for the court to allow as costs wherever the party at whose instance the publication was made had paid that or a larger sum. In other words, under the statute, when fixing the sum paid for legal publication as costs, unless the sum so paid exceeded the amount authorized to be charged by section 4921, *supra,* it could not be held unreasonable.

Appellant has submitted without objection to having the amount claimed by him for publishing the notices taxed as costs in the chancery proceeding to confirm; otherwise the court would have had no jurisdiction. Treating the case as the parties have treated it as a motion to tax as part of the costs in the suit to confirm the claim of appellant against appellee, we are of the opinion that under the statute the court should have adjudged the cost of the publication of the notices at the sum claimed by him in his response to the motion, which sum was the amount authorized under the provisions of the statute *supra*.

But, if the statute authorizes the court to fix any amount it may deem reasonable under the amount prescribed by section 4921, as contended by the appellee, we are then of the opinion that the finding of the court as to what was a reasonable sum was against the clear preponderance of the evidence. For it was not unreasonable that appellant should charge for his services the regular and customary price charged and paid for such work. It would be unreasonable to expect or require appellant to receive less for his work than others engaged in similar business would have charged appellee for the same work under the same circumstances. Yet, according to the clear preponderance of the evidence, that is what the decree of the chancellor does. For, judging by the record, a great majority of the publishers would have charged the same as appellant.

In the absence of any express contract, appellees must be held to have impliedly agreed, when it requested appellant to do the work for it, that it would pay the regular and usual price. The evidence tends strongly to show that appellee knew from previous transactions with appellant what the price would be and made no objections to it. The decree is reversed and remanded with directions to enter a decree taxing the cost of the publication of the notices at the sum of $1,148, with interest on same at 6 per cent. from December 17, 1907.

CAPITAL FIRE INSURANCE COMPANY v. KAUFMAN.

Opinion delivered July 12, 1909.

1. INSURANCE—VALIDITY OF IRON-SAFE CLAUSE.—A clause in a policy of fire insurance providing that "the books and inventories and each of the same shall be by the assured kept securely locked in a fire-proof safe at night and at all times when the building is not actually open for business" is valid, and a compliance with its terms by the assured is essential to recovery on the policy. (Page 317.)
2. SAME—SUFFICIENCY OF COMPLIANCE WITH IRON-SAFE CLAUSE.—It was not error, in an action on a policy of fire insurance, to instruct the jury in effect that if the plaintiff kept a suitable set of books in an iron safe, and was in the habit of placing them in such safe at night, but on the night of the fire he had not closed the store, but had taken the books to his bedroom upstairs for the purpose of posting them, and intending to return them to the safe that night when posted, and that while the books were in his room they were destroyed by fire, a substantial compliance with the requirement as to keeping books in a safe was shown. (Page 317.)
3. EVIDENCE—PROOF OF LOCAL CUSTOM.—In a suit on a policy of fire insurance covering a stock of goods in a small village, evidence tending to prove the custom at such place in regard to the time of opening and closing stores and the time of writing up the books was properly admitted, where it was a question whether the store was open for business at the time the fire occurred. (Page 317.)
4. APPEAL AND ERROR—HARMLESS ERROR.—Error of the trial court in instructing the jury in effect that a policy of fire insurance might be valid as to household effects insured in it, though void as to a stock of merchandise because no compliance with the iron-safe clause therein is shown, was not prejudicial where the jury found that there was no breach of the iron-safe clause. (Page 318.)

Appeal from Pulaski Circuit Court, First Division; *Robert J. Lea,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellee sued appellant on a policy of fire insurance issued February 15, 1907, insuring for a lump sum of $52 a stock of merchandise and household goods. The insurance on the stock of goods was $1,000, and on the household effects $500. It was alleged that the fire and total loss of the property insured occurred during the life of the policy. The complaint asked judgment for the full amount of the policy, with 6 per cent. interest and penalty and attorney's fees.

The answer set up in defense the application, which was made a part of the contract, and the following stipulations in the policy, to-wit:

"Section 1. The assured will take a complete itemized inventory of stock on hand at least once in each calendar year; and, unless such inventory has been taken within twelve calendar months prior to the date of this policy, and is on hand at the date of this policy, one shall be taken complete in detail within thirty days after the date of this policy, or this entire policy shall be null and void from such date.

"Section 2. The assured will make and prepare, in the regular course of business, from and after the date of this policy, a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and on credit, or this entire policy shall be null and void. By the term 'complete record of business transacted,' as used above, is meant a complete record of all the property which shall go into the premises and be added to the stock, and of all property taken from the stock, whether by the assured or by others, even though not technically purchases or technically sales.

"Section 3. The assured will keep and preserve all inventories of stock taken during the current calendar year, and also all those taken during the preceding calendar year, which are on hand when this policy is issued, and will keep and preserve all books which are then on hand, showing a record of business transacted during the current calendar year and the preceding calendar year. The assured will also keep and preserve all inventories taken after the issuance of this policy, and all books made and prepared after the issuance hereof, showing record of business transacted. The books and inventories, and each of the same, shall be by the assured kept securely locked in a fireproof safe at night and at all times when the building mentioned in the policy is not actually open for business; or, failing in this, the assured shall keep such books and inventories, and each of them, in some secure place not exposed to a fire which would destroy said building; and, in the event of a loss by fire to the personal property mentioned herein, said books and inventories, and each of the same, must be by the assured delivered to this com-

pany for examination, or this entire policy shall be null and void, and no suit or action shall be maintained thereon for any such loss. It is understood and agreed that this clause and the requirements thereof is one of the inducing causes to the acceptance of the risk herein assumed and the issuance of this policy, and that the terms and requirements hereof are material to the risk, and to this insurance, and to any fire loss happening to the property described in this policy. It is further agreed that the receipt of such books and inventories, or the request for them, or either of them, and the examination of same, shall not be an admission of any liability under this policy, nor a waiver of any defense to the same."

It was alleged "that the plaintiff did not preserve the inventory referred to in his application, nor books and invoices referred to therein, in an iron safe at night and at all times when not open for business; and that the same were destroyed in violation not only of the terms and agreements in his said application, but in violation of the terms and agreements in the policy as quoted; whereby the conditions of said policy contract were violated, and the defendant was released from liability."

Appellee was a merchant at Wampoo. She and her husband, who was her business manager (and whom we shall hereafter in the statement designate as the appellee for convenience), lived over the store room. The fire occurred February 8, 1908, first in an adjoining building. It then destroyed the building occupied by appellee and its contents. The stock of goods at the time of the fire was valued at $7,000, and the household effects were valued at $1,100 or $1,200. Appellee's counsel further states the facts correctly as follows: "Every Saturday night appellee posted his books. The store house was cold and uncomfortable, and a stairway led from the store up to the living rooms of appellee. After the active business of the day was over, he turned out the loafers, locked his doors, left his lights burning in the store, and took his books up the short flight of stairs into his bedroom, where he had a good light and warm fire, and a comfortable place in which to work. He generally closed about 10 o'clock, but was in the habit of coming down to wait on customers until he finally put out his lights, and, in case of an urgent call for medicines or necessaries, would come down later. At the

time of the fire he had not extinguished the lights in the store, and had not replaced his books and cash in the iron safe. This was the custom of appellee, and also the custom of the only other store at Wampoo. The owner of the other store closed about ten or eleven o'clock, according to the weather, on Saturday nights, and then left for his home, about a mile or a mile and a half away from his store. The population around Wampoo is pretty nearly all negroes. They get paid off on Saturday, and generally sit around appellee's store, talking, eating peanuts and chewing tobacco until appellee told them he wanted to close up. After appellee finished writing up his books, he would take his cash and his books downstairs into the store, and put them in the iron safe, lock up the safe and extinguish the lights for the night.

The policy of insurance was taken out February 15, 1907. Appellee took an inventory January, 1907, and August, 1907, between the 1st and 5th of the month. These inventories were copied into a large book, in which were kept the accounts of the store and other data of the business. This book was upstairs, and was burned. There were other books in the iron safe at the time, bringing the business down to 1906, and a credit book bringing the business down to the date of the fire. These books appellee had no occasion to have upstairs. There was also a credit ledger in the safe which was saved. Appellee had been at work on the books about an hour before the fire broke out. It was his habit to put the books in the iron safe at night, except on Saturday night, when he took them to his room to post them, leaving the light burning in the store until he finished posting his books. He testified that he intended carrying them down stairs and putting them in the big combination lock iron safe after he had finished work on them. He would then put out the lights in the store. The lights were still burning in the store at the time the fire broke out. The store was 40 feet by 22 feet, and the stairs ran straight up from the inside of the store in the rear of the bedroom.

Wampoo is six miles from the railroad. The postoffice is in appellee's store, and he is the postmaster. The invoices had been entered in the book that was destroyed by fire, and the invoices themselves were wrapped up and put away in pigeon-holes in the

store. When the invoices came in, appellee put them in the safe until Saturday night, when he took them with his book up to his room to copy them. He did not copy the items in detail, but only entered on his book the footings or aggregate amount shown by each invoice.

The court, over the objection of appellant, gave the following instructions:

"1. The court instructs the jury that the insurance on the household effects and upon the stock of merchandise mentioned in the policy sued on are divisible, and that plaintiff is entitled to recover the amount of the policy on the household goods with six per cent. interest from the 29th day of April, 1908, together with a penalty of twelve per cent. on said amount.

"2. The court instructs the jury that they have a right to take into consideration the custom or mode of doing business such as the opening and closing of the store, the time and manner of writing up the books, that was incident or prevailing at Wampoo, Arkansas, the place where the goods insured were located.

"3. The court instructs the jury that if they find from the testimony that plaintiff kept a set of books suitable for the business he was carrying on, and which are ordinarily kept for such business, and that he kept an iron safe such as is provided for in the policy sued on, and that he was in the habit of placing said set of books in such safe after closing up his business, but that on the night of the fire he did not close up his store for the night, but did retire to his room with his books for the purpose of posting the same, and did leave a light burning in the store with the intention of returning to the store with his books when he had finished working on the same for the purpose of placing the same in his safe for the night, but that while the said books were in his manual possession in his private room near the store the alarm of fire was suddenly given, and plaintiff was unable to replace them in his safe, and the said books were then and there burned, then in that event, if the jury so find, the court instructs you that such act on the part of the plaintiff was a substantial compliance with the terms of the policy in reference to keeping his books in his safe, and you will find for the plaintiff upon that point.

"4. The court instructs the jury that if they find from the testimony in the case that plaintiff took an inventory such as

is contemplated in the policy sued on in January, 1906, and again in January, 1907, and such inventory was so taken and kept, but was destroyed by fire without the fault or negligence of the plaintiff, then in that event the jury will find that plaintiff complied with the terms of the policy in reference to the inventory, and you will find for the plaintiff upon this branch of the case, although a portion of said inventories was destroyed by the fire."

The appellant duly excepted to the ruling of the court in giving the above instructions.

The court refused to give the following prayers of appellant:

"1. The jury are instructed that if the inventory of January, 1907, and the subsequent invoices and the books were destroyed by the fire at about eleven o'clock Saturday night, when they were not in the fireproof safe but elsewhere on the premises, this was a breach of the contract, and you will find for the defendant.

"2. The jury are instructed that if the assured failed to keep and preserve the set of books stipulated and provided for in the policy sued on, and the same were destroyed upon the premises and by the fire which destroyed the stock of goods, and the same were not at the time in a fireproof safe, but upstairs and exposed to the fire, this was a breach of the contract, and you will find for the defendant.

"3. The jury will find for the defendant."

The appellant objected and duly excepted to the rulings of the court in refusing its prayers. The jury returned a verdict for the full amount of the policy, with interest and penalty. A motion for new trial, assigning as errors the rulings of the court to which appellant had excepted, was presented and overruled. Judgment was entered for the amount of the verdict, which this appeal seeks to reverse.

C. S. Collins and *Ratcliffe, Fletcher & Ratcliffe,* for appellant.

1. The iron-safe clause is valid, and compliance with its terms is indispensable to recovery. 61 Ark. 207; 62 Ark. 43; 65 Ark. 240. The basis of settlement under its provisions is (1) the inventory; (2) invoices showing purchases which, added to

the inventory, are agreed upon as the aggregate, and (3) from this is to be subtracted all sales as shown by the books. 65 Ark. 240; 77 S. W. 424; 71 Miss. 919. See also 106 Mo. App. 684, 80 S. W. 289; 60 Neb. 348; 83 N. W. 81. While a custom may in a proper case be shown, it will not be allowed to overturn the express terms of a contract recognizing, but at the same time guarding against, such custom. 58 Ark. 572-3; 12 Cyc. 1091-2; 54 Ark. 23.

The custom attempted to be proved in this case was a special, not a general, custom, and there is no proof that appellant ever had notice of it. It could not affect the contract. 20 Ark. 251; 12 Cyc. 1041. The burden was upon plaintiff to prove the custom and its applicability to the contract. 12 Cyc. 1098. See also 75 Ark. 251; 69 Ark. 380; 65 Ark. 222. The books, inventory and invoices were not preserved in accordance with the contract. It was error to admit estimates of the amount of stock on hand. 65 Ark. 240, 249-50.

2. If it was reasonable for appellee to have his books upstairs at the time of the fire, which is not conceded, it was manifestly unnecessary to have the inventory out. From the testimony it appears that the inventory was either kept loose in the book that was burned, or it was copied into it. It was incumbent on plaintiff to give a satisfactory explanation for the absence of the inventory from the safe. The iron-safe clause is not complied with from either standpoint. 67 S. W. 158; 61 Ark. 207.

3. The entry in the books of the totals of the invoices is no compliance with the contract. 74 S. W. 792; 67 S. W. 153; 82 Ark. 476; 85 Ark. 580; 65 Ark. 240.

4. The inventory taken August, 1907, could not take the place of the one taken January 1, 1907. 65 Ark. 240.

5. The contract was indivisible, and it was therefore erroneous to give the first instruction asked by plaintiff. 71 Ark. 292; 52 Ark. 257.

6. The question of substantial compliance with a contract is one for the jury, especially where the evidence will support a finding either way. 81 Ark. 92, 95; 64 Ark. 34; 76 Ark. 88.

Joseph Loeb and *J. W. Blackwood,* for appellee.

1. This is even a stronger case in favor of the appellee than the Jones case, 54 Ark. 376, which settles every question here with reference to the iron-safe clause, the posting of the books at night, the custom of the locality keeping open for business, etc., in favor of the appellee.

2. Nothing in the policy, nor in the law, prescribes what shall go into the books, nor how many books shall be kept. The testimony shows that the inventory was taken in pencil, and afterwards reduced to permanent form in the general book of business. If it was kept in either paper form or book form, that was sufficient.

3. The policy contract does not require that the invoices be itemized.

4. There was a substantial compliance with the contract with reference to the inventory, and that was all that was required. 79 Ark. 163; *Id.* 267.

WOOD, J. (after stating the facts.) The policy provides that "the books and inventories and each of the same shall be by the assured kept securely locked in a fireproof safe at night, and at all times when the building mentioned in the policy is not actually open for business."

It has often been held by this court that a clause in a fire insurance policy similar to the above, and generally designated as the "iron safe clause," is valid, and that a compliance with its terms by the assured is essential to recovery. *Western Assurance Co.* v. *Altheimer,* 58 Ark. 575; *Southern Ins. Co.* v. *Parker,* 61 Ark. 207; *Germania Ins. Co.* v. *Bromwell,* 62 Ark. 43; *Sun Mut. Ins. Co.* v. *Dudley,* 65 Ark. 240.

In the case at bar the evidence was ample to warrant the court in submitting to the jury the question as to whether the appellee had complied with the provisions of the iron-safe clause. The facts in this case bring it clearly within the rules of law announced by this court in *Sun Insurance Co.* v. *Jones,* 54 Ark. 376, and the trial court, on the question under consideration, followed closely the doctrine of that case in its instructions numbered two and three.

Wampoo was situated in a country district, where the great majority were negroes, who, being paid off on Saturday nights, visited the stores at that time and remained for some time in making their purchases. It was proper to prove what the cus-

tom of these stores was in that district or place to accommodate the trade there, and appellant, effecting insurance on a store in such territory, must take notice of the custom of such stores as to their hours of trade as affecting the risk incident to the insurance of such property. There were only two stores in the country district of Wampoo where the people gathered for trade and to get their mail. The custom of these two stores as to the hours of business and trade was therefore necessarily the custom for that territory; and appellant, insuring one of these stores, must be held to have taken the usual or customary hours of business into consideration in consummating its contract with appellee.

"A usage of trade may have a greater or less territorial extent or a more general or restricted one, according to the circumstances which give rise to it." 12 Cyc. p. 1041, and cases cited in notes. There was no error in admitting the evidence of the custom of the two stores in keeping open on Saturday nights, nor in instruction numbered two.

So far as the preservation of the inventories was concerned, they fall under the same clause and the same rule for the preservation of the books; and the court properly submitted the question as to whether appellee had been negligent in preserving these according to the provisions of the policy in its instruction numbered four.

Conceding that the contract of insurance was indivisible under the doctrine announced in *McQueeny* v. *Phoenix Ins. Co.*, 52 Ark. 257 and *Planters Ins. Co.* v. *Lloyd,* 71 Ark. 292, we do not see how the court's instruction number one was prejudicial to appellant. The verdict shows that the jury found that there was no breach of the conditions of the iron-safe clause, and no forfeiture of the policy upon any other ground. Hence the question of the divisibility of the contract did not arise. So appellant is not prejudiced by the erroneous instruction.

This disposes of the instructions given by the court.

The prayers of appellant 1 and 2, which the court refused, in effect told the jury that upon different phases of the undisputed evidence in the case appellant was entitled to a verdict. Prayer number 3 was in form a peremptory direction for appellant. All these prayers were properly rejected.

Finding no reversible error, the judgment is affirmed.

NASHVILLE LUMBER COMPANY *v.* ROBINSON.

Opinion delivered July 12, 1909.

SALE OF CHATTELS—RESERVATION OF TITLE—ELECTION—Where a vendor of chattels, having reserved title until payment of the purchase money, made its election to retake the property, it will be held to have canceled the debt, and cannot thereafter sue to enforce same.

Appeal from Howard Circuit Court; *James S. Steel,* Judge; affirmed.

STATEMENT BY THE COURT.

This was a suit by appellant against the appellees on an instrument evidencing the sale and purchase of certain household and kitchen furniture and utensils. The instrument, omitting the description of the articles sold, is as follows:

"$224.30. Nashville, Ark., November 1, 1907.

"On or before the 30th day of November, 1907, for value received we promise to pay to the Nashville Lumber Company Store or order at Nashville, Arkansas, $224.30 with interest at ten per cent. per annum from date until paid. The express condition of the sale and purchase: [here follows the description of the articles sold] for which this note is given, is such that the title, ownership and possession does not pass from the said Nashville Lumber Company Store until this note and interest is paid in full, and the said Nashville Lumber Company Store has the power to declare this note due and take possession of the above property whenever they deem themselves insecure, even before the maturity of this note, and sell the same at public or private sale without notice. The proceeds (after the expenses and interest are paid) to be applied on this note, and any balance unpaid shall, in consideration of the use and rent of the property, be a valid and subsisting claim against the vendee.

"G. W. Robinson.
"E. A. Williams."

Appellant alleged that the note had not been paid, and prayed judgment for the amount thereof. The answer was as follows: They admit that they executed the "note." They allege that appellee E. A. Williams received no benefit for said notes or the purchase of said property; that he merely signed said notes as surety for the said G. W. Robinson, and further al-

leged that said notes were given for the purchase of certain property described in said note; and that it was agreed between plaintiff and defendant that the title and possession of the property described in said notes should remain in the plaintiff, Nashville Lumber Company Store, until said notes and interest thereon were fully paid. That said furniture was purchased by the defendant Robinson for the purpose of furnishing and running a boarding house in the town of Nashville, Arkansas, for the plaintiff. That said defendant Robinson ran said boarding house for said plaintiff until about the 1st day of February, 1908, when he discovered that he was running said boarding house at a loss, and thereupon quit said house and packed up all of said furniture and turned it over to the plaintiff, Nashville Lumber Company, stating at the time that he was unable to pay for said furniture, and that the Nashville Lumber Company accepted said property, and has since used it, and has sold, leased or in some way disposed of said property to parties who are now running said boarding house, and by virtue of its acceptance and use of said property it is now estopped from maintaining a suit for the purchase money thereof against either of the defendants. The appellees thus assumed the burden of proof, and the testimony in their behalf tended to prove that on the first day of November, 1907, the appellee, Robinson, rented a boarding house from the appellant at the price of $40 per month, under an arrangement that he was to board the laborers of the appellant, with a guaranty on the part of the appellant for the payment of their board. In order to run the boarding house, it became necessary for Robinson to buy quite a lot of furniture, which he purchased from the appellant, and executed to appellant the note in suit with E. A. Williams as his security; that the property purchased was removed from appellant's store to its boarding house, under the management of Robinson, and, after running said boarding house at a loss for three months, on the 1st day of February, 1908, Robinson threw up his contract, quit the boarding house, and packed all the furniture and locked it up in the house, and surrendered it, together with keys of said house, to appellant, who accepted it, and retained it, and afterwards used it or permitted its tenants to do so. There is no evidence to warrant the conclusion that appellant, in accepting the property,

if it did so, meant to receive it as a payment on the debt. But the evidence shows that appellant accepted it, if at all, as its own property, and not as the property of Robinson. It is unnecessary to set out in detail the evidence of appellant. It suffices to say that it shows that the furniture was never tendered to nor accepted by it, that it had nothing more to do with the furniture after same was sold to appellee Robinson.

The court gave at the request of appellees the following instruction:

"1. When property is sold upon the condition that the title thereto shall remain in the seller until the purchase price is paid, the seller, upon maturity of the debt, may pursue either of two remedies. First: He may retake possession of the property, and thus in effect cancel the debt, or he may bring his action to recover the debt and thus affirm the sale and waive the reservation of title. So in this case if you believe from the evidence that the plaintiff agreed to sell the furniture described in the note to the defendant and reserved the title and possession therein until purchase price thereon was paid, and that the note sued on in this case was given for the purchase price of said property, and that after maturity of said note the defendants turned over to the plaintiff the possession of all of said property, and that it accepted said property or disposed of it, then the plaintiff could not bring this suit to collect the purchase price of said property, and you will find for the defendants as to the larger of the two notes."

Appellants asked the court to instruct the jury as follows:

"1. The court instructs the jury that this is a suit upon two promissory notes, executed by the defendants to the plaintiff, for the purchase price of certain personal property of which plaintiff retained title, and the defendant Robinson claims that all of said property was returned to the plaintiff, and was accepted by it *in satisfaction of said notes,* and the burden of proof is on the defendant to establish their defense by a preponderance of the testimony, and if they fail to satisfy your minds that they, or either of them, turned over or delivered to the plaintiff or its authorized agent the property mentioned in the notes, and that the plaintiff accepted the same *in satisfaction of said notes,* then your verdict will be for the plaintiff.

"2. The court tells the jury that the mere fact that the defendant Robinson leaving [left] the personal property mentioned in the notes in the house of the plaintiff with or without its consent would not be such a delivery as would satisfy the notes, unless the plaintiff agreed to accept the same *in satisfaction thereof.*

"3. The court tells the jury that one who sells the personal property on a credit and takes notes retaining title until paid has two remedies; to either sue on the contract for the purchase price or to retake the property; and if you believe from the evidence in this case that the property was never turned over to the plaintiff or its authorizd agent by the defendants, or either of them, *in satisfaction of the notes,* and that the same was accepted by the plaintiff *in full satisfaction thereof,* and that plaintiff never at any time elected to insist on the return of the property, then your verdict will be for the plaintiff."

The court modified the above prayers by striking out the words: "in satisfaction of said notes," "in satisfaction thereof," "in full satisfaction thereof," and gave the prayers as thus modified. The appellant objected to the rulings of the court, and duly saved its exceptions. The verdict was for the appellees.

The appellant in its motion for new trial assigned as errors the rulings of the court which it urges here as grounds for reversal. The court overruled its motion, and it prosecutes this appeal.

Sain & Sain, for appellant.

W. P. Feazel, for appellees.

WOOD, J., (after stating the facts.) 1. There was evidence to sustain the verdict.

2. It will be observed that the note sued on contained the stipulation "that the title, ownership and possession does not pass from the Nashville Lumber Company's Store until this note and interest is paid in full, and the Nashville Lumber Company Store has the power to declare this note due and take possession of the above property whenever they deem themselves insecure," etc.

The appellant does not sue for the property, but for the purchase money. The only defense was that appellant had elected before the institution of the suit to retake the property. The ques-

tion of satisfaction of the note was not raised by the answer. The legal effect of the facts set up in the answer, if such facts were proved, was to show an election on the part of the appellant. Appellees introduced evidence tending to prove the allegations of its answer, and the court submitted the question to the jury under proper instructions. Appellant's prayer number one incorrectly states the defense set up by appellees. For it says: "Robinson claims that all of said property was returned to the plaintiff, and was accepted by it in satisfaction of said notes." The words "in satisfaction of said notes" were not used in the answer, and none of its allegations would warrant the conclusion that appellee Robinson was setting up the defense of payment or satisfaction based upon a contractual relation between appellant and appellees. But the allegations of the answer and the evidence adduced by the appellees shows that their defense was a cancellation of the debt by the election on the part of appellant to retake the property. The words "in satisfaction of the notes" introduced an issue not in the case, and were well calculated to confuse and mislead the jury. For, if the appellant elected to retake the property, and thus in effect to cancel the debt before this suit was brought, then it could not thereafter sue to recover the purchase money also. When this debt became due and was unpaid, the vendor, having reserved the title until the purchase price was paid, had its election to take either of two courses. It could elect to retake the property, and thus in effect cancel the debt, or it could bring its action to recover the debt, and thus affirm the sale and waive reservation of title. *Butler* v. *Dodson,* 78 Ark. 569. But appellant, having taken the former course, as appellees allege, could not thereafter pursue the latter, and hence is barred of the right to recover in the present suit.

The judgment is affirmed.

CONOWAY v. NEWMAN.

Opinion delivered July 12, 1909.

1. FRAUDULENT CONVEYANCE—MORTGAGE OF FIRM PROPERTY TO SECURE INDIVIDUAL DEBT.—An insolvent firm may mortgage their partnership property to secure individual, in preference to partnership debts. (Page 327.)
2. SAME—REPRESENTATION AS TO FUTURE EVENT.—A false statement upon which fraud may be predicated must be of existing facts or facts which previously existed, and cannot consist of mere promises as to future acts, although such promises are subsequently broken. (Page 327.)

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

Thomas & Lee, for appellants.

1. H. Greenwald is bound by the fraudulent representations of her agent in these negotiations. 5 Am. & Eng. Enc. of L. 322. The test of the deceit and fraud in this case is the preconceived intention of the agent to defraud. 47 Ark. 247. His misrepresentations related to material facts in inducing the notes and mortgage to be signed, and it is clear that Conoway and Atkinson relied upon his representations being true. 31 Ark. 170; 30 Ark. 686; 11 Ark. 58; 26 Ark. 28; 19 Ark. 522. See also 20 Cyc. 44; 47 Ark. 148; 35 Md. 439; 149 Mass. 188; 81 Cal. 1; 118 Ind. 565; 114 Mich. 581; 58 N. Y. 262; 185 Pa. St. 83; 97 Ky. 713. These misrepresentations gave Newman an unfair advantage over his partners, which cannot be allowed to stand. 63 Ark. 513.

2. The doctrine that "an insolvent firm may mortgage their partnership property to secure individual, in preference to partnership, debts" should be overruled. That decision is admitted to be contrary to the weight of authority. 54 Ark. 449; Bump on Fraud. Conv. 389 and notes 2 and 3; *Id.* 229-30; 24 Ark. 16; *Id.* 522; 31 Ark. 666; *Id.* 314; Bigelow, Fraud, 476-488.

Manning & Emerson, for H. Greenwald.

The chancellor's finding on the issue of fraud, a question of fact, will not be disturbed unless clearly against the preponderance of the evidence. 71 Ark. 605; 68 Ark. 314; *Id.* 134; 67 Ark. 200; 72 Ark. 67; 73 Ark. 489; 75 Ark. 52. Nor where the testimony is evenly balanced. 77 Ark. 305. The burden of proof

is upon the party alleging fraud. 68 Ark. 449, 457; 77 Ark. 351. It is wholly immaterial whether I. Greenwald made the representations attributed to him or not. Conoway could not have been deceived or imposed upon by them. He and Atkinson must have understood that Newman would be bound for the difference between what the company owed him and the $3,000 owed to Mrs. Greenwald when the company paid it, whether he promised to pay it or not, or whether Greenwald said he would pay it or not. Conoway had no money in the business, and there is no allegation of fraud upon him, but upon the rights of the partnership creditors. As to Goldman & Company and other creditors, they had no rights at the time the notes and mortgage were executed; therefore no fraud as to them. The case lacks two elements essential to maintaining an action of fraud, (1) fraudulent representation and (2) damages following same.

2. That a firm may mortgage their property to secure individual debts of a member of the firm in preference to partnership debts is a rule of property in this State adopted even before the decision in *Reynolds* v. *Johnson,* 54 Ark. 449, which appellants ask to be overruled. 42 Ark. 423. And this is in line with the doctrine laid down by the United States Supreme Court. 99 U. S. 119. See also 85 Tenn. 712; 20 N. J. Ch. 13. The distinction between the administration of property after it is taken into the custody of the court and the operation or management of property before it is taken into custody determines this issue in favor of appellee and of the doctrine adopted by this court. 160 Fed. 57, 63, 64, 66; 63 Kan. 288; 29 Wis. 363; 159 Mo. 213; 102 Tenn. 353; 1 Port. (Ala.) 232; 14 Colo. 174; 87 Ga. 223; 27 Am. St. Rep. 242; 147 Ill. 176; 119 Ind. 164; 64 Ia. 175; 31 Kan. 35; 2 Met. (Ky.) 356; 30 La. Ann. 1290; 47 Md. 277; 55 Mich. 64; 64 Miss. 141; 116 N. Y. 428.

HART, J. This is an action in equity instituted in the Monroe Chancery Court by J. A. Conoway and Goldman & Company against the Newman Mill & Lumber Company, R. L. Newman, J. D. Atkinson and H. Greenwald.

Goldman & Company is a partnership, composed of J. D. Goldman, W. L. Jeffries and S. Bacharach. The Newman Mill & Lumber Company is a partnership, composed of the plaintiff, J. A. Conoway, and the defendants R. L. Newman and J. D.

Atkinson. They were engaged in operating a sawmill in Monroe County, Arkansas, during the year 1907. Their assets consisted chiefly of the sawmill outfit complete and 21 head of oxen, wagons, etc. On the 30th day of September, 1907, the members comprising the firm of the Newman Mill & Lumber Company executed a mortgage on their partnership property in favor of H. Greenwald to secure an indebtedness of $3,000. The indebtedness secured was the individual debt of R. L. Newman, one of the partners. During the course of operating the mill, the Newman Mill & Lumber Company became indebted to various creditors, among whom was the plaintiff Goldman & Company. On the 18th day of December, 1907, Goldman & Company brought suit against them for the sum of $755.89 in the Monroe Circuit Court, and sued out a writ of attachment against their property.

The object of the present suit was to have the partnership of the Newman Mill & Lumber Company dissolved and its affairs wound up on account of insolvency; and to have the debt of Greenwald postponed until the partnership debts were settled. The appointment of a receiver was asked for, and J. B. Hogins was appointed receiver. He at once qualified, and took charge of the property and assets of the firm.

The complaint was filed December 30, 1907, and, in addition to the matters above set forth, alleged that the mortgage to Greenwald was procured by deceit and fraud.

Greenwald answered the complaint, and denied that he had procured the execution of the mortgage by deceit and fraud. He also denied that the debt secured thereby was the individual debt of Newman, but averred it to be the debt of the partnership. Newman and Atkinson, although duly summoned, failed to answer.

The chancellor found the issues in favor of the defendant Greenwald, and declared that his mortgage was a prior lien on the property embraced in it. A decree was therefore entered in his favor, in which the property was ordered sold and the proceeds applied, first, to the payment of his debt and interest and the remainder, if any, to the other creditors of the Newman Mill & Lumber Company. Judgment was also rendered in his favor for his debt of $3,000 and the accrued interest.

The plaintiffs have duly prosecuted an appeal to this court.

The Newman Mill & Lumber Company was insolvent at the time the mortgage to Greenwald was executed; but in the case of *Reynolds* v. *Johnson,* 54 Ark. 449, it was held that an insolvent firm may mortgage their partnership property to secure individual, in preference to partnership, debts. Counsel for plaintiffs urge us to overrule this case, and contend that it is against the weight of authority. The two lines of decisions were discussed in that opinion, and the rule above announced was deliberately adopted. It has been followed ever since by this court. It has become a rule of property, and we decline to disturb it.

It is also contended by counsel for plaintiffs that the mortgage of the Newman Mill & Lumber Company to Greenwald was procured by deceit.

The testimony for the plaintiff shows that, when the firm of the Newman Mill & Lumber Company was formed, Newman put in $1,500; Atkinson put in $500; and Conoway, nothing; that the agreement between them was that Newman should be first paid back the amount paid in by him with interest, and then that Atkinson in like manner should receive back the amount paid in by him; that at the time the mortgage in question was executed the amount, principal and interest, owed to Newman was $1,600; that, to induce them to sign the mortgage, Greenwald told them that Newman would draw out of the firm if they did not execute the mortgage, but that if they did execute it he would advance the firm more money; that Newman had traded with Mrs. Greenwald for some hotel property, and the mortgage was in part payment of it; that Newman afterwards denied that he had authorized I. Greenwald, the husband and agent of H. Greenwald, to represent to plaintiff Conoway that he would advance the firm more money.

Greenwald denied that he made the statement about Newman making further advances to the Newman Mill & Lumber Company, or withdrawing from the firm if the mortgage was not executed. This was not a false statement upon which fraud may be predicated. Such fraud must be of existing facts, or facts which previously existed, and cannot consist of mere promises as to future acts, although such promises are subsequently broken. The facts adduced in evidence by plaintiffs could only establish a

breach of contract, but they do not sustain an action for fraud or deceit. The representations here complained of relate solely to promises as to matters in future. 20 Cyc. 20, and cases cited.

We find no prejudicial error in the record, and the decree will stand affirmed.

ARNOLD v. WATSON.

Opinion delivered July 12, 1909.

1. MORTGAGES—POWER TO SUBSTITUTE TRUSTEE.—Under a mortgage appointing a trustee and authorizing the mortgagee, in case such trustee should die or neglect to carry out this trust, to appoint any other suitable person to act as such trustee, the mortgagee was authorized to substitute a trustee where the original trustee had moved out of the State and was not in a position to act. (Page 331.)
2. SAME—PRESUMPTION FROM RECITALS OF TRUSTEE'S DEED.—While the recitals of a substituted trustee's deed are not evidence of the validity of his appointment, yet, after the validity of such appointment is established by proof *aliunde,* the recitals of his deed, showing substantial conformity to the requirements of the deed of trust, are *prima facie* true as against the mortgagor and his privies, and the burden of showing their falsity, in equity as well as at law, is upon the party assailing the deed. (Page 332.)
3. SAME—VALIDITY OF APPRAISEMENT OF LAND.—Proof that the appraisers appointed to appraise mortgaged property went to the land but did not walk or ride over it is insufficient to overcome the presumption, arising from the recitals of the trustee's deed, that the appraisement was duly made. (Page 333.)

Appeal from Lawrence Chancery Court, Eastern District; *George T. Humphries,* Chancellor; affirmed.

STATEMENT BY THE COURT.

This is a suit by appellant against the appellees to set aside a deed executed by J. A. Watkins as trustee to Elbert L. Watson. The complaint alleged that Thomas Arnold died in Lawrence County in 1889, the owner in fee of certain lands, which are described in the complaint; that appellant was one of four heirs; that Elbert L. Watson claimed to have a mortgage on the lands to secure an indebtedness of $2,818; that, after the death of

Arnold, Watson probated his claim, and received a payment, leaving a balance due him of $2,000 on the original claim.

The grounds alleged for setting aside the deed are that: "Elbert L. Watson fraudulently discharged Thos. J. Watson, the duly appointed trustee, and without right or authority appointed the defendant J. A. Watkins to act in his stead, and caused the said substituted trustee to make a fraudulent sale of said lands on the 10th day of November, 1893; that the substituted trustee fraudulently neglected to cause the lands to be appraised according to law; that he fraudulently sold for $2,950, when there was in fact only $2,000 due; that at said sale Elbert L. Watson, after causing the same to be made at a time and place to suppress free competition in bidding and fraudulently agreeing with other parties present who might have bid on the lands that he would grant certain favors and immunities provided they would forbear to bid against him at the sale, purchased all the lands for the sum of $2,993.50, which was far below its real value."

The complaint then alleged that: "On the 11th day of December, 1893, without waiting for the time for redemption to expire, the substituted trustee executed to Elbert L. Watson a deed purporting to convey to him said lands, all of which was a fraud upon the rights of plaintiff, who was then a minor of the age of 9 years; that, since the execution of said deed, Elbert L. Watson died, leaving a will by which he is informed and believes that defendants have become the owners of the rights of Elbert L. Watson in the lands. That the rental value of the lands is $1,000 per year; that there was a saw mill and cotton gin on the lands when Elbert L. Watson took possession of it, of the value of $1,000, which defendants have removed."

The prayer was for an accounting, charging defendants with machinery removed and rents for the year 1894 and each year since that time and for value of machinery removed, and that the balance due on the mortgage be paid out of said sum, and that he have judgment for one-fourth interest in said land as one of the four heirs at law of Thomas Arnold, deceased, and for one-fourth of whatever balance may be due from rents and profits after paying the mortgage, and all other proper relief.

The answer denied the material allegations of the complaint, and set up title as the heirs of Watson, who had died after ob-

taining the deed from Watkins, which they allege was duly executed in pursuance of the power contained in the deed of trust.

The decree dismissed the complaint for want of equity.

W. A. Cunningham and *Smith & Blackford,* for appellant.

1. The substituted trustee had no power to sell, no contingency having arisen giving the beneficiary the right to appoint a substituted trustee. The trustee, if absent from the State, was only temporarily so, and no reason is shown for not calling on him to act. No neglect could be charged against him until he had been requested to act and had failed after a reasonable time to do so. 55 Ark. 326.

2. The appraisement was not such as is contemplated by the statute. Sandels & Hill's Dig. §§ 5112, 5113.

3. Fraud and collusion of the purchaser with others to suppress bidding invalidates the sale. 38 Ark. 589.

Campbell & Suits, for appellees.

1. The burden of overthrowing the trustee's deed is on the plaintiff, its recitals showing substantial compliance with the requirements of the deed of trust being taken as *prima facie* true. 61 Ark. 464; 71 Ark. 484; 53 Miss. 307; 109 Ill. 79; 43 Ia. 268.

Hence the burden was on the plaintiff to overcome by proof the recitals of the trustee's deed with reference to the appointment of the original trustee, the authority of Watson under deed of trust to appoint another suitable person to act as trustee upon the neglect of the original trustee to carry out the trust, the fact that he *had neglected* to carry out or execute the trust, and the appointment of J. A. Watson as substituted trustee.

2. The appraisement was regular. The record not only shows that the land was fairly appraised, so far as E. L. Watson was concerned, but it goes further, and establishes the fact that there was a conspiracy to compel him to pay more for the land than it would bring on the market at that time if a sale was had. 79 Ark. 4.

3. The proof fails to make out a case of fraud or suppression of bidding. This case is clearly distinguishable from that relied on by appellant, 38 Ark. 584, and it has no application here. Moreover in that case there was no right to redeem. In this the right to redeem existed for 12 months after the sale.

4. Appellant states no cause of action. Neither he nor any one for him has paid or tendered the amount of indebtedness. 74 Ark. 242; 71 Ark. 484.

5. The claim is stale, and appellant is barred by laches. 87 Ark. 232; 71 Ark. 209.

WOOD, J. (after stating the facts). Appellant urges the following grounds for reversal:

1st. Because the substituted trustee had no power to sell, the contingency never having arisen giving the beneficiary the right to appoint a substituted trustee.

2d. Because there was no real appraisement of the lands as contemplated by the statute, the appraisement being fixed by the agent of the beneficiary, who was also the purchaser, and not by the appraisers.

3d. Because the purchaser by fraud and collusion prevented other bidders from participating at the sale.

We shall dispose of these in the order named.

1. Thos. J. Watson was the trustee named in the deed of trust. The deed of trust contained the following provision: "But, should said Thomas J. Watson die or neglect to carry out this trust, then said Elbert L. Watson, or the holder of said notes, may by indorsement hereon or on the margin of the record of this deed name and appoint any other suitable person to act as such trustee, and such person, when so appointed, shall have all the authority herein given to said Thomas J. Watson." The deed of trust is indorsed on the margin as follows. "I, Elbert L. Watson, hereby appoint and designate J. A. Watkins as trustee to execute the within trust, and confer upon him all the power and authority for such purpose as the within deed of trust confers upon Thomas J. Watson, the trustee herein named, who has neglected to execute this trust. Newport, Arkansas, September 27, 1893. E. L. Watson."

This statement of the beneficiary in the deed of trust is certainly evidence to be considered by the chancellor in determining whether the contingency arose which gave the benficiary the right to substitute a trustee who could better determine than the beneficiary whether the trustee had neglected to carry out the trust. This statement of the beneficiary shows that he did determine that the trustee had neglected to carry out the trust,

and that should end the matter, especially in the absence of any evidence to the contrary. Such evidence as the record discloses tends to confirm the statement of the beneficiary, that the trustee had neglected to execute the trust. For it appears that prior to September 27, 1893, and "soon after the opening up of Oklahoma, he (the trustee) went over there," that "he was out of the State, and not in a position to act." The evidence is almost conclusive that the condition had arisen that authorized the beneficiary to appoint J. A. Watkins trustee. In the case of *Stallings* v. *Thomas,* 55 Ark. 326, the contingency that authorized the substitution had not arisen. The mortgage provided in that case that the beneficiary might substitute another trustee in case the trustee named in the mortgage "should die, be absent from the county or fail or refuse to execute it." The opinion states that the trustee "was alive and in the county at the time of the sale, he was not requested to execute the power, and did not refuse or fail to do it." The case is authority for the position that a trustee can not be substituted for the trustee named in the mortgage unless the conditions which authorize the substitution are found to exist. Here it is clearly shown that they did exist. In *Stallings* v. *Thomas, supra,* it appears affirmatively that the trustee named in the mortgage was not requested to execute the power, and that he was in the county where he could have executed it if the request had been made. But here the facts are different. The trustee named in the deed "was out of the State, and not in a position to act." That being true, a request to act could not have been complied with, and its necessity therefore was eliminated. Moreover, there is no affirmative showing here that the beneficiary, Watson, proceeded to substitute a trustee without requesting the trustee named in the deed to act. The language of the indorsement, "who has neglected to execute this trust," implies that the beneficiary had done whatever was necessary for him to do under the circumstances. Otherwise he could not have said that the trustee "had neglected to execute the trust."

2. To be sure, the recitals in the deed of J. A. Watkins as trustee could not be taken as *prima facie* evidence of the validity of his own appointment, that being the subject-matter of the inquiry. But, the validity of such appointment being estab-

lished by evidence *aliunde,* as we have shown, then the recitals of his deed, showing substantial conformity to the requirements of the deed of trust, are *prima facie* true, and the burden of showing their falsity is upon the party assailing the deed. *McConnell* v. *Day,* 61 Ark. 464; *Ingle* v. *Jones,* 43 Ia. 286; *Beal* v. *Blair,* 33 Ia. 318; *Tartt* v. *Clayton,* 109 Ill. 579. See also 28 Am. & Eng. Enc. L. 825, notes 10 and 11; *Naugher* v. *Sparks,* 110 Ala. 572; *Tew* v. *Henderson,* 116 Ala. 545. See note to *Tyler* v. *Herring,* 19 Am. St. 263. Where the trustee's deed is the subject-matter of attack, the same rule should apply in equity as at law. The doctrine is applicable generally only to the grantor of the power in the mortgage or deed of trust and his privies, and there can be no good reason why it should apply at law and not in equity.

The trustee's deed contains the following recital: "And whereas the said J. A. Watkins, at the request of said E. L. Watson, did, prior to said day of sale, to-wit, on the 17th day of October, 1893, cause said lands to be duly appraised by W. T. Blackford, S. W. Howard and H. H. Munsel, three householders of said Lawrence County, Arkansas, who were duly appointed by D. S. Jasper, a justice of the peace in and for said county, as the law directs, at which appraisement (Then follows a description of the lands by legal subdivisions, as called for in the deed of trust, together with a separate appraised value as to each subdivision) which appraisement totaled $3,600." According to the rule above announced, the foregoing recitals must be taken as *prima facie* true. The appellant has undertaken to show that the lands were not "duly appraised" by John Arnold, who testified, on this point, as follows: "Appraisers never went to look at the farms. John Glass stated to the appraisers that they wanted it appraised, so it would bring the debt, so it would sell, and to appraise it down so they could have it." And by William Crane, who testified: "I heard John Glass tell the appraisers they wanted it appraised so it would bring the debt and expenses, so the boys could buy it in." It was also shown by appellant that Glass was E. L. Watson's agent. It was in evidence that John Arnold lived upon the lands in question at the time the alleged appraisement was made, and that the appraisers met at his house. So when the witness says they never went to look at the farms,

he must have meant that they did not ride or walk over the farm to look at them. The testimony does not show that the appraisers could not and did not view the lands from John Arnold's house, where they met. In *Merryman* v. *Blount,* 79 Ark. 4, we said: The object of the appraisement was to ascertain the true value of the land and to insure, as far as possible, the sale of the land at a fair price, to prevent the possibility of the land being sacrificed at a grossly inadequate price. The report of the appraisers is, of course, made after they are sworn, and the presumption is that they will do their duty and ascertain the value of the land as the law requires, and that this shall be done, not by report or hearsay, but by actually viewing the property. While the statute contemplates an actual view of the property, it does not require an actual entry on the land in order to view it. A reasonable construction of the statute is that the appraisers must have viewed the property before they placed a value upon it. If this view can be had so as to ascertain the true value of the property without entry on the land as well as by actually *going* upon it, then actual entry is not necessary."

There is nothing in the evidence to show that Glass, the agent for Watson, did not have the appraisers duly appointed as shown by the recitals of the trustee's deed. Having been duly appointed, the presumption is they did their duty and ascertained the value of the land as the law required. What John Glass may have said to the appraisers was not material if the appraisers were not influenced by it to make a fraudulent appraisement. The evidence does not show that the lands were appraised at a grossly inadequate value. The preponderance of the evidence does not warrant the conclusion that the lands were appraised at less than their true value. It is certain that the evidence as to the value of the land at the time of the appraisement does not justify a finding of fraud on the part of the appraisers. The appraisement, for aught shown to the contrary, comes well up to the requirements of the law as declared in *Merryman* v. *Blount, supra.*

3. To support his contention that E. L. Watson practiced fraud in suppressing bidding at the trustee's sale, appellant relies upon the following testimony: John Arnold testified: "The morning we went to Walnut Ridge to buy it in, we saw Mr.

Watson, and he said: 'Let me bid it in, and don't you bid on it, and at the end of twelve months you come in, and I will make you a deed to it. The estate can't claim it against you.' During the time Abe Phelps wanted to bid on it, and came to me and asked me if I was going to bid on it, and I told him the arrangement I had made, and he said if we boys were going to get it he would not bid, but if Watson was buying it he wanted it. Scarborough wanted it sold in forty-acre blocks, and Watson said it was fixed so the boys would get it."

Henry Arnold testified: "I heard a conversation between John and E. L. Watson. John told Watson that he wanted to bid the land in, and Watson said: 'Let me bid it in, and I will make you a deed to it, and it will hold the other heirs off, or they will come in against it.' We were down at Newport afterward, and Watson said he had not got a deed. When he got the deed, he would make us a deed. There was only one bid, and Watson made that."

A. P. Brown testified: That he knew Watson and the Arnold boys, and that he heard a conversation between them on the day of the sale of the lands at Walnut Ridge, and from the conversation he understood they were talking about arranging the land matter, so that the Arnold heirs could get it at some future date. "As I understood it, they were to have it back by paying what was due at the end of the year."

W. H. Crane testified that he heard a conversation between E. L. Watson and John Glass, his agent, in which Glass told him that he (Watson) would have to buy the land in again, and Watson said: "I won't if you keep your damn mouth shut."

J. A. Watkins testified that after the sale Watson said to the Arnold boys: "Boys, if you want to take it up, I would be glad if you would do so."

It was shown that Judge Scarborough, mentioned in the testimony of John Arnold, was the attorney for the administrator of the Arnold estate, and was present at the sale. This suit was begun January 31, 1906, a little more than thirteen years after the sale. Glass, whose conduct in connection with the appraisement is assailed, died in 1898, and E. L. Watson, whose conduct in connection with the sale is attacked, died in 1901. Appellant is not responsible for the delinquencies of his guardian.

But it is nevertheless true that, if the facts with reference to the conduct of Glass and Watson were as John Arnold testified, he, as guardian of appellant, should have brought suit to set aside the sale long before Glass and Waston died, and was most remiss in his duty for not having done so. Again, according to the testimony of John and Henry Arnold, arrangements had been made for money with which to purchase the land at the sale, but they did not make the purchase because of the understanding they had with Watson that he was to bid it in and let them have it afterwards. If they could have raised the money to buy at the sale, they could have also redeemed before the time expired. If the land was worth between $6,000 and $10,000, as they testify, it does not seem reasonable that they would have let the opportunity pass, but would have insisted on Watson carrying out his promise to make them a deed before their legal rights to redeem had passed forever. John and Henry cross each other in their testimony as to the arrangements that had been made to secure the money before the sale with which to purchase the land. John testified that he had made arrangements with Lawrence County Bank to borrow the money. Henry testified that John told him that the arrangement to get the money was with one James Turner. Learned counsel for appellant say in their brief "that appellant was at the time of the sale a minor of the age of nine years, and that the scheme to have the lands sacrificed was a fraud upon his rights, whether John and Henry Arnold got the benefit of it or E. L. Watson." But doubtless the question with the chancellor was, as it is with us, whether a sale, which, from the recitals of the deed and testimony of the trustee, appears to have been conducted according to law, should be set aside upon the testimony alone of witnesses who confess that they were in the "scheme of fraud, if it be such, upon the rights" of their brother. The testimony of Brown, who was unrelated to the parties and disinterested, shows that, as he understood the conversation between John and Henry Arnold and E. L. Watson on the day of the sale, it was that the "Arnold heirs could get it at some future time; they were to have it back by paying what was due at the end of the year." This corroborates what O. D. Watson, the son of E. L. Watson, who was with his father on the day of the sale, says that his father told the Arnolds, towit: "The law gives you

twelve months to redeem this land, if you want to take advantage of it. All I want is my money. I don't want the land." It corroborates also the testimony of the trustee, who testifies that Watson said to the Arnold boys: "Boys, if you want to take it up, I would be glad if you would do so," which could mean nothing more nor less than that he would be glad if the boys would take up the land, *i. e.*, redeem it. The testimony of Crane is shown not to have been consistent and free from suspicion all the way through, and his testimony of the purported conversation between E. L. Watson and John Glass, Sr., after the sale is not sufficiently definite to show what the parties to the conversation meant by it. It is in the nature of hearsay evidence.

Giving all the testimony in the record careful consideration, and scrutinizing the sale with that scrupulous care required to protect all the rights of the minors, who are ever the special wards of chancery, we are unable to find any warrant in this record for setting aside the decree and finding of the chancellor. The law imputes good and not evil notions to the sayings and doings of men that appear upon their face to be regular and free from any suspicion of fraud. We are unwilling, from the testimony in this record, after this great lapse of time, to put the "trail of the serpent" over the conduct of those who were not assailed until death had closed their mouths. The law does not justify us in doing so. *Naugher* v. *Sparks, supra.*

Decree affirmed.

CRAWFORD *v.* SAWYER & AUSTIN LUMBER COMPANY.

Opinion delivered July 12, 1909.

1. TRIAL—DIRECTING VERDICT.—In determining whether the trial court properly directed a verdict for the defendant, the question on appeal is, was the evidence adduced by the plaintiff legally sufficient to support a verdict in his favor? and in deciding this question the testimony in his favor will be given its strongest probative force, and that view of it most favorable to him will be accepted. (Page 340.)
2. SAME—WHEN ERROR TO DIRECT VERDICT.—It was error, in an action by a servant against his master to recover for personal injuries sustained by him, to direct a verdict for the defendant if there was evidence

tending to prove that the master was negligent (a) either in failing to provide for the plaintiff's safety or (b) by reason of the negligence of a servant who was not a fellow servant of plaintiff. (Page 342.)

Appeal from Jefferson Circuit Court; *Antonio B. Grace,* Judge; reversed.

W. F. Coleman and *Murphy, Coleman & Lewis,* for appellant.

1. Under the doctrine laid down in the Triplett case, 54 Ark. 289, since followed and approved by this court in many cases, and the definition of fellow servants in the Snellen case, 82 Ark. 337, to be "persons employed by the same master to accomplish one common object, and so related in their labor performed in the service of the master as ordinarily to be exposed to injuries caused by each other's negligence," it is clear that appellant was not a fellow servant with the fireman, and the injury was not "within the risk ordinarily incident to the service undertaken." There was a question, therefore, for the jury's determination. 58 Ark. 198.

2. But, if they were fellow servants, there is still a case of concurring negligence by the master and a fellow servant for which the master would be liable. *Chicago Mill & Lumber Co.* v. *Cooper,* 90 Ark. 326; 4 Thompson on Negligence § 813; 1 Labatt on M. & S. § 813; 106 U. S. 700; 203 U. S. 473; 21 S. E. (Va.) 347; 95 N. Y. 552; 67 Ark. 1; 88 Ark. 28.

Austin & Danaher, for appellee.

1. The burden was on plaintiff to show some negligence on the part of the defendant which caused or contributed to his injury. Such negligence cannot be surmised or presumed. 82 Ark. 372. The plaintiff and the fireman were fellow servants, and the "injury was within the risk ordinarily incident to the service undertaken." 54 Ark. 296; 85 Ill. 500; 46 L. R. A. 377; 19 Am. St. Rep. 617; 55 L. R. A. 908; 58 Am. Rep. 881; 31 L. R. A. 321.

2. His own contributory negligence in going upon the track where he was hurt, a safer way having been provided which he could have traveled, as is conclusively shown in the evidence, will preclude a recovery. 36 Ark. 377; 49 Ark. 257.

BATTLE, J. Thos. D. Crawford brought this action against Sawyer & Austin Lumber Company to recover damages for per-

sonal injuries sustained by him as a result of the negligence of the defendant. The substance of the contents of his complaint is correctly stated in the abstract of appellant as follows:

"The defendant is a corporation, owning and operating a saw mill plant at Pine Bluff, Arkansas. West of its principal saw mill, and separated from it by a large mill pond, the defendant operates a sash and door factory. Extending from the sash and door factory, and running in an easterly direction and curving around the northern boundary of the mill pond, was one of the railroad tracks of the Pine Bluff & Western Railway Company. This track passed in close proximity to the principal saw mill and also near the machine shop, the track passing just north of both. This track was generally used by the employees of the company in going from the sash and door factory to the principal saw mill, the machine shop and the office of the company. Plaintiff was the superintendent of the sash and door factory, and was earning a salary of $2,000 per year. On the morning of the 23d of October, 1905, he started from the door factory to the machine shop, and proceeded over the track mentioned. When opposite the saw mill, defendant negligently opened a valve to blow out the boilers, which so enveloped the plaintiff in steam and vapor as to prevent him from seeing in any direction, thereby confusing him and blinding him as to his surroundings and preventing him from getting off the track with safety, as the track at this point was on a high embankment with a ditch on both sides. The blowpipe was negligently constructed in that it directed the steam immediately across the track. While plaintiff was trying to get out of the steam, he was negligently struck by a flat car propelled by the defendant's engine, and knocked down upon the track, the wheels of the car so bruising and mutilating his left foot as to cause the loss of all of his toes on that foot and to render him a cripple for life. By reason of the enormous quantity of steam and vapor enveloping the plaintiff, he was prevented from seeing the train, and the operators of the train were prevented from seeing him. The damages were laid at the sum of $15,000."

Defendant answered and denied material allegations of the complaint, and alleged that plaintiff was guilty of contributory negligence.

After hearing all the evidence adduced by the parties, the court instructed the jury to return a verdict in favor of the defendant, which they did, and plaintiff appealed.

The only question for us to decide is, was the evidence adduced by the plaintiff legally sufficient to support a verdict in his favor? In deciding this question we should give the testimony in his favor its strongest probative force, and accept that view of it most favorable to him. *Catlett* v. *Railway Co.*, 57 Ark. 461; *Rodgers* v. *Choctaw, Oklahoma & Gulf Railroad Co.*, 76 Ark. 520; *Wallis* v. *St. Louis, Iron Mountain & Southern Railway Co.*, 77 Ark. 556; *Scott* v. *St. Louis, Iron Mountain & Southern Railway Co.*, 79 Ark. 137; *Evans* v. *St. Louis, Iron Mountain & Southern Railway Co.*, 87 Ark. 628.

Pursuing this course, we find the facts in this case as follows:

"The Sawyer & Austin Lumber Company operates a large saw mill plant near the city of Pine Bluff. Some distance west of this plant and separated from it by a mill pond was a sash and door factory belonging to the same company, but operated as an entirely distinct and separate business, except as hereinafter stated. The employees of the door factory had nothing in common with the employees of the saw mill, and, so far as the record shows, the respective service of the two sets of employees never brought them in any kind of personal contact or relationship. The saw mill was in charge of one superintendent, and the door factory was in charge of another, and, while both superintendents were under a common master, there was no co-service between them, and neither had anything whatever to do with the employees under the other.

"According to the testimony of the defendant, the company had established a roadway and walk from the door factory around the southern end of the pond to the company's office, which was located east of the saw mill. As a matter of fact, a railroad track extended from the office and curved partially around the saw mill plant and the north end of the pond. It was known as the pond track. Various employees, especially those of the door factory, often used this track as a walkway, in going to and returning from their work and in going from the door factory to the office of the company, with the full knowledge

and acquiescence of the company. Plaintiff testified that he invariably used it two and sometimes three and four times a day, as the occasion demanded. The company operated its log trains on this track.

"The saw mill was run by steam, while the door factory was operated by electricity. The boiler and engine rooms of the saw mill were located north of the saw mill plant, and in close proximity to the railroad track. Electricity was generated in the engine room by the same power which ran the saw mill, and was conducted through wire cables to the door factory. Except for this connection between the two, the door factory was as separate from and independent of the saw mill as it would have been if located in another city or in a different part of Pine Bluff.

"A blow-off pipe extended from the boiler room to within five or six feet of the track, and pointed directly across the track. The location and direction of this pipe when blowing off menaced the safety of any one passing along the railroad track, for in blowing off the steam it went with great force directly across the track. To avoid danger, the superintendent of the saw mill, who had absolute power in the premises, contented himself by giving positive instructions and establishing a rule that the boilers were not to be blown off in the day time, unless it was imperative, and that they were never to be blown off until the man in charge of the boilers had first looked to see if any person was in a position to be injured. The superintendent himself testified to these instructions and to this rule, and the testimony of Henry Washington, the employee in charge of the boilers, was to the same effect. This testimony not only established the fact of the existence of a dangerous agency which threatened the safety of the employees, but it showed a knowledge and appreciation of the danger on the part of the company.

"The plaintiff was the superintendent of the door factory, and often used the railroad track in going from the factory to the company's office. In doing this he passed directly in front of the blow-off pipe. He testified, however, that he had never noticed the blow-off pipe, and did not know that it was there, and had never seen the steam blown off."

"On the fifth of October, 1905, about 8:30 o'clock in the morning, the plaintiff started from the door factory to the machine

shop and to the office, and went by way of the railroad track because it was a shorter route. As he passed the corner of shed No. 4, which was on the western shore of the mill pond, he noticed defendant's log train moving east on the scales track on the south side of the saw mill plant. This track extended in a northeasterly direction to a junction with the other track referred to, the connecting switch being near the company's office. The train was moving in the same general direction that the plaintiff was going, and, as it was the invariable custom to weigh the cars as they passed over the scales, the plaintiff reasonably supposed that it would be ten or fifteen minutes before the train could pass the switch and come back on the track on which he was walking, even if it was the intention of the train crew to bring it back on that track. As the plaintiff continued on his way, he lost sight of the train, which passed on the other side of the saw mill plant from him. When the plaintiff reached a point about opposite the blow-pipe, the valve was suddenly opened without any warning, and the plaintiff was immediately enveloped in steam and vapor. Henry Washington testified that he opened the valve without first looking to see if the way was safe, and that he violated the company's orders in doing so. It enveloped him so completely that he could not see in any direction. He was feeling around trying to get off the track, exercising the best care he could in his confusion, and making special effort to avoid stumbling and falling, because the track at this place was on an embankment six or seven feet high with a ditch on each side. While groping his way to the north side of the track, which was away from the steam and afforded the best avenue of escape, a puff of wind lifted the steam and he saw the end of a log car about two feet from him. He reached out his hand, and it struck the end of the log. He tried to catch hold of it, but missed, and grabbed the end that hung down. He threw his foot against the break beam, and when he lost his hold he fell with his back on the north rail. As his foot was pressed against the brake beam, the train pushed him a few feet along the rail, when he tried to throw himself off the rail on the north side of the track. In doing this his left foot was run over, and he was injured in such a way as to make him a cripple for life. If it had not been for the steam, plaintiff would have seen the train, for he was keeping

a lookout for it, and the train operatives would have seen the plaintiff, for they were looking down the track."

These facts presented at least two questions that should have been submitted to the jury. First. Was appellee guilty of negligence in failing to provide for the safety of appellant and thereby liable for his injury? Second. Were appellant and Henry Washington fellow servants—were they "so related in their labor performed in the service of the master as ordinarily to be exposed to injuries caused by each other's negligence? (*Snellen* v. *Kansas City Southern Railway Company*, 82 Ark. 334, 337.) They should have been submitted with appropriate instructions. The court erred in instructing the jury to return a verdict in favor of the defendant.

Reverse and remand for a new trial.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. LEWIS.

Opinion delivered July 12, 1909.

1. MASTER AND SERVANT—SAFE PLACE AND APPLIANCES.—It is the master's duty to use ordinary care to provide his servant with suitable instruments with which to work and a suitable place in which he may discharge his duties as safely as the hazards incident to his employment will permit. (Page 349.)
2. SAME—DUTY OF MASTER.—It is the master's duty not only to use ordinary care to furnish safe appliances and a safe place to the servant, but also to exercise the same care to keep such appliances and place in the same condition. (Page 349.)
3. SAME—HOW NEGLIGENCE OF MASTER ESTABLISHED.—Evidence that a servant was injured by reason of a defective appliance is not sufficient to establish the master's liability, it being necessary to show that the master did not exercise due care. (Page 349.)
4. SAME—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.—Proof that the car step which caused plaintiff's injuries was defective and that such defect could have been, but was not, discovered by defendant's inspectors justified a finding of negligence on defendant's part. (Page 349.)
5. SAME—FELLOW SERVANTS.—A railroad conductor and car inspector, being in different departments of the service, are not fellow servants under Kirby's Digest, § 6659. (Page 349.)

6. DAMAGES—PERSONAL INJURIES—PREDISPOSITION TO DISEASE.—Where a servant, owing to the master's negligence, received a fall, from which hernia resulted, he is entitled to recover damages therefor, though he was predisposed to that disease. (Page 350.)

Appeal from Jefferson Circuit Court; *Antonio B. Grace,* Judge; affirmed.

Sam'l H. West and *Bridges, Wooldridge & Gantt,* for appellant.

1. The negligence must be proved. It cannot be inferred from the mere happening of the accident. 82 Ark. 372; 79 Ark. 437; 74 Ark. 19; 51 Ark. 467; 101 Md. 168.

2. The master is not the insurer of the servant's safety, but is only held to ordinary care in providing a safe place and safe appliances in which and with which to work. 35 Ark. 602; 44 Ark. 524; 48 Ark. 333; 59 Ark. 98; *Id.* 465; 80 Ark. 260, 263; 85 Ark. 460; 90 Ark. 145.

3. If a car step be classed as a common or simple appliance, no inspection by the master was required. 127 Wis. 318; 106 N. Y. 512. But, if inspection was required, the testimony shows it was made. If inspection was necessary, it should be such as the time, place, means and opportunities, and the requirements of commerce will permit. If the duty of inspection has been performed with ordinary care, and a defect is afterwards found to exist, though not discovered at the time of inspection, the company is not liable for any injury caused thereby unless it had knowledge of such defect. 146 Ind. 564; 101 Md. 168; 4 Am. & Eng. Ann. Cas. 761 and notes; 79 Ark. 437. The master is presumed to have performed his duty until the contrary appears. Wood on Master & Servant, 346; 106 N. Y. 512, 517.

4. The reasoning in the Falvey case, 104 Ind. 409, upon which the third instruction given by the court appears to be based, fails in this case, because that case, and others supporting it, arose between a passenger and a railroad company, and not, as in this case, between a servant and master. In this case the doctrine announced in 4 Col. 344, 34 Am. Rep. 89, should be followed.

W. F. Coleman and *T. M. Hooker,* for appellee.

1. There was no issue raised, either in the pleading or proof, or in the court's declarations of law, as to the duty of a

master to guaranty the safety of the place in which to work or of the appliances with which to work. The complaint alleges a want of ordinary care in inspecting the appliances, and the jury's verdict found that such care was lacking. The court's first instruction properly declared the law on the subject.

2. The second instruction given by the court also correctly declared the law. 67 Ark. 1; 89 Ark. 222; 87 Ark. 471; 88 Ark. 181.

3. This court will not reverse on the facts in testimony, where there is evidence to support the verdict. 48 Ark. 495; 51 Ark. 467; 75 Ark. 111; 73 Ark. 377; 67 Ark. 531; 85 Ark. 193; 84 Ark. 74; 118 S. W. (Tex.) 739. Nor where there is a mere conflict of evidence. 84 Ark. 406; 76 Ark. 326; 67 Ark. 433. Nor even where the verdict appears to be against the weight of the evidence or the court differs from the jury in its conclusion as to the weight to be attached to the evidence. 67 Ark. 399; 75 Ark. 111; 74 Ark. 478. The evidence was sufficient to warrant a finding that the stirrup was defective at the time of the injury. 48 Ark. 461; 89 Ark. 326; 90 Ark. 326.

4. Proper instructions having been given, it was for the jury to say whether the appellant had been guilty of negligence. 90 Ark. 145.

5. Appellant's argument that the master is not required to inspect a common or simple appliance has no application to this case. 67 Ark. 1; 87 Ark. 471; 88 Ark. 181; 211 U. S. 608.

6. The third instruction is correct and supported, as appellant admits, by the weight of authority. While a different degree of care is demanded of carriers as between their passengers and employees, yet when once the negligence necessary to recover has been established, there is no different rule for the computation of damages. Watson's Personal Injuries, §219.

7. Appellant is liable for the full amount of the resultant injury, notwithstanding any latent tendency to hernia. 13 Cyc. 31 and cases cited; 119 S. W. (Mo.) 467; 104 Ind. 409; Watson's Personal Injuries, § § 219-222.

BATTLE, J. M. R. Lewis sued the St. Louis Southwestern Railway Company for damages for an injury caused by its failure to properly inspect its cars. He alleged that he was on the 27th of February, 1907, in the employment of the defendant

as conductor of one of its gravel trains, and while so engaged sustained painful and permanent injuries as a result of the gross negligence of the defendant; that in the discharge of his duties as such conductor he caused said train to be moved to the Bearden Gravel Pit on its line of railway, for the purpose of loading the same with gravel for use on defendant's railway, and caused it to be stopped at the place where it was the custom of the railroad company to inspect its cars and to repair any and all defects and injuries that any of them may have received, and after it had been stopped sufficiently long for such purpose caused it to be moved to a steam shovel there located to be thereby loaded with gravel, and when it stopped placed his foot upon the stirrup or step of one of the cars of the train for the purpose of alighting, and it, being defective, as he did so, swung around from one end, and threw him to the ground, and thereby inflicted hernia in one of his sides, a painful and permanent injury. He further alleged "that said stirrup on said car was defective, and that same was known to the defendant, or could have been known to it by the exercise of ordinary care; but that defendant, through its agents and employees, did not exercise ordinary care in the inspection and repair of its said cars, but was guilty of gross negligence, thereby causing the injury to the plaintiff as above;" and charged "that defendant has been guilty of negligence in not providing safe appliances for its said cars, and in the use and employ of defective machinery and appliances, to the plaintiff's great injury;" and stated "that, by the wrongful and negligent acts of the defendant, plaintiff has suffered great bodily pain and mental anguish and suffered permanent injury; and that he has suffered such injury as renders him unable to perform his usual labors and incapacitates him for performing manual labor of any kind; and that he has been damaged thereby in the sum of $20,000," for which he asked for judgment.

The defendant admitted that plaintiff was in its employment, and denies all other material allegations, and pleaded contributory negligence and assumed risks by plaintiff as defenses.

A trial of the issues before a jury followed, in which a verdict was returned in favor of the plaintiff for $1,500; and the defendant appealed.

Evidence was adduced in the trial tending to prove the following facts: On the 27th day of February, 1907, plaintiff,

Lewis, was a conductor in the employment of the defendant, St. Louis Southwestern Railway Company, having in charge of the moving of the trains of the railway company and the loading of its cars with gravel at Bearden Gravel Pit. He had caused a line of cars to be moved down to the steam shovel at that place for loading, and was stepping from one of the cars to a step suspended under the sill on the side of the car. The step gave away, and he fell to the ground, a distance of about two feet, which caused a hernia in his left side and much pain and suffering. This step "was in the nature of a stirrup, being on the ends of bolts coming down through the sill." It was a flat piece of iron bent in the shape of the letter U. A bolt passed through each end, and was secured by nuts. After appellee had fallen, he discovered that one of these nuts had come off, leaving one end of the step unfastened. When he put his weight on the step, the end slipped off the bolt, and he fell. He could not have discovered the defect in the step before falling, without getting down on the ground and looking up from beneath the car.

Inspectors were sent to and kept at Bearden Gravel Pit to inspect the cars of the appellant arriving at that place. They made all necessary repairs they could that this inspection disclosed, and, if they could not be made there, the car was sent to the shops at Pine Bluff, Arkansas. They made report of cars inspected to a Mr. Adams, "the superintendent of motive power at the Pine Bluff shops." C. E. Yowell was foreman of the freight car repairs of appellant in its shops at Pine Bluff. The inspectors at Bearden Gravel Pit were employed by him, and he sent them there as car repairers and inspectors. They inspected the car with the defective step a short time before and on the day appellee was injured. They failed to discover the defect, and no good reason is given for the failure. The car was moved a very short distance after the inspection to where appellee fell.

T. S. Stinson was train master of the appellant, and in February, 1907, was in charge of the Bearden Gravel Pit, together with the gravel trains of the appellant "and the operations of the grading of its road." So it appears that appellee and the inspectors were in different departments of service.

The court instructed the jury, in part, as follows:

"1. It is the duty of the master to exercise reasonable care in providing safe appliances and apparatus with which his ser-

vants are required to work, and in inspecting and repairing such appliances, and in discovering any defects therein, and the extent or degree of such care—that is, what is reasonable care—must be determined by the nature of the business in which he is engaged and the ordinary manner of their use and the dangers ordinarily arising therefrom. It is such care as a reasonably prudent and careful man, having a reasonable regard for the safety of others, would use under like conditions. But the master is not an insurer of lives, health or safety of his employees, nor of the soundness or safety of the appliances so furnished for their use. His liability ceases in law when he has used reasonable care in their selection, construction and maintenance, as above stated, and the mere fact that the injury may have resulted from the use of defective appliance would not, of itself, create a cause of action in the injured party against the master. In order to entitle him to recover damages for such injury, the burden is on the plaintiff to show, by a preponderance of the evidence, that: (1) He has been injured. (2) That such injury was caused by the operation of a defective appliance furnished by the master. (3) That such defective condition was known to the inspectors of the company, or some of them, or that it was such that it would have been known by them, or some of them, before the accident, if they had used reasonable care, skill and diligence in the performance of their duties, and that they did not use such reasonable care, skill and diligence in inspecting the appliances which caused the injury and in discovering and repairing the defects therein. The presumption of the law is that the master had performed his duty in furnishing proper appliances, and that, if any defects existed, he was ignorant thereof, and the burden is upon the plaintiff to show the contrary by a preponderance of the evidence."

"2. If you find from the evidence that the injury complained of was caused by a defective, unsafe and dangerous condition of the stirrup mentioned in the testimony, and that such stirrup was in such defective, unsafe and dangerous condition at the time of the inspection by the car inspector, as mentioned in the complaint and answer, and that by the exercise of ordinary care the defective, unsafe and dangerous condition of such stirrup could have at the time of inspection been discovered,

so that said defect could have been remedied, and such stirrup rendered in a safe condition for use, then your verdict will be for the plaintiff in such sum, if any, as he has been damaged thereby."

No objection is urged by appellant against the foregoing instructions in its brief. They are substantially correct. It was the duty of the appellant to have provided the appellee with suitable instrument and means with which to do his work and a suitable place in which he, exercising due care himself, could have discharged his duties as safely as the hazards incident to his employment would have permitted. In the performance of these duties it was only bound to exercise reasonable and ordinary care; and it was its duty to exercise the same care to keep such place, means and appliances in the same condition. The evidence that the appellee was injured on account of the defective step was not sufficient to hold appellant liable; but it was necessary to show that it did not exercise proper care in the premises. *St. Louis, Iron Mountain & Southern Railway Company* v. *Gaines,* 46 Ark. 555; *Little Rock, Mississippi River & Texas Railway Company* v. *Leverett,* 48 Ark. 333; *Emma Cotton Seed Oil Co.* v. *Hale,* 56 Ark. 232; *Park Hotel Co.* v. *Lockhart,* 59 Ark. 465.

In the case at bar appellant employed inspectors to inspect the car. The evidence shows that a step was defective, and that this could have been discovered by proper inspection, and that its appointed agents for that purpose, with ample opportunity and means to do so, failed to make the discovery. Appellant, under the circumstances, ought to have known through these employees that the step was defective. The jury could reasonably have inferred from the evidence that its failure was due to neglect. The appellee and the inspectors, being in different departments of service, were not fellow servants under the statute in force at the time of the injury (Kirby's Digest, § 6659), and appellant was liable for the consequences of the negligence of inspectors to appellee. *St. Louis, Iron Mountain & Southern Railway Company* v. *Holmes,* 88 Ark. 181.

The court gave the following instruction to the jury over the objection of the defendant:

"3. If you find that the defendant company in this case is liable under the instructions heretofore given, and that the

plaintiff received the injuries complained of in the manner alleged, and that at the time of such injury he was predisposed to hernia, but otherwise in good health, and that said injury was solely excited or caused by his fall from the car step described in the evidence, without his fault, and that his injury, whatever you find that to be, has directly resulted therefrom, then you are instructed that the plaintiff is entitled to recover to the fullest extent of whatever you find his injuries so received to warrant, notwithstanding such predisposition or weakness of the parts in regard to hernia." This instruction states a rule of law well sustained by the authorities. *Louisville, etc., Railway Company* v. *Falvey,* 104 Ind. 409, 426-428; *Crane Elevator Co.* v. *Lippert,* 63 Fed. 942, 948; *Vosburg* v. *Putney,* 86 Wis. 278; *Herndon* v. *Springfield,* 119 S. W. 467; Watson on Damages for Personal Injuries, § § 219, 220; 1 White's Personal Injuries on Railroads, § 170; 13 Cyc. 30, 31, and cases cited.

The evidence was sufficient to sustain the verdict.

Judgment affirmed.

FRAUENTHAL v. SLATEN.

Opinion delivered July 12, 1909.

1. MUNICIPAL CORPORATIONS—DEDICATION OF PUBLIC PLACE.—An owner of land who files a plat thereof showing blocks, lots and squares and sells lots with reference to such plat is held to have dedicated such streets, alleys and squares irrevocably. (Page 355.)
2. SAME—HOW INTENTION TO DEDICATE DETERMINED.—The fact of dedication depends upon the intention of the owner to dedicate, but the intention to which the courts give heed is not an intention hidden in the mind of the landowner, but an intention manifested by his acts. (Page 355.)
3. SAME—DEDICATION OF PUBLIC SQUARES.—The word "square," used on a plat to designate a certain portion of ground within the limits of a city or town, indicates a public use. (Page 355.)

Appeal from Cleburne Chancery Court; *George T. Humphries,* Chancellor; affirmed.

J. H. Harrod and *R. W. Robins,* for appellant.

1. On the question of dedication by the plat, the *whole plat* must be considered in order to determine the extent of the dedication. 10 L. R. A. 673. The certificate attached to the plat clearly limits the dedication to the streets described in the deed. The principles that govern the dedication of streets and alleys differ greatly from those that govern the dedication of parks. The first are indispensable to the use of lots, while parks are only indirectly beneficial to them. Hence dedication of streets may be established by acts and circumstances which would be wholly insufficient to show the dedication of parks. 21 Mich. 319; 129 Mass. 167; 11 Allen 5. Nothing in the plat either directly or indirectly refers to Spring Square as a public park; but, if there was a dedication, that was defeated by the act of Frauenthal in taking possession of and fencing the square in 1882 and hold possession to this date. 11 L. R. A. (N. S.) 129.

2. Excluding the plat, is dedication shown? (1) The rule is that there can be no dedication by the acts of an owner in connection with the town or public unless it appears that he had an unmistakable intention to permanently abandon his property. 21 N. Y. 477. (2) Undisputed facts in the case show that Frauenthal's *ownership* was always recognized. Acts done by the town in making improvements, since they were by the consent and sufferance of Frauenthal, cannot be made the foundation of an adverse claim of title. The use of the park and springs, being permissive, was not adverse, and no rights could be acquired thereby. 23 Ark. 296. (3) The suggestion that the property be left off the tax books came from the town officials; but if *he* had requested that it be not taxed, that would be the highest evidence that he had not abandoned it or dedicated it to the public. (4) Frauenthal is not estopped to claim the park by his having omitted to notify purchasers of lots that he owned the park. He was under no obligations to do so.

M. E. Vinson and *S. Brundidge, Jr.*, for appellees.

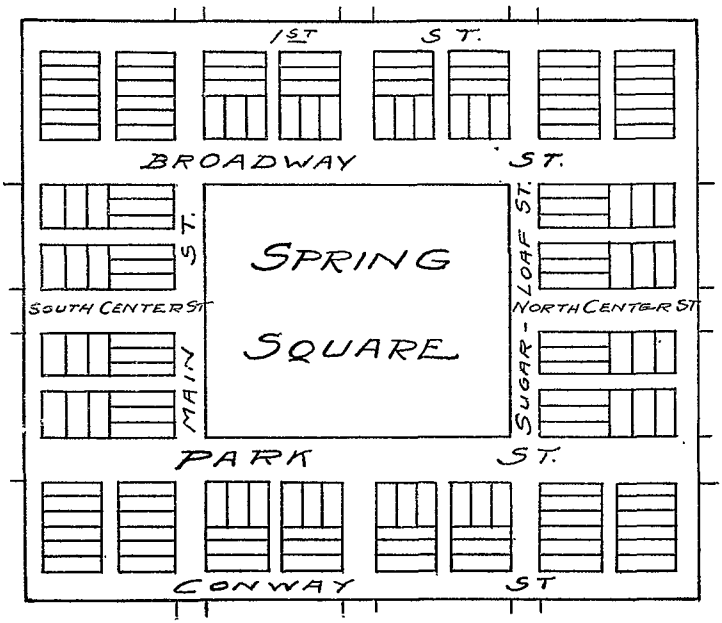
"An owner of land by laying out a town upon it, platting it into lots and blocks, and selling lots by reference to the plat, dedicates the streets and alleys to the public use, and such dedication is irrevocable. He will also be held to have dedicated to the public use squares, parks or rather public places marked as such on the plat." 77 Ark. 221 and cases cited; Brewster on Convey-

ancing, § 95. Not only so, but appellants are estopped to deny dedication of the park by reason of sales of lots by reference to the plat to numerous purchasers without any claim of private ownership of the park to any of the purchasers. Their rights are paramount. 54 Fed. 248; 82 Ark. 294; 77 Ark. 178; 80 Ark. 489. It is immaterial that Frauenthal built a fence around the park, etc., before the town was in existence. After it was incorporated, the town took charge of the park, and has ever since held it. Subsequent possession by the dedicator, if taken, will not be presumed to be adverse to the town. 58 Ark. 142; 68 Ark. 68. The facts and undisputed testimony show a complete dedication of Spring Park. 2 Abbott on Mun. Corp. §§ 729, 730; 70 N. W. 237; 12 N. J. Eq., 547; 56 Cal. 478; 47 Ky. 232; 20 N. J. L. 86; 11 Wend. 487; 45 N. E. 236; 6 N. E. 866; 43 N. E. 943; 17 Ill. 251; 6 Pet. 432; 154 U. S. 235; 56 Ill. 311.

McCULLOCH, C. J. This suit involves a controversy between Max Frauenthal and his wife, Sallie Frauenthal, and son Mortimer Frauenthal, on the one side, and the incorporated town of Sugar Loaf (or Heber, as it is sometimes called) and certain citizens thereof, on the other side, concerning the ownership of a block or square of ground in said town known as "Spring Square." The chancellor rendered a decree in favor of the plaintiffs, and the defendants, Frauenthal and others, appealed.

The question at issue is whether or not the defendants have irrevocably dedicated said property to public use as a park or square. In the year 1881 Max Frauenthal purchased the tract of 680 acres of land on which is now situated the town of Sugar Loaf. The land was then situated in Van Buren County, but it is now in Cleburne County, which was thereafter created by an act of the Legislature. In the same year Frauenthal executed to the Sugar Loaf Springs Company a deed to a large portion of said tract, and in 1883 that company platted 200 acres of it into the townsite known as Sugar Loaf, which plat was duly filed for record and recorded.

The plat contained blocks and lots, intersected by streets and alleys, and the property in controversy, which comprises about four blocks of the usual size designated on the plat, was marked "Spring Square." A section of the plat, showing this square and the surrounding blocks and streets, is herewith shown:



Another block or square was designated on the plat as "Court Square." It does not appear that the Sugar Loaf Springs Company was ever incorporated, but Max Frauenthal was president, and one Watkins was secretary of the unincorporated company or association, and Frauenthal was the principal owner or shareholder. For some time thereafter lots were sold with reference to this plat, and deeds of conveyance were executed by Frauenthal as president and Watkins as secretary of said company. Some time later the other individuals composing said company reconveyed the remainder of the lots embraced in the plat to Frauenthal, and lots have from time to time been sold off to individuals. Soon afterwards Cleburne County was created, and the town of Sugar Loaf was made the county seat. Frauenthal agreed to convey Court Square to the county for the purpose of building a court house thereon, and this was done.

There are six springs in this park known as Spring Square, from which fine medicinal water flows—white, black and red sulphur. These waters are said to possess many curative properties, and the place was then noted as a summer resort. Since then it has grown in popularity year by year, and has many visitors,

sometimes as many as 1,500 each summer. The public generally has always had free use of the park and the waters therein contained. Notwithstanding the fact that the public has always enjoyed the freest use of the park, Frauenthal has, according to the preponderance of the evidence, maintained some sort of supervision over it. Before the alleged act of dedication, he built a fence around the square, but afterwards, when it rotted down, it was replaced at the expense of the town. He built a tool house in the park, and for a time employed a man to look after the park. The town has from year to year expended small sums of money on repairs, aggregating something over $600, but it appears that these repairs have usually been made after consulting Frauenthal, who lived there a portion of the time, and in Memphis, Tenn., and in Conway, Ark., the balance of the time, usually visiting the place several times each year. There is some conflict in the evidence, and numerous citizens of the place have testified in the case as to the precise relation of Frauenthal to the property. We take it to be settled, however, by the preponderance of the evidence that he exercised some kind of supervision over it, and was consulted whenever any change was to be made. It appears clearly that the character of this supervision was for the protection of the public and for the public benefit. There is no evidence that he manifested any intention of using the property for private purposes.

In the year 1901 Frauenthal and wife conveyed all of the unsold lots (not including Spring Square) to the Bank of Conway, and on the same day the bank reconveyed the same property to his wife, Mrs. Sallie Frauenthal. Frauenthal paid taxes on the square, together with the other property, for several years after the alleged dedication, but finally, at the suggestion of the town authorities, and with the assent of the county assessor, Spring Square was left off the tax books, and no taxes have been paid thereon since then, the property being entirely omitted from the tax books. Shortly before the institution of this suit, and after there was a prospect of a railroad coming to the town, Frauenthal proposed to put the property back on the tax books and pay taxes thereon. These matters were introduced in evidence as tending to establish the fact that Frauenthal treated the square or park as public property. On the other hand, Frau-

enthal insists that the omission of the property from the tax books was suggested by the town authorities, and consented to by him merely as an act of grace in view of the fact that he was getting no benefit from the property for the time being, and that the public at large was enjoying the use thereof. He denies that that was a permanent arrangement, or that any dedication was ever intended.

The law bearing on the question of dedication of property to the public use is well settled by the decisions of this court. 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 reference to the plat, dedicates the streets and alleys to the public use, and such dedication is irrevocable. He will also be held to have thereby dedicated to the public use squares, parks and other public places marked as such on the plat. The dedication becomes irrevocable the moment that these acts concur. *Hope* v. *Shiver,* 77 Ark. 177; *Davies* v. *Epstein, Id.* 221; *Dickinson* v. *Ark. City Imp. Co., Id.* 570; *Brewer* v. *Pine Bluff,* 80 Ark. 489; *Stuttgart* v. *John,* 85 Ark. 520.

The fact of dedication depends upon the intention of the owner to dedicate to the public, as clearly and unequivocally manifested. But it is held that "the intention to which courts give heed is not an intention hidden in the mind of the landowner, but an intention manifested by his acts." *Davis* v. *Epstein, supra;* 13 Cyc. 452; Elliott on Roads and Streets, § § 124, 156.

The word "square," as used on a plat to designate a certain portion of ground within the limits of a city or town, indicates a public use. This is said to be the proper and settled meaning of the term in its ordinary and usual signification. *Rowzee* v. *Peirce,* 75 Miss. 846; *Trustees of Methodist Episcopal Church* v. *Hoboken,* 33 N. J. L. 13.

In the New Jersey case above cited, an owner of real property filed a map or plat, showing lots and blocks with intersecting streets and alleys and certain spaces, one of which was marked with the word "square;" and the court held this to be an irrevocable dedication of the space to the public use. The court there said: "It may be stated, as a general rule, that when the owner of urban property, who has laid it off into lots with streets, avenues and alleys intersecting the same, sells his lots with refer-

ence to a plat in which the same is so laid off, or when, there being a city map on which this land is laid off, he adopts such map by reference thereto, his acts will amount to a dedication of the designated streets, avenues and alleys to the public. The same principle is applicable to urban lands to be used as an open square."

In the case of *Mayor of Bayonne* v. *Ford,* 43 N. J. L., 292, an owner (R. Graves by name) platted a tract of land into building lots, selling some of them by reference to this plat; on said plat was a small section marked "Annette Park, now belonging to R. Graves." *Held,* that this became public property by dedication.

The same court in *Price* v. *Inhabitants of Plainfield,* 40 N. J. L. 608, laid down as a definite rule of law that where a landowner caused a map of a tract of land to be filed in the county clerk's office, on which streets and building lots were delineated, and one block was set apart and marked with the word "park," and when such landowner subsequently made conveyances of certain of said lots to various purchasers, such conduct was conclusive evidence of a dedication of the "park."

The Connecticut court in *Pierce* v. *Roberts,* 57 Conn. 31, held that where an owner laid out land in lots, bounded on the inside by an elliptical half-acre, marked "park" on the plat, and sold the lots with reference to the plat, this constituted a dedication. In that case there was an element in the facts of representation to purchasers that the space marked "park" was to be kept open for all the lot owners; but the court in its opinion distinctly held that the designation on the plat was sufficient to constitute a dedication, saying: "In the first place, the word 'park' on the map cannot be eliminated from the deeds, but is, on the contrary, an inseparable part of those deeds, and thereby the grantors are estopped from appropriating the land in question to a use inconsistent with such designation.....Why not give like effect to the plan and designation of the 'park?' That surely is a prominent and attractive feature of the plat, and indeed essential to its completeness. The lots for sale were all numbered in order from one to twenty-two. The center piece contained no number to facilitate a selection by a purchaser, but on the contrary it was given a name which in itself imported a design to set it apart and reserve it for common benefit of all."

In *Archer* v. *Salinas City,* 93 Cal. 43, the court held that "the word 'park' written upon a block of land designated upon a map of property within the limits of an incorporated city or town signifies an open space intended for the recreation and enjoyment of the public, and this signification is the same whether the word be used alone or with some qualifying term, as 'Central Park.'"

Judge Dillon, in his work on Municipal Corporations (§ 645) says: "The word 'park' written upon a block upon a map of city property indicates a public use; and conveyances made by the owners of the platted land, by reference to such map, operate conclusively as a dedication of the block;" citing *Price* v. *Plainfield,* 40 N. J. L. 608; *Maywood Co.* v. *Maywood,* 118 Ill. 61.

Also, in *Rhodes* v. *Brightwood,* 145 Ind. 21, it was held that an irrevocable dedication of land is effected by designating certain land on a map filed in the county recorder's office as a 'park,' and by selling lots with reference to the map.

There is little if any distinction between the words "park" and "square," and when used in this way they mean substantially the same thing. The defendants in this case are not aided by the extrinsic evidence as to the intention of the dedicator, for, as before stated, though it shows that he intended to reserve some measure of supervision over the property, it was yet altogether for the public use. And it does not appear that any private rights therein were intended to be reserved. Nor is he aided by the fact that in the certificate of dedication it is shown that certain streets were dedicated to the public use, as the evidence shows the area in controversy was also intended to be used by the public, and was set apart for that use.

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

FRAUENTHAL, J., disqualified and not participating.

LOUISIANA & ARKANSAS RAILWAY COMPANY *v.* STATE.

Opinion delivered July 12, 1909.

RAILROADS—REQUIREMENTS TO BUILD STATION—VALIDITY.—A special statute requiring a railroad company to build and maintain a station at a certain place is void if there was no public necessity therefor, and if its erection and maintenance would cause the company to incur large expense without corresponding benefit to the company or to the public.

Appeal from Columbia Circuit Court; *George W. Hays,* Judge; reversed.

Henry Moore and *Henry Moore, Jr.,* for appellant.

1. The statute under which the indictment was presented in this case required appellant to "construct and at once build and maintain a regular station," etc. The demurrer should have been sustained because the indictment only charges that appellant "failed to maintain a regular station," etc., without charging a failure to "construct and build." 47 Ark. 488.

2. The act is an arbitrary and unreasonable exercise of legislative control over a railroad. 85 Ark. 12. It is repugnant to § 1 of 14th amendment U. S. Const. and to § 8, art 2, Const. Ark. The question to be considered is the convenience of the entire public, and not that of the limited few who will profit by the erection of the station; also the reasonableness of the regulation and the loss entailed on the railroad by reason thereof must be considered. The power to alter or amend the charter of a corporation does not extend to taking its property by confiscation or indirectly by other means. 154 U. S. 362 and 398, 399; 173 U. S. 685; 197 U. S. 287; 193 U. S. 52; 142 U. S. 492; 132 Ill. 559. See also 52 Ark. 410; art. 12, § 6, Const. Ark. The act is also in direct contravention of art. 1, § 8 Const. U. S., the interstate commerce clause, and violative of the acts of Congress regulating the carriage of mails. 122 U. S. 326; 196 U. S. 195; 201 U. S. 321; 202 U. S. 543; 203 U. S. 335.

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellee.

There is absolutely no showing that a station is necessary at Snow Crossing. The evidence to support the reasonableness of the statute is not only totally lacking, but it affirmatively shows

that it is unreasonable, arbitrary and confiscatory. We confess error. 85 Ark. 12, 23; 206 U. S. 1.

BATTLE, J. This cause has been in this court once before on appeal. The opinion delivered at that time can be found in *Louisiana & Ark. Ry. Co.* v. *State,* 85 Ark. 12. The law and proper mode of procedure in the case were determined in that opinion. The judgment of the circuit court was reversed, and the cause was remanded for further proceedings. Up to that time the facts in the case are set out in the opinion.

Upon the return of the case to the circuit court the defendant filed a special plea, which is in part as follows:

"Comes the defendant, Louisiana & Arkansas Railway Company, and, reasserting that it is not in any manner amenable to the indictment herein, says: (1) That it is not guilty as charged in the indictment. (2) The Louisiana & Arkansas Railway Company, further pleading, says that said 'Snow Crossing' is simply the crossing of a country road over and across the line of defendant's railway, and that no railroad crosses the line of defendant's road at or within many miles of said Snow Crossing. That said Snow Crossing is not a town, and that the only improvements of any kind there consist of a cotton gin and two small houses and a small box house used as a barn, and that the total population of said Snow Crossing consists of two families with about ten persons in all; that the surrounding country is sparsely settled, the same being largely wild and uncultivated land; that the same is a farming country, principally devoted to the raising of cotton, so far as any salable crops are concerned, which is hauled to the neighboring towns of Magnolia, Lewisville and Taylor, where the farmers are accustomed to purchase their supplies. That at Experiment, about two miles north of Snow Crossing on the line of the railroad of said railway company, there is a flag station where passengers and freight are received and discharged, and that about five miles south of said Snow Crossing on the line of said railroad is the station of Taylor, where there is a depot building, and where a telegraph operator and passenger and freight agents are employed and stationed, and that said stations of Experiment and Taylor furnish to the inhabitants at or near Snow Crossing ample transportation facilities, and that to require the erection and

maintenance of a regular station at Snow Crossing would force said defendant to maintain three stations in a sparsely settled country within a distance of about seven miles. That to erect a suitable station at Snow Crossing would cost in the neighborhood of one thousand dollars ($1,000). That Snow Crossing is located at the foot of a very heavy grade on the line of defendant's railroad, and, because of the topography of the country, it is impracticable (except with very great expense) to provide side tracks and passing tracks at said point, such as would be necessary to comply with act No. 105 of 1905, under which this indictment is found. And that it would cost to maintain same and pay the necessary agents and employees about seventy-five dollars ($75) per month, and that the receipts from freight and passengers at Snow Crossing would not meet and pay more than a small proportion of such sum and the expenses attendant upon the maintaining said station, and that such station would have to be operated at a large monthly loss to said defendant.

* * * * * * * * * * *

5th. That Snow Crossing is located at the foot of a very heavy grade on the line of defendant's railway—the heaviest grade at any point on said line. It is a point where there is a rising grade to the north for a long distance, some five thousand feet, eleven hundred feet of which is a one per cent. grade (that is, a rise of one foot for every one hundred feet) and said point of Snow Crossing is located about thirty-four hundred feet north of the most abrupt grade on the whole line of defendant's railway, being a hill known as 'Red Cut Hill,' the grade there being a two per cent. grade. In order to overcome the difficulty in getting over the heavy grade south of Snow Crossing, it is necessary to use the momentum acquired by trains in going down the hill that lies to the north of Snow Crossing, and, if compelled to stop at Snow Crossing to receive or discharge freight and passengers, ordinary freight trains would have to double to Taylor, as an engine there could only start and pull up over the two per cent. hill a little more than fifty per cent. of what is the customary and necessary tonnage of such trains; and passenger trains south bound in handling the usual equipment of such passenger trains under adverse weather conditions, or with an engine not steaming properly, if required to stop at said Snow Crossing, would be

compelled to back up north in order to attain sufficient speed and momentum to take such trains over the heavy grade of said 'Red Cut Hill.' About thirty-five hundred feet north of said Snow Crossing there is a one degree curve in the line of said railway, which curve is 2,500 feet in length, and which curve, coupled with the necessity of backing trains north of Snow Crossing if they were compelled to stop there, in order to overcome the heavy grade of said Red Cut Hill, would greatly increase the danger of accidents to said freight and passenger trains and to the employees operating same, and to the employees upon United States mail cars, and to the passengers transported upon said line of railway; and that to have to cut in two the usual freight trains at Snow Crossing and to double from that point to Taylor would greatly increase the danger to property and to the lives of the employees of said railroad company, and this danger would be particularly great when this was required to be done in the night time, which would frequently be the case; and that the only way in which the provisions of said act No. 105 as to the establishment and maintenance of a station at Snow Crossing and the stopping of freight and passenger trains at said point could be complied with, with safety to life and property, would be the cutting down of said Red Cut Hill, so that trains could avoid the necessity of backing up, or of doubling, from that point to Taylor, as mentioned, which would cost not less than thirty or forty thousand dollars, and that the business of defendant is not of sufficient proportion to justify any such expenditure. So that the provisions of said act No. 105 and the enforcement of same and the attempted enforcement of same are unreasonable and arbitrary and repugnant to section 1 of the 14th amendment to the Constitution of the United States and of section 8 of art. 2 of the Constitution of the State of Arkansas, in this, that the effect of such enforcement would be to deprive the defendant of its property without just compensation and without due process of law, and would be to deny to it the equal protection of the laws, and repugnant to and in violation of the interstate commerce clause of section 8, art. 1, of the Constitution of the United States, and repugnant to and in violation of the statutes of the United States regulating the carriage of the mails under section 10 of art. 1 of said Constitution of the United States. That the statements as to the con-

ditions and surroundings and physical facts set forth in this plea were the conditions and surroundings and physical facts as to said Snow Crossing at the date of the passage of said act No. 105 of 1905 and at the date of the finding of the indictment herein."

After hearing the evidence adduced by the parties, the court found that the special act of the Legislature upon which the indictment was founded was a valid statute; and, the defendant admitting that it had failed to comply with the act, fined it (defendant) $25, and rendered judgment against it for that amount. To reverse this judgment the defendant prosecutes an appeal to this court.

The Attorney General, in behalf of the State, confesses that the court erred in holding that the statute in question is valid.

The undisputed evidence adduced in the trial fully sustains the statement of facts in the special plea of the defendant, which shows that there was no public necessity for a station at Snow Crossing on defendant's line of railway, and that the requirement that such a station should be constructed and maintained is unnecessary, unreasonable and arbitrary, and, if executed, would cause the defendant to incur large expense without any corresponding benefit to it or the public. The result is it should not be enforced, and the confession of error of the Attorney General should be sustained.

Judgment reversed and cause remanded with directions to the court to dismiss the indictment.

TEXAS & PACIFIC RAILWAY COMPANY v. SMITH.

Opinion delivered July 12, 1909.

1. NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—Where, in an action against a railroad company for negligently killing certain stock, the only issue was as to the value of the animals, a motion for new trial on the ground of newly discovered evidence tending to prove that plaintiff was guilty of contributory negligence sets up matter not relevant to any issue in the original case, and presents no ground for new trial. (Page 366.)

2. EQUITY—RELIEF UPON NEWLY DISCOVERED EVIDENCE.—If a party in an action at law, through no fault of his own, is ignorant of facts constituting a defense to the action, and cannot avail himself thereof in such action in a motion for new trial upon the ground of newly discovered evidence, because such evidence is not relevant to the issues in the action at law, he may obtain relief in equity, provided he has exercise reasonable diligence to discover the evidence. (Page 366.)

Appeal from Miller Circuit Court; *Jacob M. Carter,* Judge; affirmed.

Glass, Estes & King, for appellant.

Where material evidence is discovered after the trial, which is essential to a complete defense of the action, and the failure to discover it sooner is not due to any negligence on the part of the defendant, this is a ground for setting aside the judgment and granting a new trial, after the term in which the judgment was rendered has been adjourned. Kirby's Dig. § 6220.

E. F. Friedell, for appellee.

The court heard the testimony of witnesses on the motion for new trial, and the court's finding will not be disturbed. 53 Ark. 166; 60 Ark. 257. The trial court is necessarily vested with large discretion in the matter of motions for new trials. 39 Ark. 108; 76 Ark. 97; 85 Ark. 179.

BATTLE, J. Daniel W. Smith brought an action against the Texas & Pacific Railway Company, before a justice of the peace of Miller County, to recover eighty-five dollars for damages caused by an alleged negligent killing of two burros by defendant. After trial and judgment in a justice's court it was taken by appeal to the Miller Circuit Court, where a jury trial was had on the 29th of June, 1908, and judgment was rendered against the defendant in favor of the plaintiff for twenty-five dollars and costs. After the rendition of the judgment an order was made allowing the defendant until the fourth day of July following within which to file a motion for a new trial, but no motion was filed, and the judgment became final. The court at the June, 1908, term, adjourned on the fourth of July, 1908, and thereafter, on the 14th day of the same month, the following motion for a new trial, based upon newly discovered evidence, was filed by the defendant:

"Comes the defendant herein, in vacation, as provided by law, and files this, its motion for a new trial of this case, with the

prayer that the verdict of the jury and the judgment of the court rendered herein be set aside, and the case be tried anew.

"In support of this motion the defendant respectfully shows that since the trial of this case and the adjournment of the June, 1908, term of this court, it has discovered new evidence bearing on the issues of this case, which evidence is material to the defense herein, and which, after reasonable diligence, it could not and did not discover and produce at the trial.

* * * * * * * * * * *

The defendant shows that, since said trial and the adjournment of said court, it has discovered evidence to the effect that either the day before or the afternoon or evening when they were struck, the plaintiff led them upon the defendant's right of way and within the inclosure surrounding same; that he led them upon said right of way and within the enclosure surrounding same by pushing down the bottom wire of the fence, and lifting up the upper wire, permitting them to go upon the right of way between said wires; that at such time they were tied together with a rope, and were left within said inclosure, grazing, exposed to the danger of being struck by passing trains, with no chance to escape if upon trestle or curve.

"The defendant shows that said testimony is essentially material to its defense in that it shows that the plaintiff's own negligence and carelessness caused and contributed to such damage as he sustained, and that such negligence and carelessness, even if negligence were proved against the defendant, which was not, would preclude a recovery by the plaintiff in the case.

"The defendant shows that it could not, with reasonable diligence, have discovered and produced this testimony at the trial of this case, and says that it made a special effort prior to this trial to get at all the facts and all the merits of the claim involved in this suit. That it sent its special agent to the place where the damage was alleged to have been done, and undertook to ascertain, through said special agent, not only all the facts and circumstances connected with the injury, but also everything relating to the value of the animals; that said special agent spent some time in said vicinity, went to see every man who was reputed to have known anything of the claim, and used every diligence he could to ascertain all the facts about the matter. It says that said

special agent never heard it intimated by any one, nor did any one else connected with this defendant hear it intimated by any one, prior to the trial of this cause, that plaintiff had in any manner been responsible for the animals being upon the defendant's right of way, and that after the trial, and after judgment had been rendered and the term of this court had adjourned, a credible person of his own volition, and thinking that the matter had been concluded and terminated, apprised the defendant's agent of the testimony hereinafter set out, and stated to said agent that he himself had observed and seen defendant lead the said animals from the woods and admit them to the defendant's right of way between said wires of said fence and leave them within said enclosure tied together.

"The defendant says that it expects to have the testimony of said witness at another trial of this case, and now files this its petition for a new trial, and prays that summons may be issued as provided by law, on same, requiring the plaintiff to appear and answer on or before the first day of the next term, that the judgment rendered in this case be set aside, and that a new trial be granted herein, and for such other and further relief as the plaintiff may be entitled to.

"The defendant further shows to the court that the plaintiff in this case is irresponsible financially, and that, if permitted to execute the judgment heretofore rendered and hereinbefore complained of, the defendant will not be able, in the event a new trial is granted, to force the plaintiff to return and restore to it the money collected on such judgment; and further that, unless prevented, the plaintiff will proceed with the collection and enforcement of said judgment, and thus render of no effect and consequence a judgment setting aside the verdict of the jury hereinbefore rendered and the judgment of this court as hereinbefore rendered, if this motion be granted and the said judgment set aside; that, in order to make the judgment herein prayed for effectual, and in order to prevent great wrong and damage and injustice to the defendant, and in order to give force and effect to the judgment that may be rendered by this court on this motion, it is necessary to restrain the plaintiff from the execution of said judgment. Defendant therefore prays that, pending a final hearing of this matter, your honor direct your most gracious writ

of injunction to issue, enjoining and restraining plaintiff from proceeding with the collection of said judgment until final determination of this motion."

This motion or petition was supported by an affidavit, and on the 15th day of August, 1908, was submitted to the judge of the circuit court, who, after hearing the testimony adduced in support of it, made an order directing the clerk to issue an order restraining plaintiff from collecting the judgment recovered by him. The motion came on to be heard by the court for final decision at the November term of the circuit court following, and the defendant adduced testimony of witnesses supporting his motion, which was contradicted by the testimony of the plaintiff, and the court overruled the motion, and from the order overruling the motion the defendant appealed to this court.

The record in the case shows the following facts: "That the killing of the burros was not denied, nor was there any defense urged at the trial, except such as related to the value of the animals. That the issue as to the value was submitted under appropriate instructions of the court; no other issues being submitted, and no other fact being investigated in the case."

A new trial is defined by the statute to be "a re-examination in the same court of an issue of fact after a verdict by a jury or a decision by the court." Kirby's Digest, § 6215. It may be granted for "newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial." *Ib.*, subdiv. 7. The newly discovered evidence must be material to the issue tried. *Olmstead* v. *Hill*, 2 Ark. 346; *Robins* v. *Butler*, 2 Ark. 133; *White* v. *State*, 17 Ark. 404; *Bourland* v. *Skinner*, 11 Ark. 671. Unless it was relevant to the issue, it could not be material, and was not admissible if it had been produced at the trial without an amendment of the pleadings. The newly discovered evidence in the case at bar was not relevant to any issue in the original case, and therefore not material and no ground for a new trial. But the defendant is not without remedy. He has his remedy in equity. Mr. Pomeroy, upon this subject says: "It frequently happens that a party, through no fault of his own, is ignorant of facts constituting a defense to the action. The rule in such cases is that equity will relieve if the party could not, by the

exercise of reasonable diligence, have obtained the evidence. But if there has been an ample opportunity to discover the evidence, and it is not then forthcoming, relief will be denied."

Judgment affirmed without prejudice to appellant's right to institute a suit in equity for relief.

BLOOM v. HOME INSURANCE AGENCY.

Opinion delivered July 12, 1909.

1. CONTRACTS—RESTRAINT OF TRADE.—Contracts in partial restraint of trade, which are reasonable and founded upon a legal consideration, will be enforced. (Page 372.)
2. GOOD WILL—DEFINITION.—Good will in a business, which is the probability that old customers will resort to the old place for the purpose of trade, is recognized in law as a thing of value, which may be sold. (Page 373.)
3. CONTRACT—REASONABLENESS OF CONTRACT IN RESTRAINT OF TRADE.—Where an incorporated fire insurance agency sold out its business and good will to another company, and its principal stockholder agreed with the latter company not to engage in the fire insurance business at a certain place for the term of five years, such contract was reasonable and binding upon him individually, as well as upon the insurance agency in which he was interested. (Page 373.)
4. MONOPOLIES—COMBINATION OF LOCAL INSURANCE AGENCIES.—An agreement between several local insurance agencies, having no authority to fix the price or premium to be paid for insuring property, to transfer their business and good will to another, with the view of decreasing the expenses of the several agencies, does not create a combination in violation of the "anti-trust act" of January 23, 1905. (Page 374.)
5. CORPORATIONS—CONTRACT MADE BY PROMOTERS—VALIDITY.—Where a contract made on behalf of a corporation before its organization was subsequently adopted by it and recognized by all the parties as binding on it, all parties to it are bound by its terms. (Page 375.)
6. SAME—POWER TO CONTRACT.—Within the scope of the purposes of its creation, a corporation has the same power to make contracts which natural persons have. (Page 376.)
7. SAME—POWER TO CONTRACT IN RESTRAINT OF TRADE.—A corporation engaged in the fire insurance business, as incident to the sale of its business and good will, may agree to refrain from engaging in the business of a local fire insurance agency. (Page 376.)

8. SAME—ULTRA VIRES—ESTOPPEL.—After a corporation has received the benefits of a contract into which it has entered, it will not be permitted to violate the obligations of that contract upon the ground that it had no power to make it. (Page 376.)

9. PARTIES—REAL PARTY IN INTEREST.—Where a contract was entered into by the promoters of a corporation on its behalf before its organization, the corporation, being the real party in interest, was authorized to sue to enforce such contract; but in such case it was not error to permit the promoters to be brought in as parties plaintiff in order to secure a complete determination of the controversy. (Page 377.)

10. INJUNCTION—RESTRAINT AGAINST ENGAGING IN TRADE—PARTIES.—While a person who has agreed not to engage in a designated business in a certain locality for a period of time may be restrained from engaging in such business for such period and within said territory, either for himself individually or as a partner of any firm or member of any corporation engaged in such business, and from holding himself out to customers in that territory as being a member of such firm or company, it is error to restrain a firm or corporation of which he is a member, not made a party to the proceedings, from engaging in such business. (Page 377.)

Appeal from Jefferson Chancery Court; *John M. Elliott,* Chancellor; affirmed with modification.

STATEMENT BY THE COURT.

The Home Insurance Agency, one of the plaintiffs below, instituted this suit gainst the defendant, E. B. Bloom, and in its complaint prayed for an injunction restraining the defendant, either for himself or for others, from soliciting insurance in Jefferson County, Arkansas, for five years from November 1, 1905. Subsequently W. Z. Tankersley, F. M. Rosenberg, George M. Wells, and Russell Hollis were made parties plaintiff to the action. Prior to September 16, 1905, W. Z. Tankersley, the Bell-Vernon Company, represented by F. M. Rosenberg, George M. Wells & Company, a firm composed of said Wells and Hollis, and the Travellers Insurance Company of Pine Bluff, were the owners of four separate local insurance agencies in the city of Pine Bluff, Arkansas, and were engaged in the business of soliciting insurance as agents for general insurance companies that wrote and executed policies of insurance. The defendant was the secretary of the Travellers Insurance Company of Pine Bluff, Arkansas, which was engaged in the business of writing

fire and tornado insurance and issuing policies of insurance therefor, in addition to owning a local agency in said city which acted as an agent in solicting insurance business. The defendant also owned 400 shares of the capital stock of said Travellers Insurance Company of the par value of $10,000, and was actively engaged for that company in soliciting insurance. There were a number of other insurance agencies in Pine Bluff engaged in the same business. The plaintiffs and defendant on September 16, 1905, entered into negotiations for forming a corporation to be known as the Home Insurance Agency, for the purpose of engaging in the business of conducting an insurance and real estate agency at Pine Bluff, which would be capitalized at $17,000, and would be actually incorporated on November 1, 1905. On September 16, 1905, the parties entered into written agreement, by which the above named four local agencies did sell and transfer to said Home Insurance Agency "the entire insurance business of their respective agencies, together with all the expirations therein, including good will, life insurance only excepted." In consideration of the sale and transfer, each of the agencies was to receive such proportion of the capital stock of the corporation, the Home Insurance Agency, as was represented by the amount of the expirations of the business of each agency, with adjustments, so that each of the four agencies should own one-fourth of the entire capital stock. The contract also provided that the parties thereto would associate in the same office for the purpose of conducting the said agency business, and would deliver to the Home Insurance Agency upon its incorporation all the "books, registers, supplies and other papers relating or belonging to the insurance business of the several agencies."

The following provision, which forms primarily the basis of this action, was made a part of said written contract: "That the said W. Z. Tankersley, George M. Wells, Russell Hollis and F. M. Rosenberg, beginning with said first day of November, 1905, obligate and bind themselves to render their personal service in good faith to the carrying on of the business of the aforesaid Home Insurance Agency for the the term of at least two years, at and for such salary as the board of directors may fix and determine, which salary, however, we suggest and recommend to be $150 per month to each of said parties; and the said above

last-named parties, together with E. B. Bloom and the Travellers Insurance Company, agree to and among themselves and with the said Home Insurance Agency, that they will not, either directly or indirectly, for themselves or as employees for others, for the term of five years from the said first day of November, 1905, within the limits of Jefferson County, Arkansas, engage in any line of insurance mentioned and contemplated in the articles of incorporation, except life, save only in the employ of the said Home Insurance Agency."

This contract was executed by the defendant E. B. Bloom individually and also by the Travellers Insurance Company by E. B. Bloom, its secretary.

In pursuance of said contract the Home Insurance Agency was incorporated on November 1, 1905, and the capital stock thereof issued to the parties. For the Travellers Insurance Company there were issued 169 shares to E. B. Bloom, trustee, and one share of said capital stock to E. B. Bloom; but all these 170 shares were actually owned by the Travellers Insurance Company. In consideration of said shares of capital stock, the separate agencies, including E. B. Bloom for the Travellers Insurance Company, delivered to the Home Insurance Agency all the properties and business set out in the above contract of September 16, 1905. On May 25, 1907, the Home Insurance Agency paid a dividend of $7.50 to said E. B. Bloom on the one share of stock in his name and on the stock in his name as trustee the sum of $1,267.50. In July, 1908, these 170 shares of the capital stock of the Home Insurance Agency, issued as above and owned by the Travellers Insurance Company, were sold by that company to the Home Insurance Agency for the sum of $5,000.

On June 9, 1908, the defendant became a member of the firm of Banks, Bloom & Company, and later, of the firm of Bloom, Hanf & Bloom; and these firms and the defendant himself thereafter engaged in the business of soliciting fire insurance in Jefferson County, Arkansas, and in violation of the above provision of said written contract.

The chancellor decreed that defendant be enjoined from soliciting fire insurance in Jefferson County, Arkansas, for five years from the first day of November, 1905, either for Banks, Bloom & Company, or for Bloom, Hanf & Bloom, or for any

other person, firm or corporation, or for himself personally; and from engaging in any line of insurance, except life, in said county for said period of time; and the firms of Banks, Bloom & Company and Bloom, Hanf & Bloom were enjoined for said period from engaging in or conducting any insurance business, save life, within the limits of Jefferson County as long as said E. B. Bloom was a member of said firms or directly or indirectly interested therein, or his name connected with said firms.

From that decree the defendant has appealed to this court.

Young & Rowell, White & Altheimer and *W. B. Alexander,* for appellant.

1. The contract was executed by Bloom without consideration, and without the sale of a good will or a business, and is in restraint of trade. 2 Beach, Cont. 1575; 6 L. R. A. (N. S.), 850; 10 *Id.* 268; 28 C. C. A. 492; 29 *Id.* 211; 62 *Id.* 487; 24 A. & E. Enc. Law (2 Ed.) 851; 62 Ark. 105; 46 L. R. A. 142; 4 *Id.* 154.

2. The contract is not enforceable for want of mutuality. 85 Ark. 153; Beach. Mod. Law of Const. § 980; 6 A. & E. Enc. Law (2 Ed.), p. 730; 9 Cyc. 541. Contracts in restraint of trade are construed strictly. 9 Cyc. 541; 73 Ark. 338; 74 *Id.* 41.

3. The Home Insurance Company had no cause of action, and the complaint could not be amended by making others plaintiffs. 34 Ark. 144; 56 *Id.* 167; 18 Ala. 395; 57 *Id.* 168; 49 Me. 536; 51 Cal. 154.

4. The combination formed is clearly against the anti-trust laws of Arkansas. Acts 1905, p. 5; 65 L. R. A. 347; 52 *Id.* 262; 139 N. Y. 251; 23 L. R. A. 221; 40 Ark. 266; 193 U. S. 352; 36 Ohio 666.

Bridges, Wooldridge & Gantt and *Taylor & Jones,* for appellees.

1. The contract is not in restraint of trade. 62 Ark. 101; 48 *Id.* 145; 48 *Id.* 216.

2. It was not executed to violate the anti-trust law, and was based upon a valuable consideration. 78 Am. St. Rep. 613; 74 Am. Dec. 746; 48 Am. Rep. 269; 60 *Id.* 464; 24 Ark. 201; 64 *Id.* 637; 62 *Id.* 108.

3. There was mutuality of promise. Page on Const. § 1615; 44 L. R. A. 258. Appellant and the Travellers Insurance

Agency received the benefits accruing to them by accepting the contract, and *ultra vires* cannot be pleaded. 70 Ark. 238; 6 L. R. A. (N. S.) 870; 63 Ga. 103; 10 Cyc. p. 1156, note 35 and pp. 1157-8-9-10; 74 Ark. 377; *Ib.* 190; 77 *Id.* 109; 77 *Id.* 128.

4. The contract was ratified by the Home Insurance Agency, and it cannot take advantage of its own acts or omissions to escape liability. 21 Am. St. 110; 10 Cyc. 1071; 44 Ark. 383; 2 Nev. 257; 35 Ark. 365.

5. The complaint was properly amended. Kirby's Dig. § 6148. The court's discretion will not be controlled unless clearly abused. 26 Ark. 360; 58 *Id.* 504; 64 *Id.* 257; 26 *Id.* 465.

FRAUENTHAL, J., (after stating the facts.) The defendant admits the execution of the above contract, by which he agreed that he would not engage in the insurance business mentioned in said contract at the place and for the time therein set forth. He contends, however, that this is a contract in restraint of trade, and is therefore invalid. The doctrine that is invoked to avoid a contract in restraint of trade is based upon a public policy. But a contract is not against a sound public policy that only partially limits a person's business, and leaves open to him practically an unlimited field of industrial activity, and which does not injuriously affect the interest of the public, where it only prevents a person from carrying on a particular business. In such case there is no good reason for restricting the freedom of contracts. The rule with reference to such contracts is thus stated in the case of *Leather Cloth Co.* v. *Lorsont,* L. R. 9 Eq. 353, quoted with approval by the Supreme Court of Michigan in the case of *Up River Ice Co.* v. *Denler,* 114 Mich. 296:

"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 that does not restrain him from

alienating that which he wants to alienate, and therefore enables him to enter into any stipulation, however restrictive it is, provided that restriction, in the judgment of the court, is not unreasonable, having regard to the subject-matter of the contract."

And so it has been by this court uniformly held that where a restraint of trade is limited as to time and place and is reasonable, the agreement is not against public policy and is not invalid. In the case of *Webster* v. *Williams,* 62 Ark. 101, this court announces the principle as follows: "Contracts in partial restraint of trade, if they are reasonable and founded upon a legal consideration, will be enforced." *Keith* v. *Herschberg Optical Co.,* 48 Ark. 138; *Daniels* v. *Brodie,* 54 Ark. 216; 1 Page on Contracts, § 375; 9 Cyc. 529.

Ordinarily, the agreement to refrain from a calling within a given space and for a specified time must accompany a sale of a business property itself. But if the enterprise is disconnected with any plant or tangible property, and is a business with a good will and custom, it is still valid to agree, as a protection to the purchaser thereof, from competition in that line of business, to discontinue such calling, and abstain from such business. 1 Page on Contracts, § 373; *Wood* v. *Whitehead Bros. Co.,* 165 N. Y. 545.

In the case at bar each insurance agency that was a party to the contract owned a separate business. Each agency had what are called, in the insurance business, expirations. These consisted of custom and trade which would ordinarily be renewed in and held by such agency. These expirations were considered property. It was actually the good will of the agencies. Good will is "the probability that the old customers will resort to the old place for the purpose of trade." It is recognized in law as a thing of value which may be sold. 1 Page on Contracts, § 374.

Each agency by this contract sold its expirations, good will and business. That constituted a thing of value; and incidental thereto they had the legal right to protect the purchaser in that business which he thus acquired by agreeing to refrain from engaging in the same business within Jefferson County for a period of five years. Such a contract was therefore not invalid. Under the evidence in this case the defendant was an active

force and party in the Travellers Insurance Company. By his personal efforts in soliciting business for that company a large amount of its custom was obtained, and it is but reasonable to presume that a great part of that trade was attracted and retained by him personally and would follow him personally. The good will of that company in its local agency was largely the good will of the defendant. And the defendant was also interested in all the properties and business of the Travellers Insurance Company. He was a large stockholder in that corporation, and therefore actually owned a part of the business and good will which that company sold; and as such stockholder the defendant received a part of the consideration which was paid to that company therefor.

In the case of *Up River Ice Co.* v. *Denler,* 114 Mich. 296, a stockholder in a corporation which was engaged in the ice business sold his stock in the company, and in consideration of the purchase agreed not to engage in the ice business at a specified place. In a suit to enjoin him from a violation of that contract he contended "that contracts of this character are enforceable only when connected with the good will of some business, and that individually he owned and sold no business." In that case the court held that the money received by him on the sale of his stock of the corporation was a sufficient consideration to support the agreement of the individual stockholder not to engage in the business that had been conducted by the corporation.

The defendant received as a shareholder of the Travellers Insurance Company a valid consideration for his agreement not to engage in the insurance business; and this agreement was connected with a sale of a business and property in which he was interested. His interest in the property and good will of the local agency of the Travellers Insurance Company which were sold, and the obligations which he assumed by the execution of the contract, were the same in legal effect as if the company with which he was connected, and which he partly owned, had been a partnership instead of a corporation. The contract which he thus executed was binding on him in all its terms.

The various parties to the contract were agents whose business consisted in soliciting insurance for insurance companies throughout the United States and other countries that actually

wrote insurance and issued policies. Under the evidence in this case and the finding of the chancellor, these agencies did not fix or regulate the price or premium to be paid for insuring property. The sale of these agencies to the company did not, under the evidence, affect that price in any way. The object of associating themselves together was to decrease the expenses of the several agencies; and the object of requiring an agreement that all parties would abstain from soliciting the same kind of insurance business was to keep the good will of the various agencies, and thus retain the total volume of business of all the agencies. There was no evidence that showed that this was a combination for the purpose of fixing or regulating the price of insurance, or that this agreement could have that effect. The contract was therefore not invalidated by the act of the General Assembly of Arkansas, approved January 23, 1905, and commonly known as the "anti-trust law." Acts 1905, p. 1.

The purpose and aim of this contract was not to stifle competition. Its object was to sell and transfer a business and the good will of that business. To maintain that good will in its integrity as a thing of value, it was essential that the vendor should not solicit and thus destroy that custom and trade which he had sold. It was therefore not invalid for the vendor to agree, for the purpose of protecting the vendee in his purchase of that good will, to abstain from engaging in the business within a limited space and for a limited time.

It is urged that, because the Home Insurance Agency was not incorporated, and therefore not in existence, at the date of the contract, there was a lack of mutuality, and the contract is not effective on that account. But a promise that lacks mutuality at its inception becomes binding on the promisor after performance by the promisee. Where, therefore, a corporation, after its organization, makes the original agreement its own contract by adopting and acting on it, the original contract becomes binding on it; and where all the parties after such organization recognize and act on the original contract, all parties to it are bound by its terms. 9 Cyc. 329; 10 Cyc. 263; *Perry* v. *Little Rock, etc., Ry. Co.* 44 Ark. 383.

In the case at bar the Home Insurance Agency was duly organized on November 1, 1905, and it then accepted and adopted

the contract, which was in legal effect a proposal to the future corporation. All the parties thereafter recognized the contract as effective and acted upon it. The Home Insurance Agency, in conformity with the contract, issued its stock to the various parties, and took over the books, papers, expirations and good will of the various agencies. The defendant, in conformity with the contract, then received and accepted the stock. The contract thus became mutual and binding on all the parties.

It is also urged that the Bell-Vernon Company and the Travellers Insurance Company were corporations, and it was beyond the powers of these corporations to enter into the contract to refrain from engaging in the business of a local insurance agency; and on this account the contract was not mutual, and therefore not binding on the defendant. But the contract was but an incident to a sale of property, and it was within the implied power of these corporations to make any disposition of their property which in the their judgment was for the benefit of the corporations. It is not shown that the contract was without the scope of the purposes of their creation; and within that scope these corporations had the same power to make and take contracts which natural persons have. The presumption is that this contract made by these corporations was not *ultra vires*. But, if it should be considered that this contract was in excess of the powers of these corporations to enter into, yet, as has been said above, the contract has been so carried out that these corporations have received the benefits thereof. They would not therefore be permitted to violate the obligations of that contract upon the ground that they did not have the power to make it, after having thus received the fruits and benefits thereof. *Bloch Queensware Co.* v. *Metzger,* 70 Ark. 238; *Minneapolis F. & M. Ins. Co.* v. *Norman,* 74 Ark. 190; *Arkadelphia Lbr. Co.* v. *Posey,* 74 Ark. 377; *Ark. & La. Ry. Co.* v. *Stroude,* 77 Ark. 109; *White River, L. & W. Ry. Co.* v. *Star R. & L. Co.,* 77 Ark. 128; 5 Thompson, Corp. § 6021; 10 Cyc. 1156.

The defendant cannot, therefore, on this account claim that the contract so lacked the requisite of mutuality that it was not binding on him.

This suit was originally instituted by the Home Insurance Agency as the sole plaintiff, and on the same day of and before

the trial below the other plaintiffs were made parties to the suit over defendant's objection. It is urged that the Home Insurance Agency had no cause of action under the contract, because it was not in existence at the time of the execution thereof; and that therefore the complaint could not be amended by making other parties plaintiff who may have had a right of action thereon.

By section 5999 of Kirby's Digest it is provided that every action must be prosecuted in the name of the real party in interest, with certain exceptions which do not apply here. The beneficial owner is the real party in interest within the meaning of this provision of the code. 30 Cyc. 45. Where a contract is entered into for the benefit of a third person, the latter is the real party in interest; and a majority of the American courts have adopted the rule that such person may maintain an action for the violation of the contract. *Lawrence* v. *Fox,* 20 N. Y. 268; *Brewer* v. *Dyer,* 7 Cush. (Mass.) 337; 30 Cyc. 65.

The contract which is the foundation of this suit was executed for the benefit of the Home Insurance Agency; and later, when the Home Insurance Agency came into existence, it was recognized, adopted and acted upon by all the parties as the contract of that company. It was therefore the real party in interest and a proper party plaintiff. There was therefore a cause of action with a proper plaintiff set forth by the complaint. The court had then the right to amend the complaint by adding to or striking out the name of any party at any time in furtherance of justice. Kirby's Digest, § 6145. And the question as to when and whether such parties should be brought in as necessary to a complete determination of the controversy is within the sound discretion of the trial court. And in this case we do not think that discretion has been abused. 31 Cyc. 477.

In the decree the chancellor also enjoined the firms of Banks, Bloom & Company and Bloom, Hanf & Bloom, for said period, from engaging in or conducting any insurance business, save life, within Jefferson County as long as defendant was interested in or connected with said companies. It is true that if the defendant engaged in such business during the term and within the territory specified, either individually or as a partner in a firm, or if he caused it to be believed among the customers of the agency transferred that he was a partner or member of the

competitive companies, this would be a breach of the contract by him. *Daniels* v. *Brodie,* 54 Ark. 216. But the above firms or companies were not parties to the contract, and were not parties to this suit, and could not be bound by this decree. The decree should enjoin the defendant only from engaging in said business for said period and within said territory, either for himself individually or as a partner of any firm or member of any corporation engaged in said business, and from holding himself out to the customers of the insurance business in that territory that he was a member of such firm or company.

To the extent that the decree enjoins the above named firms or companies, it is erroneous, and it should be modified so as to enjoin only the defendant. And, so modified, the decree will be affirmed.

EAGLE v. FENCING DISTRICT NO. 2.

Opinion delivered July 12, 1909.

1. APPEAL AND ERROR—SUFFICIENCY OF ABSTRACT.—The question whether a fencing district was legally formed will not be considered on appeal if appellant's abstract fails to set out the proceedings under which the district was formed. (Page 381.)
2. FENCES—REGULARITY OF ASSESSMENT—PRESUMPTION.—A complaint which seeks to collect an assessment of a fencing district which alleges that the assessment was levied by the board of commissioners and approved by the county court is not defective in failing to allege that the county court made the assessment, as it will be presumed, in the absence of a contrary showing, that the assessment was regularly made. (Page 381.)
3. SAME—VALIDITY OF ASSESSMENT.—Where the commissioners of a fencing district advance their own funds for material to build the fence, although the fence was never completed for want of sufficient funds, the district is liable to reimburse them for the money paid out in constructing the fence. (Page 382.)
4. SAME—ALLOWANCE OF ATTORNEY'S FEE.—Under Kirby's Digest, § 5695, providing that in case of improvement districts in cities and towns an attorney's fee shall be allowed in a suit to enforce the lien of an assesment, and § 1399, providing that suits to enforce the collection of assessments in fencing districts "shall proceed in the same man-

ner as now provided by law in cases of suits for the collection of assessments for local improvements in cities of the first class," etc., *held* that it was error to allow an attorney's fee in a suit to enforce the assessment in a fencing district. (Page 382.)

Appeal from Lonoke Chancery Court; *John E. Martineau,* Chancellor; affirmed with modification.

T. C. Trimble, Joe T. Robinson and *T. C. Trimble, Jr.,* for appellants.

1. The levy or assessment was void, being made by the board of commissioners. Only the county court is empowered to levy or assess this tax. Kirby's Dig., § 1388.

2. The commissioners were without power to bind the district by borrowing money. The law relating to fencing districts does not either directly or indirectly authorize them to do so. Kirby's Dig., § § 1373-1407. Hence they could not on their personal responsibility borrow money and bind the district, even though it was used in building a fence. Only such powers as are expressly granted by the law or necessarily implied can be exercised by the commissioners. 58 Ark. 270; 23 Pick. 74; 1 Dillon, Mun. Corp. § 463; 7 O. 411; 46 Mich. 565; 59 Ark. 344; 61 Ark. 74; 67 Ark. 413; 79 Ark. 229. The contract of the officers being unauthorized, the doctrine of estoppel can not apply against the tax payers. 1 Beach, Mun. Corp. § 248 *et seq.;* 110 U. S. 608, 629, notes 1, 2, 3; 59 Ark. 344; 59 Cal. 233. Nor can there be a recovery on a *quautum meruit.* 44 N. W. 1002; 14 S. W. 332; 3 So. 31; 11 La. Ann. 59; 1 Beach, Pub. Corporations § § 628, 690, note 1; 2 *Id.* § § 862, 1327, The doctrine of subrogation will not apply in favor of the commissioners. They are mere volunteers. 25 Ark. 129; 39 Ark. 531; 50 Ark. 108; 47 Ark. 11; 44 Pac. 295; Beach. Mod. Eq. Jur. § 801; 27 S. W. 40.

3. The allowance of the attorney's fee was without authority of law.

J. H. Carmichael and *James B. Gray,* for appellee.

1. The case should be affirmed for failure of appellants to file a sufficient abstract of the pleadings, evidence and findings of the chancellor to enable this court to understand the questions presented for decision. 80 Ark. 259; 86 Ark. 369; 87 Ark. 206; 87 Ark. 202; 89 Ark. 41.

2. On the merits, the burden was upon appellants, yet they have failed to prove that the district was not properly organized, or that the money spent by the commissioners did not go into the purchase and construction of the fence; but the evidence does show that the money was used for the beenfit of the district. On these questions of fact the court's findings will not be disturbed. 85 Ark. 83; 71 Ark. 605; 78 Ark. 420.

3. The law governing improvement districts in cities of the first class applies to fencing districts. Kirby's Dig. § § 1397, 1398, 1399, 5695. No suit was brought (nor is it alleged) within the time prescribed by statute to test the validity of the assessments. Kirby's Dig. § 1393. The issues raised in this case as to irregularities in formation of the district, etc., have been passed on by this court contrary to appellant's contentions. 71 Ark. 17.

4. The allowance and taxation was proper. Kirby's Dig. § 5699; 65 Ark. 343, 352. On the question of penalty, see 80 Ark. 462.

5. If the commissioners levied the assessment, it was duly approved by the county court.

6. The district has received the full benefit of the money borrowed, and appellants can not be heard to say that it was never legally organized, nor that the commissioners were without authority to borrow. 185 U. S. 2, 46 L. Ed. 777. And 79 Ark. 229 does not hold that the district has no right to borrow money. See page 233.

HART, J. On October 27, 1906, Fencing District No. 2 of Lonoke County, Arkansas, filed separate complaints against R. E. L. Eagle and twenty-six others in the Lonoke Chancery Court. All of the complaints were in the same form, and were proceedings in equity under the statute to have the lands of the defendants sold for the payment of taxes assessed against them for Fencing District No. 2 of Lonoke County. The suits were consolidated, and the defendants filed their answer, in which they denied that the district had been legally formed. They denied that the commissioners had ever been appointed or qualified. Further answering, they aver that, at the time the assessments which the suits were brought to enforce were made, the said fencing district had ceased to exist, and that it owed no debts.

Upon the final hearing of the cause, the chancellor found in favor of the plaintiffs. An attorney's fee of $250 was allowed plaintiff's solicitors, and the same was ordered to be prorated among all the defendants and be charged against their lands respectively. A decree was entered, in which the amount of tax, penalty and cost against each tract of land was declared to be a lien on it, and, in default of payment thereof by the owner of the land within the time specified, the lands were ordered sold for the payment thereof. The defendants have appealed.

The proceedings under which the fencing district was established are not set out in defendants' abstract, and we have no means of ascertaining whether or not the record shows that the district was legally formed except by exploring the transcript, which, under a familiar rule of practice, we are not required to do. Hence the objections that the district was not legally formed, and that the commissioners were never appointed, may be considered as waived or abandoned.

Counsel for defendants insist that the levy or assessment was void because it was made by the board of commissioners, and not by the county court, as provided by section 1388 of Kirby's Digest. To sustain their contention, they rely upon the following language in the complaint: "That the third assessment of five mills on the dollar was levied on the lands hereinafter mentioned by the said board of commissioners and approved by the county court," etc. The answer denied this allegation. This allegation in the complaint was unnecessary. Section 1397 of Kirby's Digest provides that, in the complaint in such cases, it shall not be necessary to state more than the fact of the assessment and the non-payment thereof in the time required by law, without any other further statement of any step required to be taken by the court, or the board. The plaintiff meant to allege that the board of commissioners ascertained the cost of fencing and reported the same to the county court, and that the court assessed said cost. See Kirby's Digest, § 1388. In any event, as was said in the case of *Board of Improvement Dist.* v. *Offenhauser,* 84 Ark. 262: "The court has held in levee district and drainage district cases that regularity of the proceedings in forming the districts will be presumed, in the absence of evidence to the contrary." (Citing cases.) Here the record does not

show that any evidence on that question was introduced, and the presumption is in favor of the assessment.

Counsel for defendants also contend that "the commissioners could not borrow money on their personal responsibility and bind the district for it." We do not think this question is presented by the record.

The fencing district in question was organized in the fall of 1902. The board of commissioners were appointed, and began the work of erecting the fence. Twenty-three miles were contemplated, and the wire for it was purchased. The district did not have any money, and the members of the board on their individual responsibility borrowed $6,000 and used it in constructing the fence. The Legislature at its 1903 session passed an act making a four-wire fence lawful in that part of Lonoke County which was south of the Choctaw railroad, and this included the territory embraced in Fencing District No. 2. The act went into effect April 25, 1903. Because of the passage of this act, many of the landowners in the fencing district wished to abolish it. On account of this, and because the district did not have the money with which to do so, the fence has never been completed as originally planned, and that part of the fence which was built has not been kept up. The object of the collection of the assessment sued on is to reimburse the commissioners for the money which they had paid out for the purpose of constructing the fence. It is not a suit by the holders of the note against the district for money alleged to have been borrowed by it. True, the money used in constructing the fence was borrowed by the commissioners. But it was borrowed by them on their individual account, and as the matter now stands the commissioners built the fence and paid the cost thereof out of their own funds. In short, the taxes collected will be applied to the actual cost of erecting the fence.

It was the duty of the board to erect the fence, and the district was liable for the cost of it. *Altheimer* v. *Board, etc., Plum Bayou Levee Dist.*, 79 Ark. 232. The district is liable for the actual cost of constructing the fence, and it was proper to levy the assessments, which are the foundation of this action, for the purpose of paying for it.

Counsel for defendants also urge that the court erred in making the allowance of $250 to the solicitors for the plaintiff.

In this they are correct. In the case of improvement districts in cities and towns, an attorney's fee is expressly allowed by statute. Kirby's Digest, § 5695. In the case of fencing districts, the statute provides that suits to enforce the collection of assessments shall proceed in the same manner as is provided by law in cases of suits for the collection of assessments for local improvement; but this does not give the right to tax an attorney's fee. It has reference only to the mode of procedure. Kirby's Digest, § 1399. The allowance of the attorney's fee of $250 was error, and to that extent the decree is modified; otherwise it will stand affirmed.

BURGIE v. BAILEY.

Opinion delivered July 12, 1909.

1. EVIDENCE—ADMISSIBILITY OF PROOF OF PAROL CONTRACT.—The rule forbidding the introduction of a verbal contract to add to a written one is not violated by permitting a separate and independent verbal contract to be proved, relating to a matter not embraced in the written contract. (Page 388.)
2. FRAUDS, STATUTE OF—ASSUMING ANOTHER'S DEBT.—An agreement between A and B that the former will assume the indebtedness of the latter, already incurred, is an original undertaking, and is not within the statute of frauds. (Page 388.)

Appeal from Chicot Circuit Court; *Henry W. Wells,* Judge; reversed.

Harry E. Cook, for appellant.

The court erred in striking out the testimony of Hauptman and Matthews, and in refusing to admit the testimony of Robinson and Beadel. This testimony was admissible to establish the promise of Bailey to settle Jackson's outstanding bills, and to show a new, original and valuable consideration actuating Bailey to make the promise. Where an agreement to pay the debt of another is founded upon a new and original consideration of benefit or harm between the new contracting parties, it does not fall within the statute of frauds. 64 Ark. 462; 8 Johns. 29; 12 Ark. 174; 31 Ark. 613; 25 Ark. 292; 20 Tex. 329; 1 Brandt,

Suretyship and Guaranty, § 70. No consideration moved to Jackson. He delivered to Bailey his personal interest, credits and bank account. Beadel's testimony would have shown that no consideration moved to Jackson save Bailey's assumption of the indebtedness and that it was understood in his presence that Bailey assumed and would pay it. 75 Ark. 89; 55 Ark. 112; 71 Ark. 408.

E. A. Bolton and *Wm. Kirten*, for appellee.

The contracts were in writing, and parol evidence was not admissible to add to or take from them. 67 Ark. 62; 66 Ark. 393; 77 Ark. 431.

HART, J. On the 24th day of November, 1905, L. & E. Wertheimer brought suit before a justice of the peace in Chicot County against L. C. Jackson for $292.50 alleged to be due them by Jackson for whisky and other merchandise sold to him.

Jackson answered and admitted the indebtedness. He also filed a cross complaint against H. F. Bailey and Gaines Robinson, alleging that he had purchased the license, stock of goods and place of business of said H. F. Bailey for the sum of $4,812.20, on which he had paid, in three monthly installments, $1,800; that, becoming dissatisfied with the business and aware that he had paid a grossly excessive price for same, he surrendered to said Bailey the said business, in which he had invested $300 of his own money and turned over to said Bailey, $230 that he had in cash in the bank at the time, submitting to the said Bailey invoices of all goods purchased and all unpaid bills; that, in consideration of his surrendering said business and all of his interest in the $300 of his personal funds invested therein and the $230 check for cash in bank, the said Bailey was then and there to assume and pay off the outstanding indebtedness of Jackson, consisting of the claim of the Wertheimers and another small claim, amounting to less than $30. He further alleged in his cross-complaint that Bailey had on the same day traded said business to Gaines Robinson for a sum amounting to $3,544.20, being $815 in excess of the amount due Bailey from Jackson, which said excess was to cover the outstanding bills and to pay for some goods used by Jackson in his business which were not covered in the original trade between Jackson and Bailey. He asked that he be grant-

ed judgment against Bailey and Robinson for the sum of $292.50, the amount claimed by the Wertheimers.

On November 29, Bailey answered the cross-complaint, denying that he assumed the unpaid bills of Jackson, including that of the Wertheimers, and alleging that Jackson had on his books outstanding accounts amounting to about twice as much as Jackson owed for goods, and that the assumption was by Robinson, and not by himself, Bailey, and he further undertook to account for the $815 excess, in which he included $320 for four months' rent, being for the months of September, October, November and December, 1905, when Jackson surrendered possession of the premises on September 6, delivering the same into the possession of H. F. Bailey, who placed Gaines Robinson in possession.

The court rendered judgment in favor of L. & E. Wertheimer against L. C. Jackson for $292.50, and rendered judgment on the cross complaint in favor of L. C. Jackson and against H. F. Bailey and Gaines Robinson for the same amount. From this judgment Bailey appealed to the circuit court, giving bond with John G. B. Simms as surety. Execution was issued on the judgment in favor of Wertheimer and against Jackson. The same was stayed for six months, and then paid by Jackson and his sureties.

During his lifetime, Jackson assigned and transferred his judgment against Bailey to Samuel Burgie and Samuel Epstein, who had advanced him money, and upon his death, same having been suggested to the court, Samuel Burgie was appointed special administrator to conduct the suit in circuit court. In the circuit court the cause was treated by the parties as a suit by Jackson against Bailey for $292.50, the amount which L. & E. Wertheimer had recovered against him.

Jackson introduced in evidence the original contract of purchase from Bailey to him. It read as follows: "This agreement between H. F. Bailey & Co., of the first part, and L. C. Jackson, of the second part, witnesseth: Said first parties hereby sell and transfer to second party all its stock of whisky, beer, cigars and fixtures, unexpired license at cost, with 10 per cent. added as cost of carriage on said stock. This sale is conditional, and considered as a lease during the period of installment payments herein agreed upon, and said business is to continue under

the old firm name and by Jackson as agent. Said Jackson shall pay for said property in equal monthly installments at the end of each month, beginning June the first next, the amount to be specified in the notes to be fixed by the invoice of said property, and said notes and invoice are a part of this contract. Said Jackson agrees to pay the rent due by the said first parties at the rate of $100 per month in advance, and to have possession of all rented property. Said Jackson agrees to conduct an orderly business, and, if he fails so to do, to return said property to first party. Said first parties agree to aid and assist in every way they can to secure said business to be a success, and if the trade of the business becomes at any time so dull as to hinder second party in his monthly payments, first party agrees to extend same a reasonable time. Said second party agrees to use from the warehouse of the first party exclusively such goods as are stored therein, and pay cost for the same, or cost and 10 per cent. carriage, as they are withdrawn and needed by second party in the business. It is understood the invoice of the stock of goods and fixtures, which are situated in the Robinson building, and which are the goods leased hereby, amounts to $4,812.50, and the unexpired license amounts to $800. The second party's notes are eight in number, and for $601.50 each, and when said notes are paid the property belongs to the said Jackson, and said Bailey & Company will execute a bill of sale for all the same, and all of said notes draw 8 per cent. interest from date until paid. The jugs and bottles are included in this sale, and are partly in warehouse."

He also introduced W. D. Hauptman and C. M. Mathews, who testified in substance the matters hereinbefore set out in his cross-complaint.

Bailey, who became a witness for himself, denied the matters set up in Jackson's cross-complaint, and in substance said that he had not agreed with Jackson to pay his outstanding indebtedness, incurred while he was running said saloon. He also introduced the written contracts between Jackson and Robinson, and between Robinson and himself. They read as follows:

"Know All Men by These Presents:

"That, whereas, Gaines Robinson, party of the first part, desires to purchase from L. C. Jackson, party of the second part

herein, the saloon business now owned by the said party of the second part, and situated in the Robinson building in the town of Lake Village, Arkansas; and, whereas, the said party of the second part is indebted to one H. F. Bailey in the sum of $3,544.20 (thirty-five hundred and forty-four and 20-100 dollars), now the party of the first part agrees to assume said indebtedness and pay the same unto the said H. F. Bailey according to the tenor of a certain contract now existing between the said H. F. Bailey and said party of the second part, bearing date the first day of May, 1905, where the said Bailey sold unto the said party of the second part the aforesaid saloon property, and the said party of the second part for the consideration aforesaid agrees to and by this contract does sell, transfer, assign and convey unto the said Gaines Robinson, party of the first part hereto, all merchandise, goods and wares, and all fixtures and book accounts in said saloon building, and also transfers unto the said Robinson his lease upon said building, and all other rights, things and property which the said Jackson acquired from the said Bailey by the aforedescribed contract, and the said Jackson does immediately upon the signing of this contract deliver the possession of the aforedescribed property unto the said Robinson.

"In testimony whereof witness our hands this 6th day of September, 1905.

"L. C. Jackson,
"Gaines Robinson."

"Know All Men by These Presents:

"Whereas, L. C. Jackson has this day sold and transferred his saloon business, situated in the Robinson building, unto Gaines Robinson, and the said Gaines Robinson has agreed to and with the said Jackson to assume the said Jackson's indebtedness to me, amounting to thirty-five hundred and forty-four and twenty-one hundredths dollars, and the said Gaines Robinson does sign this instrument, and agree and covenant with me that he will assume and pay said sum of money. Now, in consideration of the premises above set out, I hereby release the said L. C. Jackson from any further and all liability to me on account of said indebtedness, and I, Gaines Robinson, hereby agree to and with H. F. Bailey that I will pay unto the said H. F. Bailey the aforesaid indebtedness.

"Witness our hands and seals this the 6th day of September, 1905.

(Signed) "Gaines Robinson,
"H. F. Bailey."

Bailey then moved the court to strike out the testimony of Hauptman and Mathews because it varied the terms of the written contract. The court excluded the testimony. Jackson then offered to prove by Gaines Robinson and by Allen Beadel, the attorney who prepared the contracts, that the sale was made by Bailey to Robinson, and that Bailey agreed to pay the debts incurred by Jackson in running the business, but the court refused to permit the introduction of the testimony. The jury was then instructed to return a verdict for Bailey, which was accordingly done. Jackson has duly prosecuted an appeal from the judgment rendered.

The court erred in excluding the testimony of Hauptman and Mathews, and in refusing that of Robinson and Beadel. The testimony did not go to the extent of varying or contradicting the written contracts. It tended to show a separate and independent verbal contract between Bailey and Jackson, and was admissible for that purpose. *Ramsey* v. *Capshaw,* 71 Ark. 408.

It was not a collateral undertaking on the part of Bailey to answer for the default of Jackson, but it was an original undertaking on his part for a valuable consideration to pay the debts Jackson incurred while running the business, and was not required to be in writing. The question of the truth or falsity of the testimony should have been submitted to the jury. *Gale* v. *Harp,* 64 Ark. 462.

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

WOODSON v. PRESCOTT & NORTHWESTERN RAILWAY COMPANY.

Opinion delivered July 12, 1909.

1. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.—Where two courses of conduct were open to a servant in the face of imminent danger, caused by another's negligence, and upon the spur of the moment

he chose the more dangerous one, and was injured, he cannot be held as matter of law to have been negligent in such choice, although by choosing the other course he might have escaped injury; whether he was negligent in such case being a question for the jury to determine in the light of all of the surrounding circumstances. (Page 391.)

2. SAME—CONTRIBUTORY NEGLIGENCE.—An instruction that if plaintiff, who was a locomotive fireman, knew that his engine was derailed and that he could escape by jumping, but thought the engine would stop, and decided to remain on it and take the risk, he could not recover was erroneous as in effect charging that plaintiff was negligent as matter of law in not leaping from the engine. (Page 392.)

3. SAME—DUTY OF MASTER TO FURNISH SAFE PLACE AND APPLIANCES.—It is the duty of the master to exercise ordinary care to provide his servants with a reasonably safe place in which to work and reasonably safe appliances with which to work, and this duty includes the duty to make reasonable inspection to see that the place and appliances are safe. (Page 393.)

4. SAME—INJURIES TO SERVANT—PRESUMPTION OF NEGLIGENCE.—Negligence on part of the master in failing to provide a safe place to work cannot be inferred merely from the happening of an injury to a servant, but must be proved by the servant, and the burden of establishing it is on the servant. (Page 393.)

5. SAME—NEGLIGENCE IN FAILING TO MAKE INSPECTION.—Upon proof that plaintiff was injured by reason of a defective appliance while in defendant's service, and that this defect was discoverable by reasonable inspection, it became a question for the jury whether the defendant was guilty of negligence in failing to inspect and discover such defect. (Page 394.)

Appeal from Nevada Circuit Court; *Jacob M. Carter,* Judge; reversed.

J. O. A. Bush and *Murphy, Coleman & Lewis,* for appellant.

1. The first instruction asked by plaintiff should have been given. 67 Ark. 306; 82 *Id.* 372; 83 *Id.* 318; 157 U. S. 72; Bailey on Master and Servant, p. 101.

2. The third and fourth instructions given for defendant were erroneous. 77 Ark. 9.

3. The tenth instruction was clearly erroneous.

McRae & Tompkins, Hamby & Haynie, and *D. L. McRae,* for appellee.

1. The modification of the first instruction given for plaintiff was proper.

2. The burden was on plaintiff to show injury by reason of the alleged defects. These defects were known to the company, or could have been known by the exercise of reasonable diligence, and there was no presumption that the alleged defects caused the injury. 46 Ark. 570; 67 *Id.* 305; 87 *Id.* 217; 81 *Id.* 277; 79 *Id.* 76; 179 U. S. 663.

3. Under the evidence the tenth instruction was proper. The question whether or not he assumed the risk should have been submitted to the jury.

FRAUENTHAL, J. The plaintiff, Edgar Woodson, was in the employ of the defendant, the Prescott & Northwestern Railway Company, as a fireman on one of its engines; and while in that employment he claims that he sustained personal injuries through the negligence of the defendant; and he brought this suit against defendant to recover damages for those injuries. The defendant in its answer denied all allegations of the complaint, and alleged that any injury the plaintiff sustained was caused by his own negligence.

The evidence tended to prove the following facts: The plaintiff had been in the employ of the defendant for about a month as a fireman on one of its engines, and was acting in that capacity at the time of the injury complained of. On November 6, 1907, the train was running in the direction of Prescott, and when it came to a certain switch, known as Arcadia Switch, the engine left the track, and continued some forty or fifty yards, and turned over. The plaintiff at the time was engaged in his duty as fireman in shoveling coal. He was caught by the engine as it turned over, and was severely injured. The blind drive wheels of this engine had become so worn that grooves had been made in them, so that these wheels had flanges on each side. These blind drive wheels were made without any flanges, and all other wheels on the engine had flanges only on the inside of the wheels. From the marks that were made on the ties it appeared that these blind drive wheels, with their flanges on the outside, struck the stop rail at the point where the switch joins the main track, and caused the engine to be derailed. The evidence tended to prove that these grooves had worn into the blind drive wheels to a depth of one-half inch, and that the derailment of the engine was caused by this defect in these wheels. The train was

going at the rate of about ten miles an hour when it left the track, and the plaintiff did not attempt to jump from the engine.

The plaintiff requested the court to give the following instruction to the jury: "1. A railroad company owes to its employees, engaged in the running of its trains, the duty of using reasonable and ordinary care to furnish and keep in safe repair safe and suitable engines and other appliances for the carrying on of such operation, and to inspect or cause to be inspected such engines and appliances at all reasonable and necessary times, with the view to keeping the engines in such reasonably safe condition; and if it does not do so, but negligently permits any wheel or wheels of its engines to become so worn as to render the running or operation of such engine dangerous, and by reason thereof its employee is injured, it is liable to him in damages."

The court refused to give the instruction as asked, but modified it by striking therefrom the following: "And to inspect or cause to be inspected such engines and appliances at all reasonable and neecssary times with the view to keeping the engines in such reasonably safe condition."

Among other instructions it gave at the request of the defendant the following: "10. You are further told that if, after the plaintiff knew the engine was derailed, he knew he could have escaped in safety, but thought the engine would stop, and, with full knowledge of the facts, decided to remain on the engine and take the risk, instead of trying to escape, he can not recover."

The jury returned a verdict in favor of the defendant; and from the judgment entered thereon the plaintiff prosecutes this appeal.

It is claimed by the defendant that the plaintiff was guilty of contributory negligence by remaining on the engine and by not jumping therefrom. The question presented by the above instruction number 10, given at the request of the defendant, is whether as a matter of law under the circumstances of the case the plaintiff was guilty of contributory negligence by remaining on the engine. The evidence tended to prove that the derailment of this engine was caused by defective drive wheels. These wheels had been in use so long that grooves had worn into the wheels to a depth of one-half an inch, so that it made flanges on each side of the wheels, and this caused the engine to leave the

track. It was not the duty of the plaintiff to inspect the appliances that were furnished him. He had a right to rely on the assumption that the defendant had exercised due and ordinary care in furnishing him a reasonably safe engine in which to work. There is no evidence to show that the engine left the track through any fault or negligence of the plaintiff. A perilous emergency was thus presented. It is well established that when one is required to act suddenly and in the face of an imminent danger he can not be held to be guilty of contributory negligence because he failed to exercise the best judgment or did not take the safest course. Especially is this true when the peril has been caused by the fault of another. In the case of *Jones* v. *Bryce,* 1 Stark. 493, Lord Ellenborough said: "If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences." It is true that it is the duty of the employee to exercise ordinary care to avoid injury and to take reasonable precaution not to expose himself to extraordinary danger. 3 Elliott on Railroads, § 1314. But where, in the face of imminent peril, the employee is obliged to act on the spur of the moment, he can not be necessarily charged with negligence if he does not do the right thing. The question is then for the jury to determine whether under all the circumstances he acted as any ordinarily prudent and careful person would have done under similar circumstances. 1 White on Personal Injuries on Railroads, § 422.

As is said in case of *St. Louis, I. M. & S. Ry. Co.* v. *Stamps,* 84 Ark. 241: "Where there are two courses left open to a person in the face of imminent danger, and he chooses on the spur of the moment the one which is really the more dangerous, he can not be held as a matter of law to be negligent in his choice, although by choosing the other course he might have escaped." *Choctaw, O. & G. Rd. Co.* v. *Thompson,* 82 Ark. 11; *Kansas City S. Ry. Co.* v. *Henrie,* 87 Ark. 443.

It then becomes a question for the jury to determine whether he is guilty of negligence, and his conduct must be tried in the light of all the surrounding circumstances of the case.

Now, by this instruction the court in effect told the jury that the defendant was in this impending danger guilty of negligence as a matter of law if he knew he could have escaped in

safety, but thought the engine would stop and therefore decided to remain on the engine. The plaintiff might have thought that he would be safe in remaining on the engine. The presumption is, from the natural desire to preserve life, that he did think that. And yet if, with these two courses before him, he in good faith believed he would be safe by remaining on the engine, under this instruction he would still be guilty of negligence by thus remaining on the engine. This in effect would make the employee the insurer of his own safety.

In effect, the court by this instruction told the jury that as a matter of law the plaintiff was guilty of negligence in not leaping from the engine. Under the circumstances of this case, that was error.

It is urged by the plaintiff that the court erred in modifying the above instruction number one asked for by the plaintiff. The modification eliminated from the instruction the duty on the part of the defendant to inspect its engines. But this was to a great extent covered by instruction number two given on the part of the plaintiff, and for that reason we do not think that this cause should be reversed solely on the refusal to give the instruction number one as asked by plaintiff. But, inasmuch as there must be a new trial of this cause, we deem it but proper to say that the plaintiff is entitled to a suitable instruction presenting the duty of defendant to inspect its engines at such reasonable times and in such reasonable manner as an ordinarily prudent and careful person would do under like circumstances. "It is the duty of the master to exercise ordinary care to provide his servants with a reasonably safe place in which to work and reasonably safe appliances with which to work. This duty also includes one of making reasonable inspection to see that the place and appliances are safe." 1 Labatt on Master and Servant, § 7; 26 Cyc. 1182, 1177; *St. Louis, I. M. & S. Ry. Co.* v. *Rice,* 51 Ark. 467; *St. Louis, I. M. & S. Ry. Co.* v. *Gaines,* 46 Ark. 555; *St. Louis, I. M. & S. Ry. Co.* v. *Brown,* 67 Ark. 304; *Bryant Lumber Co.* v. *Stastney,* 87 Ark. 321; *Ozan Lumber Co.* v. *Bryan,* 90 Ark. 223.

It is true that the presumption is that the master has done his duty in furnishing safe and suitable appliances; and, even if they are defective, it is further presumed that the master had no notice of the defect, and was not negligently ignorant of it. But

these presumptions can be overcome by proof. Negligence of the master can not be inferred merely from the happening of the accident. That must be proved, and the burden of establishing it is on the plaintiff. But this can be shown by evidence that there was a defect in the appliance which caused the injury, and that this defect was discoverable if it had been reasonably inspected. It would then become a question for the jury to determine whether the defendant was guilty of negligence in failing to inspect and discover such defect. *St. Louis, & S. F. Rd. Co.* v. *Wells,* 82 Ark. 372; *Kansas City S. Ry. Co.* v. *Henrie,* 87 Ark. 443; 1 Labatt on Master and Servant, § § 155-157; *Bailey* v. *Rome, W. & O. R. Co.,* 139 N. Y. 302.

For the error in giving said instruction number ten on the behalf of the defendant the judgment is reversed, and the cause is remanded for a new trial.

MORGAN v. KENDRICK.

Opinion delivered July 12, 1909.

1. JUDGMENT—CONCLUSIVENESS.—A right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is upon a different cause of action, the right, question or fact, once so determined, must, as between the parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. (Page 397.)

2. LIMITATION OF ACTION—PAYMENT ON MORTGAGE—RECORD.—Under Kirby's Digest, § 5399, when a debt secured by a mortgage is apparently barred by limitation, and no payment which would stay the limitation is indorsed on the margin of the record of the mortgage, it becomes, as to third persons, an unrecorded mortgage, and constitutes no lien upon the mortgaged property as against them, notwithstanding they have actual knowledge of the execution of the mortgage. (Page 397.)

3. MORTGAGES—EFFECT OF UNRECORDED MORTGAGE.—An unrecorded mortgage is binding as between the parties, and constitutes a valid lien, except as to the legal rights of third parties. (Page 398.)

4. SAME—EFFECT OF SUBSEQUENT CONVEYANCE BY MORTGAGOR.—A conveyance of mortgaged property by the mortgagor to a third party with a fraudulent purpose of defeating the mortgage, and without an actual and *bona fide* consideration, would not defeat the lien of a valid mortgage, although unrecorded. (Page 398.)

5. FRAUDULENT CONVEYANCE—PRESUMPTION.—Proof that a mortgagor conveyed the mortgaged property to his sons without any consideration being paid raises a *prima facie* case of fraud. (Page 399.)

6. QUIETING TITLE—SUFFICIENCY OF EQUITABLE TITLE.—Where mortgaged land was sold in accordance with law and the provisions of the mortgage, but no deed was executed to the purchaser, an equitable title was vested in the purchaser, which, after expiration of the period allowed by law for redemption, will be quieted. (Page 400.)

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

Woodson Mosley and *Taylor & Jones,* for appellants.

1. There was no way to revive the lien of the mortgage as to third parties, except by compliance with Kirby's Digest, § 5399. This was not done.

2. There is no evidence to show fraud.

J. W. Crawford and *T. M. Hooker,* for appellee.

1. The judgment of the circuit court is *res judicata,* as to the Morgans, on the question of the payments on the note and the statute of limitations. 76 Ark. 423; 57 *Id.* 500; 46 *Id.* 272; 55 *Id.* 536; 83 *Id.* 545; 74 *Id.* 320; 2 Black on Judgments, § 504; 1 Herman on Est. & Res Judicata, § § 107-8. It binds all privies. 2 Black on Judgments, § 504; 75 Ark. 320; 83 *Id.* 545.

2. Kirby's Digest, § 5399, only applies to third parties who purchase in good faith for a valuable consideration. The sons paid nothing, and the deed to them was a fraud. 64 Ark. 317; 6 Wall. (U. S.) 310.

3. A chancellor's finding of facts will not be set aside unless clearly against the preponderance of the evidence. 68 Ark. 134; 68 *Id.* 314; 73 *Id.* 489.

FRAUENTHAL, J. The plaintiff below, J. J. T. Kendrick, instituted this suit on October 1, 1907, in the Cleveland Chancery Court for the purpose of confirming a sale of real estate made under and by virtue of a power of sale contained in a mortgage executed to him by W. J. Morgan, one of the defendants; and also

to cancel a deed executed by said mortgagor to his two sons, George and Frank Morgan, the other defendants herein. On January 24, 1896, W. J. Morgan for a valuable consideration executed to the plaintiff his note for $563.95 due January 1, 1897, and bearing ten per cent. interest per annum from date until paid, and on the same day to secure the payment of said note executed to plaintiff a mortgage on the land in controversy. The mortgage was duly filed for record in April, 1896. The plaintiff alleged that payments were made by the maker on the note as follows: January 15, 1901, one dollar; July 7, 1902, two dollars; and that on June 11, 1906, the plaintiff indorsed a memorandum of said payments on the margin of the record of said mortgage, which was then duly attested. In May, 1906, the plaintiff sold the land under the power of sale contained in the mortgage; and in making said sale he complied with the terms of said mortgage and all requirements of the law. The plaintiff became the purchaser at that sale, and, although the period for redemption had expired, he did not execute a deed to himself under the sale for the reason that he did not think he had that power. He credited the amount of the bid upon the note; and on November 1, 1906, instituted a suit in the Cleveland Circuit Court against the defendant, W. J. Morgan, for the balance of said note. In that suit said Morgan denied making the above payments and pleaded the statute of limitation. Upon a trial and verdict of a jury a judgment was rendered in that case in favor of the plaintiff and against the defendant W. J. Morgan for the sum of $639.23 as the balance due on said note. On April 3, 1905, W. J. Morgan conveyed the said mortgaged land to his said two sons for the alleged consideration of $400; and this deed was filed for record on June 19, 1906. The plaintiff seeks to set aside said deed on the ground of fraud.

The defendants in their answer denied all allegations of payments and of fraud, and claimed that by reason of the failure to indorse the alleged payments on the margin of the record of the mortgage until after the note appeared to be barred by limitation and until after the execution of said deed the mortgage was invalid as to the defendants, George and Frank Morgan.

The chancellor found that the note was not barred by limitation; that the mortgage sale of the land was regular in all re-

spects; that the alleged conveyance made by the mortgagor to the other defendants was fraudulent. He entered a decree, cancelling said deed and confirming the sale under the mortgage and quieting the title in plaintiff; and directed a commissioner of the court to execute a deed to plaintiff for the land.

In accordance with the pleadings the chancellor in said decree also reformed the description of a small portion of the land. From this decree the defendants have appealed to this court.

The sole defense in this suit is made by the defendants George and Frank Morgan, who claim an unincumbered title to the land by virtue of the conveyance from their father. Neither in the answer of the defendant W. J. Morgan, nor in the brief of appellants, is it contended that the said note secured by the mortgage is barred by the statute of limitation. The evidence sustains the finding of the chancellor that payments were made thereon by the maker as above set forth, and that on that account the note was not barred. That issue was also determined by the judgment of the Cleveland Circuit Court in the above mentioned suit founded upon said note. As is said in the case of *National Surety Co.* v. *Coates,* 83 Ark. 545, "a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery can not be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question or fact, once so determined, must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified." 12 Cyc. 1215.

The judgment of the Cleveland Circuit Court involved the question as to whether said note was barred, and it therefore became conclusive against the defendant W. J. Morgan and *prima facie* evidence against the other defendants; and with the other testimony in the case fully sustains the finding of the chancellor that the note was not barred.

But the defendants, who are the grantees in said deed, contend that on April 3, 1905, when they obtained said deed, the plaintiff had not made any indorsement of the payments on the margin of the record of said mortgage; and that therefore their rights could not be affected by the payments. Section 5399 of Kirby's

Digest provides: "In suits to foreclose or enforce mortgages or deeds of trust, it shall be sufficient defense that they have not been brought within the period of limitation prescribed by law for a suit on the debt or liability for the security of which they were given. Provided, when any payment is made on any such existing indebtedness before the same is barred by the statute of limitation, such payment shall not operate to revive said debt to extend the operations of the statute of limitation with reference thereto, so far as the same affects the rights of third parties, unless the mortgagee, trustee or beneficiary shall, prior to the expiration of the period of the statute of limitation, indorse a memorandum of such payment with date thereof on the margin of the record where such instrument is recorded, which indorsement shall be attested and dated by the clerk."

The effect of that statute, as to strangers to the transaction, is that when the debt secured by a mortgage is apparently barred by limitation, and no payments which would stay the limitation is indorsed on the margin of the record of the mortgage, it becomes as to such third parties an unrecorded mortgage; and like an unrecorded mortgage it constitutes no lien upon the mortgaged property, as against such third party, notwithstanding he has actual knowledge of the execution of such mortgage. *Jacoway* v. *Gault,* 20 Ark. 190; *Jarratt* v. *McDaniel,* 32 Ark. 598; *Neal* v. *Speigle,* 33 Ark. 63; *Ford* v. *Burks,* 37 Ark. 91; *Dodd* v. *Parker,* 40 Ark. 536; *Martin* v. *Ogden,* 41 Ark. 186; *Wright* v. *Graham,* 42 Ark. 140; *Hill* v. *Gregory,* 64 Ark. 317.

But an unrecorded mortgage is still good and binding between the parties. It constitutes a valid lien on the property, except as to the legal rights of third parties. *Conner* v. *Abbott,* 35 Ark. 365; *Applewhite* v. *Harrell Mill Co.,* 49 Ark. 279; *Hampton* v. *State,* 67 Ark. 266; *Rhea* v. *Planters' Mutual Ins. Assn.,* 77 Ark. 57.

The mortgagor can not defeat the binding lien of an unrecorded mortgage by placing the title to the property in another for his benefit, nor by giving the property away. As is said in the case of *Leonhard* v. *Flood,* 68 Ark. 162: "As to one holding the property by a conveyance entirely voluntary, it would be presumed that the conveyance was made subject to the mortgage." The conveyance therefore by a mortgagor to a third party with the

fraudulent purpose of defeating the mortgage, and without an actual and *bona fide* consideration, would not relieve the property of the lien of a valid mortgage, although unrecorded. *Leonhard* v. *Flood, supra.*

Now, in this case it appears that the father conveyed to his two sons the mortgaged land. The deed was executed in April, 1905, but the evidence tends to prove that it was still retained by the father and undelivered; and after the mortgagee proceeded to make sale of the land under the mortgage in May, 1906, the father placed the deed on record on June 19, 1906. The two sons were young men who were members of the father's family, and the evidence does not show that they had any property. They knew of the mortgage which their father had executed to the plaintiff on the land, and knew that it was unpaid. The deed recites that the consideration of $400 was paid for the land, but the defendants testified that as a matter of fact it was not paid. They claim that they had executed a note therefor, but they and their father testified that they had never seen the note since its execution, and did not know when it matured; and this testimony was given three years after its alleged execution. The note was not paid, and was not produced; and finally the father stated in his testimony: "If they pay me for it, it is all right; and if they never pay for it, it is all right, of course." No other person testified to seeing the deed prior to the date it was filed for record; and no other person testified as to the note. It was claimed that "about $50" was paid along on the note, but no statement is made as to when or in what manner such alleged payments were made. The circumstances thus surrounding this deed and the alleged transaction between father and sons are sufficient to arouse suspicion and to throw doubt upon them as legitimate contracts. The circumstances of this case and the relation of the parties make out a *prima facie* case of fraud which impeaches the consideration of the deed, which has not been overcome by any testimony in the case. *Leonhard* v. *Flood,* 68 Ark. 162; *Wilks* v. *Vaughan,* 73 Ark. 174; *McConnell* v. *Hopkins,* 86 Ark. 225; 20 Cyc. 439.

The chancellor made a finding that this alleged conveyance by the father, W. J. Morgan, to his sons was not *bona fide,* but was colorable and fraudulent. The evidence sustains the finding

of the chancellor and the conclusion that the deed was in truth and in effect a voluntary conveyance. It therefore follows that this deed did not relieve the land of the valid lien which existed on the land by virtue of said mortgage, and that the conveyance from W. J. Morgan to his sons, George and Frank, is subject to said mortgage. And, inasmuch as the land has been sold under said mortgage and the period for redemption has expired, said deed should be removed as a cloud from the title to said land.

The land was sold in accordance with law and the provisions of the mortgage, and it therefore vested in the purchaser an equitable title, although no deed was made. *Daniel* v. *Garner,* 71 Ark. 484. The chancellor was therefore right in quieting the title to the land in the plaintiff and directing a deed to be made to him. Kirby's Digest, § 6318.

Finding no error in the decree of the Cleveland Chancery Court, it is in all things affirmed.

CAZORT & MCGEHEE COMPANY *v.* DUNBAR.

Opinion delivered July 12, 1909.

1. PLEADING—EXHIBITS.—Written instruments filed as exhibits to a complaint in equity, and thereby made a part of the record, will control the averments of the complaint. (Page 403.)
2. SAME—CONSTRUCTION OF COMPLAINT.—In determining whether a complaint states sufficient facts to constitute a cause of action, every fair and reasonable intendment must be indulged. (Page 404.)
3. SAME—INDEFINITENESS.—If the averments of a complaint are imperfect, incomplete or defective, the proper mode of correction is not by demurrer but by a motion to make the allegations more definite and certain. (Page 404.)
4. INDEMNITY—CONSTRUCTION OF MORTGAGE.—The distinction between an indemnity mortgage to save the mortgagee harmless and an indemnity mortgage to satisfy a liability incurred is that in the former the condition is not broken until the mortgagee is actually damnified by being forced to pay the liability, while in the latter the condition is broken as soon as the liability accrues. (Page 404.)
5. SAME—WHEN CAUSE OF ACTION ACCRUES.—Where an indemnity mortgage obligated the mortgagors to pay whatever liability should be

adjudged upon a supersedeas bond executed in their favor by the mortgagees, a cause of action accrued in favor of the mortgagees as soon as the mortgagors failed to pay any liability adjudged upon such bond. (Page 405.)

6. PRINCIPAL AND SURETY—CONCLUSIVENESS OF JUDGMENT AGAINST SURETY.—A judgment obtained against the sureties on a supersedeas bond in a suit to which the principal was not a party is only *prima facie* evidence of the amount due as against the principal. (Page 405.)

7. MORTGAGE—IDENTIFICATION OF AMOUNT.—A mortgage is not defective in failing to state the exact amount intended to be secured if it sufficiently sets forth the liability in general terms. (Page 405.)

8. HUSBAND AND WIFE—CONVEYANCE BY MARRIED WOMAN—VALIDITY.—Where a married woman joined with her husband in the granting clause of a deed and acknowledged its execution, this will be held to be a sufficient execution and acknowledgment to convey title to her separate property, though she also released her dower and homestead interest and acknowledged that she had made such relinquishment. (Page 406.)

Appeal from Crawford Chancery Court; *J. Virgil Bourland,* Chancellor; reversed.

Jesse London and *Winchester & Martin,* for appellants.

1. Judgment against the sureties by *consent* does not bar them from any benefit under the mortgage. The right to foreclose accrued as soon as Ella Sharp failed and refused to perform the judgment. 25 Ark. 170; 23 *Id.* 530. The mortgage was a contract for indemnity, and failure to satisfy the judgment gave the sureties the right at once to enforce the contract. 23 Ark. 530. The liability was fixed by the judgment of the Supreme Court affirming the judgment below. The failure of the principal to satisfy the judgment perfected the right of the sureties to enforce indemnity. 16 Ark. 83; 56 S. W. 7; 43 Iowa, 86.

2. If the mortgage contains enough to embrace the liability intended to be secured, and to put a person examining the record on notice, and to direct him to the proper source of information, it is sufficient. 46 Ark. 70; Jones on Mortg. (5th Ed.) §§ 380, 384. The mortgage protects the parties to the extent of the amount they were compelled to pay. Cases *supra.*

Ira D. Oglesby, for appellees; *Edwin Hiner,* of counsel.

1. Ella Sharp did not convey the land as her separate property, but only released dower and homestead rights. The ex-

hibits to the complaint control and determine plaintiff's right of recovery. 68 Ark. 263.

2. Ella Sharp was not a party to the suit in which a *consent* judgment was rendered, and she is not bound. The complaint shows no condition broken authorizing them to foreclose against a *bona fide* purchaser. The complaint does not show the necessary facts to constitute a cause of action. There is no showing that the conditions of the mortgage were broken, and that by reason thereof the sureties were required to pay the judgment. Jones on Mortg. § § 1213, 1314; 44 Wis. 489; 16 Ark. 83; 23 *Id.* 530; 25 *Id.* 170; 56 S. W. 7.

FRAUENTHAL, J. The plaintiffs, Cazort & McGehee Company and another, instituted this suit in the Crawford Chancery Court against the defendants, E. C. and W. T. Dunbar, seeking to foreclose a mortgage executed to plaintiffs by John and Ella Sharp on real estate which was subsequently conveyed by the mortgagor, Ella Sharp, to the defendants.

To the complaint the defendants interposed a general demurrer, which was incorporated in their answer. This demurrer was sustained by the chancery court; and, the plaintiffs declining to plead further, the complaint was dismissed; and from the order of dismissal the plaintiffs bring this appeal.

The complaint, in substance, alleged that in a certain cause pending theretofore in the Crawford Chancery Court, wherein Henry L. Fitzhugh, trustee, was plaintiff and John Sharp and Ella Sharp were defendants, a decree was rendered in favor of the plaintiffs in that suit, and the defendants appealed therefrom to the Supreme Court; and on August 1, 1903, executed a supersedeas bond with the plaintiffs in the present case as sureties thereon; that said decree was by the Supreme Court affirmed in part and reversed in part; "that the said Ella Sharp failed and refused to perform that part of the judgment of the lower court which was affirmed by the Supreme Court;" that afterwards said Fitzhugh, trustee, instituted suit in the Crawford Circuit Court against these plaintiffs upon said supersedeas bond, and on July 3, 1907, recovered judgment against these plaintiffs for the sum of $2,500 and costs amounting to $7.75; and that on October 15, 1907, the plaintiffs paid said judgment; that, in order to secure the plaintiffs by reason of the execution by them of said super-

sedeas bond as such sureties, the said John Sharp and Ella Sharp, on August 1, 1903, executed to them a mortgage on certain real estate, which was duly acknowledged by them, and that the mortgage was duly filed for record on August 11, 1903; that thereafter on June 6, 1905, the said Ella Sharp conveyed said real estate to the defendants. And the plaintiffs in this complaint prayed for a foreclosure of said mortgage and a sale of the land to reimburse them for the amount paid by them on said supersedeas bond and judgment; and they prayed "for such other relief, general and special, as the facts may justify and as to the court may seem fit." Copies of the supersedeas bond, mortgage and judgment referred to in the complaint were made exhibits thereto and also the deed from Ella Sharp to defendants. These exhibits are the foundation of this action, and they are therefore a part of the record of this suit, and will control the averments of the complaint. *Beavers* v. *Baucum,* 33 Ark. 722; *American Freehold Land Mortgage Co.* v. *McManus,* 68 Ark. 263.

By the provisions of the supersedeas bond the said John Sharp and Ella Sharp as principals, and these plaintiffs as sureties, did covenant, amongst other things, the following: "Also that they will satisfy and perform the judgment or order appealed from in case it should be affirmed and any judgment or order which the Supreme Court may render or order to be rendered by the inferior court not exceeding in amount or value the original judgment or order."

The indebtedness clause in the said mortgage executed by John and Ella Sharp to plaintiffs is as follows: "Whereas, the said Cazort & McGehee Company have become sureties on a supersedeas bond given by John Sharp and Ella R. Sharp to supersede a judgment in favor of Henry L. Fitzhugh in the sum of four thousand dollars. Now, if said John Sharp and Ella R. Sharp shall satisfy said judgment, if affirmed, or any judgment rendered against them by the Supreme Court in this cause, then this bond shall be void, but if they fail to do so, then the said grantees or their assignee, agent or attorney in fact, shall have power to sell said property at public sale to the highest bidder, for cash." etc.

It is contended by the defendants that the complaint does not state facts sufficient to show that any condition of said mortgage

has been broken, so as to authorize a foreclosure; that this is an indemnity mortgage; that the condition of said mortgage would only be broken in event that the Supreme Court affirmed the judgment appealed from and rendered judgment in the Supreme Court against the makers of the supersedeas bond, and the mortgagors did not then satisfy such judgment and the mortgagees did pay same; and they contend that such allegations are not made in the complaint.

In determining whether the complaint in this cause states sufficient facts to constitute a cause of action, every fair and reasonable intendment must be indulged in to support it. If a cause of action can be reasonably inferred from the allegations, then it is not subject to a general demurrer. If the averments are imperfect, incomplete or defective, the proper mode of correction is not by demurrer but by a motion to make the allegations more definite and certain. Upon a general demurrer being interposed to a pleading the test then is, can the pleading be cured by amendment? And if the facts stated, together with every reasonable inference therefrom, constitute a cause of action, then the demurrer should be overruled. *Murrell* v. *Henry,* 70 Ark. 161; *Moore* v. *Rooks,* 71 Ark. 562; *St. Louis, I. M. & S. Ry. Co.* v. *Moss,* 75 Ark. 64; *Nelson* v. *Cowling,* 77 Ark. 351; 6 Enc. Pleading & Prac. 389; 31 Cyc. 289-290.

From the complaint and exhibits it sufficiently appears that the obligation assumed by the execution of said supersedeas bond was not only to satisfy any judgment for the recovery of money that might be directly adjudged in and by the Supreme Court against the parties makers on said bond, but any judgment or order that the Supreme Court might render; and therefore, if by any order or judgment of the Supreme Court a liability was incurred by reason of the execution of that bond, the principals in that bond, the mortgagors, agreed to satisfy that liability. That is but a fair and proper inference from the provisions of the supersedeas bond and the mortgage. If, by reason of the judgment of the Supreme Court, a liability resulted against the makers of the supersedeas bond which could be enforced by suit in any court, that liability the mortgagors agreed to satisfy; and the mortgage was executed to secure the performance of that obligation by the mortgagors; and on a failure, therefore, by them

to satisfy that liability the condition of the mortgage was broken. There is a clear distinction between an indemnity mortgage to save the mortgagee harmless and an indemnity mortgage to satisfy a liability incurred. In the former the condition is not broken until the mortgagee is actually damnified by being forced to pay the liability; in the latter the condition is broken as soon as the liability accrues. The bond and mortgage in this case form a contract of indemnity against liability; and when that liability was established, the cause of action accrued to the plaintiffs.

From the allegations of the complaint and the provisions of the supersedeas bond and mortgage it may be reasonably inferred that the averments are in effect that the mortgagors promised to pay whatever liability would be incurred by reason of the execution of the supersedeas bond; and to secure that written promise they executed the mortgage. Upon a failure, then, by John Sharp and Ella Sharp, or either of them, to pay such liability, the cause of action accrued to the mortgagees. *Snider* v. *Greathouse* 16 Ark. 72; *Bone* v. *Torrey,* 16 Ark. 83; *Faust* v. *Burgevin,* 25 Ark. 170; *Gunel* v. *Cue,* 72 Ind. 34; *Thurston* v. *Prentiss,* 1 Mich. 193; 22 Cyc. 90; 27 Cyc. 1068.

The amount of that liability is alleged in the complaint as being the amount of a certain judgment recovered against the plaintiffs in the Crawford Circuit Court by the appellee in the supersedeas bond. That judgment, it appears, was recovered against the plaintiffs by consent. John and Ella Sharp were not parties to that suit, and therefore no judgment was recovered against them. The judgment, therefore, can only be *prima facie* evidence of the amount of the liability secured by the mortgage. Because the judgment was rendered by consent does not render it void. The fact that consent to its rendition was given is no evidence of any fraud, for that action may have been taken because there was no defense thereto, and to save cost. If the defendants desired a more detailed or definite statement of the liability, it could have been secured by a motion made for that purpose.

The indebtedness clause of the mortgage does not state the exact amount of the debt to be secured. But the character of the indebtedness is sufficiently set forth, from which the amount could be ascertained. "If the mortgage contains a general de-

scription sufficient to embrace the liability intended to be secured, and to put a person on examining the records upon inquiry, and to direct him to the proper source for more minute and particular information of the amount of the incumbrance, it is all that fair dealing and the authorities demand." *Curtis* v. *Flinn,* 46 Ark. 70; *Hoye* v. *Burford,* 68 Ark. 256.

It is also urged by defendant that it appears from the mortgage and acknowledgment that Ella Sharp was the wife of John Sharp, and that she did not convey the land in question as her separate property, but only released and conveyed dower and homestead rights. We do not think that there is any merit in this contention, even if it should be conceded that the complaint would be demurrable on this account. It appears from these instruments that Ella Sharp did join in the granting clause of the mortgage; and also that the following clause is in the mortgage: "And I, Ella R. Sharp, wife of the said John Sharp, for the consideration aforesaid and hereinafter set out, do hereby convey and release unto the said Cazort & McGehee Company all my estate, title and interest, and all my rights of dower and of homestead in and to said lands." The acknowledgment states: "And on the same day also voluntarily appeared before me the said Ella Sharp, wife of said John Sharp, to me well known, and in the absence of her husband declared that she had, of her own free will, executed the foregoing deed, and executed, signed and sealed the relinquishment of dower and of homestead therein expressed, for the consideration and purposes therein mentioned and set forth, without compulsion or undue influence of her said husband." This is a sufficient execution and acknowledgment of a deed by a married woman to her separate property.

From this it follows that the court erred in sustaining the demurrer to the complaint and in entering its decree of dismissal.

The decree is therefore reversed, and this cause is remanded with directions to overrule said demurrer to the complaint.

MOORE v. SHARPE.

Opinion delivered July 12, 1909.

1. DEEDS—ESTATE ON CONDITION—FORFEITURE.—At common law the only method whereby a forfeitu . could be effected for breach of a condition subsequent was by re-entry upon the premises or by a public attempt to re-enter with a declaration of forfeiture. (Page 410.)

2. SAME—BREACH OF CONDITION—ASSIGNMENT OF RIGHT OF RE-ENTRY.—At common law the right of re-entry upon land for condition broken was not assignable, and could be exercised only by the grantor who created the condition or by his privies in blood. (Page 411.)

3. SAME—BREACH OF CONDITION—CONVEYANCE OF RIGHT OF RE-ENTRY.—Under Kirby's Digest, § 736, providing that "any person claiming title to any real estate may, notwithstanding there may be an adverse possession thereof, sell and convey his interest in the same manner and with like effect as if he was in the actual possession thereof," *held* that where a deed conveyed land upon condition that the grantee should build and complete a railroad within three years from the date thereof, and the condition was never performed, the grantor could effect a forfeiture of such condition (conceding that it was a condition subsequent) by merely conveying it to another after condition broken. (Page 411.)

Appeal from Phillips Circuit Court; *Hance N. Hutton,* Judge; reversed.

John I. Moore, for appellant.

1. The condition in the deed was subsequent and not precedent, and there only remained to the grantor a right of entry upon the breach which cannot be assigned to a third party, and a conveyance to a third party cannot work a forfeiture. 145 Fed. Rep. 296, 301; 97 U. S. 693; Tiffany, Mod. Law, Real Prop. § 75; Warvelle, Real Property, 51; Goodwin, Real Property, 39; 21 Wall. 63; 33 Fed. Rep. 693; 50 Ark. 141.

Rose, Hemingway, Cantrell & Loughborough, for appellees.

1. The condition is precedent, and, the railroad never having been built, the estate never vested. 3 Ark. 259; 26 *Id.* 628; 72 *Id.* 310; 50 *Id.* 141; 145 Fed. 296; 2 Washb. Real Prop. (4th Ed.), 6; Greenleaf's Cruise on Real Prop. tit. 32, c. 25, § 10.

2. The right to take advantage of condition broken passed to the assignees of the grantor. Kirby's Dig., § 736; 14 Ark. 493; 17 *Id.* 608, 672; 66 *Id.* 193; 1 Pet. 503; 44 Ark. 153; 16 Pa.

St. (4 Harris) 146; 67 N. J. L. 288; 51 Atl. 781; 56 S. W. 367; 1 Nev. 40, 55; 7 Mo. App. 429; 77 N. W. 530; 37 S. W. 485; 9 Bush, 211; 5 Pick. 528; 10 *Id.* 206; 21 *Id.* 215; 147 Fed. 938; 152 U. S. 453.

3. All lands in this State are declared allodial, and feudal tenures are abolished. Const. Ark., 1868, art. 1, § 24; art. 2, § 28. In all States where livery of seisin is not necessary to convey an estate, a subsequent deed is an act equivalent to an entry. 152 U. S. 453.

4. Ejectment may be maintained without an actual re-entry. This is universally admitted. 1 Tiffany, Real Property, p. 74.

5. The court had no jurisdiction to order a sale of lands in another State. Wharton, Confl. Laws, § 272 *et seq.*; 47 Ark. 254. The sale was never reported nor confirmed. 23 Ark. 39; 55 *Id.* 307; 53 *Id.* 445; 59 *Id.* 5.

John B. Jones, amicus curial.

1. The condition is precedent, and no title ever vested. 1 Jones, Real Prop. & Conv., § 656; 26 Ark. 617; 4 Kent, Com. § 125; 72 Ark. 310.

2. Re-entry is not necessary upon wild lands, even if the condition was subsequent. Livery of seisin never prevailed in this State. 15 Ark. 585; Const. 1868, art. 11, § 28; Const. 1874, art. 1, § 24. Hence no re-entry required. 14 Johns. 406; 15 Pick. 189; 8 Cr. (U. S.) 8, 9; 2 Cruise, Dig., p. 37; § 37; *Ib.* § 38; 2 Washb. Real. Pr. (3d Ed.), p. 13, § 16; 8 Allen (Mass.), 598; 134 Mass. 82; 152 U. S. 152. A subsequent conveyance declares a forfeiture. 44 Ark. 153.

Julian Laughlin and *Murphy, Coleman & Lewis, amici curiae.*

1. The condition in the deed is a condition subsequent. 42 Ark. 347; 50 *Id.* 141; 28 *Id.* 54; 77 *Id.* 168.

2. Right to enter for breach of condition subsequent is not assignable. 1 Jones, Real Prop. § 728; Tiffany, Real Prop. § 75; Warvelle, Real Prop. 51; Goodwin, Real Prop. 38; 97 U. S. 696; 21 Wall. 63; 16 *Id.* 230; 106 U. S. 368; 139 *Id.* 676; 6 Fed. 653; 12 Allen (Mass.), 144; 26 N. J. L. 21; 65 So. C. 256; 48 N. Y. S. 363; 12 Barb. 460; 20 Ga. 563; 31 Conn. 478; 129 Ind. 244; 63

Ill. 204; 159 *Id.* 215; 34 Me. 324; 40 N. H. 222; 79 Hun 488; 130 N. C. 8; 87 Ala. 641; 14 Kan. 581; 26 N. J. 21; 21 Mo. 282; 53 Mo. 411; 94 *Id.* 465; 16 Gray (Mass.), 316; 16 Wall. 230; 97 U. S. 696; 106 *Id.* 360.

3. Kirby's Dig., § 736, does not change the common-law rule. 50 Ark. 141, 150. The right to re-enter is not title, nor an estate nor interest in land. 2 Wash. on Real Prop. § 954; Goodwin, Real Prop. 39; 12 N. Y. 132.

4. To forfeit an estate upon condition, there must be re-entry or its equivalent. 97 U. S. 696; 21 Wall. 53, 63; 114 N. W. 459; 55 N. E. 224; 98 Fed. 281; 42 Ark. 349; 2 Minor's Inst. 362; 147 Fed. 937-8; 145 Fed. 296.

MCCULLOCH, C. J. This action was instituted by plaintiffs, Alberta J. Sharpe and Augustine Boice, against J. R. B. Moore in the circuit court of Phillips County to recover possession of forty acres of land situated in that county. The plaintiffs recovered judgment below, and the defendant appealed.

Each party deraigns title from the same source, viz., from Edmund McGehee, who owned the land at the time of his death during the year 1865 under a patent from the State of Arkansas. The plaintiffs claim title to the land under a deed executed in 1881 by the widow and devisees of Edmund McGehee. The defendant claims title under a deed executed in 1873 by the executors, including the widow, of Edmund McGehee, to the St. Louis & Memphis Railroad Company. This deed purported to convey a large body of land, including the tract in controversy, all of which was wild, timbered land; without any clearing or habitation on it. The will of Edmund McGehee conferred no power upon the executors to execute the deed, and it was executed pursuant to an order of a Mississippi court, and no order was made by the Arkansas probate court. It is conceded that on this account the deed was ineffectual as a conveyance of the testator's title, and conveyed nothing except the undivided interest of the widow as one of the devisees under the will. The deed was executed on the condition, expressed therein, that the grantee should build and complete a railroad within three years from the date thereof. Whether this was a condition precedent or subsequent we need not now decide, since, conceding it to have been a condition subsequent, which is essential to the strength

of defendant's claim of title under the deed, the conclusion we have reached on another controlling question is adverse to the defendant.

The condition of the deed, treating it as a condition subsequent, was not performed. No considerable amount of work in building the railroad was done, and after the condition was broken the grantor, without re-entering upon the land or by any other overt act declaring a forfeiture, subsequently executed the deed under which plaintiffs claim title. The question we propose to decide is, then, whether or not re-entry upon the land, suit or declaration of forfeiture by the grantor before conveying the land to a third party, was essential in order to effect a forfeiture, and whether any interest or estate was conveyed by the subsequent deed under which the plaintiffs claim title. We pretermit a discussion of the numerous other questions presented and argued in the case.

The doctrine of estates upon condition is of feudal origin, of which system the doctrine of title by livery of seisin formed an essential part, on account of the condition of real property at that time, and the only practical method of conveying it. This was then a doctrine of necessity, for in that day no system of registration of conveyances existed. Indeed, lands were not generally conveyed by writings, and the only practical method of giving notice of a change of title was either by actual delivery of possession or by symbolic delivery in sight of the land.

At common law, the only method whereby a forfeiture could be effected for breach of condition was by re-entry upon the premises or by a public attempt to re-enter, with a declaration of forfeiture. This, too, grew out of the doctrine of livery of seisin, the reason being that the forfeiture for condition broken must be accomplished by acts of equal dignity and notoriety with those which created the condition, viz., delivery, either actual or symbolic. "As by the old common law a freehold could be created only by the ceremony of livery of seisin, the corresponding ceremony of re-entry was necessary in order to determine it, or, as Coke has it, 'an estate of freehold cannot begin nor end without ceremony.'" (1 Jones on Conveyancing in Real Property, § 715.) "The entry, moreover, in the language of the Touchstone, should be 'an open and notorious act, equivalent to investiture of land by

livery of seisin, that notoriety might be given to the change of title.' It is not necessary, however, that the party entering should declare at the time for what purpose he enters. The act speaks for itself." (*Ib.* § 716.)

In his recent work on Real Property, Professor Minor (vol. 1, p. 532), says: "It is an established rule of the common law that if the conditional estate be a freehold the mere occurrence of the event which constitutes the violation of the condition does not defeat the estate, because as a freehold can, at common law, only be created by livery of seisin, there is needed a corresponding notoriety in order to determine it. This corresponding notoriety is the re-entry of the grantor or his heirs. * * * No actual re-entry is necessary to determine an estate for years on condition, 'for, as a term of years may begin without ceremony, so it may end without ceremony'."

It also must be conceded that at common law the right of re-entry for condition broken was not assignable, and could only be exercised by the grantor who created the condition, or by his privies in blood. It could not be exercised by one who was only the grantor's privy in estate. This under the maxim that, in order to discourage maintenance, "nothing which lies in action, entry or re-entry can be granted." The same rule prohibited the conveyance of lands held adversely, or any interest therein. This rule was created under the English statute (32 Henry VIII, chap. 9) against selling pretended titles, and Sir Edward Coke states the reason therefor as follows: "To prevent maintenance, suppression of right, and stirring up of suits; and therefore nothing in action, entry or re-entry can be granted over; for under color thereof pretended titles might be granted to great men whereby right might be trodden down and the weak oppressed, which the common law forbiddeth." Coke on Littleton, 214a.

In many of the States of the American Union this English statute against the sale of pretended titles to lands not in possession has been re-enacted, and in a few States the doctrine has been recognized and enforced as a part of the common law. But this court in *Lytle* v. *State,* 17 Ark. 674, held that "the provisions of these statutes, upon which so much of the law of maintenance and champerty rests for support in the English law, so far from having been re-enacted in this State, have been met here by

directly conflicting legislation in the several provisions touching the sale of real estate held in adverse possession; whereby the right of 'alienation and purchase' of every interest, title and estate therein has been enlarged almost to an unlimited extent.' "

This rule has long since been changed in England by statute. By the Wills Act of 1837 (1 Victoria, c. 26, § 3), all rights of entry for condition broken were made devisable, and in 1844 another statute (7 & 8 Victoria, c. 76, § 5) made them assignable. At common law there was a distinctive reason for the rule of inhibition against the assignment of a grantor's rights before and after breach of condition. Judge Hare in his note to Dumpor's Case (1 Smith's Leading Cases, p. 112) says: "When it is said, in general terms, that a condition cannot be taken advantage of, save by the grantor and his heirs, and, of course, that it is not assignable, two very distinct points of law, resting on different reasons, are involved in the assertion. Before breach the reason why an assignee cannot take advantage of a condition really depends upon the want of capacity for transfer of the condition itself. But after breach the condition itself is gone, and there arises in its stead, whatever may be its term, in the case of freehold estates, at all events when created by a common-law conveyance, a right or title of entry, which is as little capable of assignment as the condition, although the obstacles to its assignment are of a different nature, arising out of the policy of the common law, and the provisions of the statute of maintenance, which forbade the sale or transfer of all claims or demands unsustained by possession and resting solely in entry or action."

However, the same learned author states his opinion to be that the abrogation of the rule or statute against maintenance does not alter the rule as to the non-assignability of the grantor's right before re-entry. On that subject he says: "It does not necessarily follow that the right to enforce the forfeiture of a condition is equally susceptible of assignment. The right to enter for a breach of condition is a bare right or remedy, which differs essentially from the right to clothe the title to land with possession by expelling a disseisor or intruder, for, while the right of property and right of possession belong in the one case to the person who enters, they are vested in the other in him on whom the entry is made, and continue in full force, although

liable to be defeated down to the last moment before that at which the grantor enters."

The contrary view was expressed by the New Jersey Court of Errors and Appeals in a learned and exhaustive opinion in which all judges concurred. *Bouvier* v. *Baltimore & N. Y. Ry. Co.*, 67 N. J. L. 281. In the opinion in that case it was said: "A distinction not always clearly made should, however, be borne in mind. Before breach, as in case of any determinable fee, there is in the grantor only a possibility of reverter. 4 Kent, Com. 11n; *Nicoll* v. *N. Y. & E. Rd. Co.*, 12 N. Y. 121. After breach there is a vested right." At another place in the opinion, after referring to the statute of that State declaring the assignability of estates in expectancy, it is said: "It is suggested also that the proviso in the act that no chose in action shall thereby be made assignable at law excepts rights of entry after breach from its operation; but I do not take that view. Some judges have spoken of the right after breach as a mere chose in action, but the designation is inaccurate. A right of entry is an interest in land. * * * But, although it may be that the statute only authorizes a transfer before breach, I think a transfer after breach is also valid, for the reason that moved the Supreme Court of Pennsylvania to a like decision. I would not say, as did that court, that a right of entry can be levied on and sold at execution, but I think that in this State it may be transferred at the will of the holder."

The Pennsylvania Supreme Court in *McKissick* v. *Pickle*, 16 Pa. St. 140, where, under a deed which created a condition subsequent and wherein the grantor reserved for himself, his heirs and assigns, the right of re-entry, the question was whether or not a purchaser of the grantor's interest at execution sale could exercise the right, the court said: "The law against maintenance has never been adopted in this State. The reason assigned why a condition in England could not be assigned is, because no title could be made to land held by another adversely, as that was against the law, which forbids maintenance. And hence the rule that none but the grantor or his heirs can enter for condition broken. This reason does not apply here, where the grantor expressly reserves the right (citing authorities). In the last case Chief Justice Gibson says, none but the feoffer or his heirs can enter; and the reason why a right of entry cannot be assigned

is that a contrary doctrine would favor maintenance and promote litigation. This is a fair case for the application of the maxim, *cessante ratione cessat ipse lex.*"

We perceive no distinction by reason of the grantor having expressly reserved the right of re-entry to his assignee.

The common-law doctrine of livery of seisin and the law against maintenance or the sale of pretended titles have never found lodgment in this State. The former is contrary to our whole scheme of laws, and especially the system of registration of land titles which has existed in this State from the beginning. Before the statute was passed (December 9, 1837) putting in force in this State the common law of England so far as applicable to our form of government, the following statute was passed, which undoubtedly worked an entire change and swept away every vestige of the feudal doctrine concerning alienation of real estate and interests therein:

"Any person claiming title to any real estate may, notwithstanding there may be an adverse possession thereof, sell and convey his interest in the same manner and with like effect as if he was in the actual possession thereof.

"'The term 'real estate,' as used in this act, shall be construed as co-extensive in meaning with 'lands, tenements and hereditaments,' and as embracing all chattels real." (Secs. 736, 737, Kirby's Digest.)

Of this statute the court, in *Cloyes* v. *Beebe,* 14 Ark. 489, said: "It is true that at common law, if a man had in him only the right of possession or property, he could not convey it to another, lest, in the language of the ancient law, 'pretended titles might be granted to great men, whereby justice might be trodden down and the weak oppressed.' But this was for the feudal reason that possession was an indispensable element of alienation. * * * But every vestige of this feudal doctrine, which thus restrained the alienation of real estate, has been swept off by our statute, which enacts that 'any person claiming title to any real estate may, notwithstanding there may be an adverse possession thereof, sell and convey his interest in the same manner and with like effect as if he was in the actual possession thereof.' "

It is insisted by learned counsel for appellant that the statute accomplished no more than an abrogation of the rule against main-

tenance, and that, nothwithstanding the statute, the title does not revert to the grantor nor his heirs until after re-entry, and that without entry neither he nor they have anything to convey.

Conceding, as they contend, that the statute only abrogates the rule against maintenance, that, in our opinion, is sufficient. For we conceive the rule stated by the New Jersey and Pennsylvania courts to be correct, that, after condition broken, the grantor or his heirs have a vested right or interest which is assignable. But the statute accomplishes more than a mere abrogation of the rule against maintenance. It declares that the grantor, notwithstanding an adverse possession, may sell his interest in the real estate, and gives the broadest definition to the term "real estate." Of this part of the statute our court has said, quoting from Sir Edward Coke, that the word hereditaments "is by far the largest and most comprehensive expression, because it included not only lands and tenements, but whatever may be inherited, be it corporeal or incorporeal, real, personal or mixed." Proceeding further, the court said: "And thus it appears that, although at common law there were certain rights to and interests in real estate that for want of possession, either actual or constructive, could not be alienated to a stranger, although they could be released or devised by will, or would pass to the heir or executor—as contingencies and mere possibilities—such is the comprehensiveness of our statute in embracing hereditaments in the term 'real estate' that that distinction is also annihiliated, and therefore, in this State, whatever interest in real estate may be inherited may be bargained, sold or conveyed." *Cloyes* v. *Beebe,* 14 Ark. 489.

There is very little conflict, if any, among the text writers and lexicographers as to the meaning of the word "hereditaments." It is "anything that may be inherited, be it corporeal or incorporeal, real, personal or mixed. The word is almost as comprehensive as property." Anderson's Law Dictionary; 1 Coke, Inst. 6; 3 Kent, Comm. 401.

"Whatsoever may be inherited is an hereditament. In other words, when a right is of such a nature that on the death of its owner intestate it descends to his heir, it is an hereditatment. The term includes a few rights unconnected with land, but it is generally used as the widest expression for real property of all kinds." Rapalje & Lawrence, Law Dictionary.

We do not deem it necessary, however, to resort to any technical meaning of the word hereditaments, for it is obvious that the Legislature, by the first section quoted above, intended to make interests of every kind whatever in lands alienable. This court has placed the same construction on the statute in another class of cases, not differing, we think, in principle from the present case. *Bagley* v. *Fletcher,* 44 Ark. 153. In that case the question was as to the right of a minor to disaffirm by the execution of a quitclaim deed, without having re-entered or manifested a disaffirmance by any other overt act. The court held that the infant's deed vested in the grantee a defeasible estate in fee, subject to be defeated by disaffirmance, and that the execution of the quitclaim deed was effectual for the purpose of conveying the minor's interest, and was of such a hostile character to the original deed as amounted to a revocation of the former grant. That decision was rendered by a divided court, but there was no disagreement among the judges on the point which is pertinent here. Judge EAKIN, dissenting, conceded that a deed with covenants of warranty, executed by a quondam infant, would operate as a disaffirmance and revocation of the former deed; but he held that a similar effect should not be given to a quitclaim deed. In his dissenting opinion he said: "In other States, as here, where lands adversely held may be transferred by the owners, the entry is dispensed with as an overt and solemn act of disaffirmance, and the deed, if incompatible with any supposed recognition of the outstanding title, is taken as a manifestation of an intention to do what would, under the common law, have been actually necessary."

The decision in *Bagley* v. *Fletcher* was recently followed in the case of *Beauchamp* v. *Bertig,* 90 Ark. 351, where the land conveyed by the minor was held adversely by his original grantee.

So it may be said here with equal force, as in the case just cited, that the grantor in a conditional deed, by the execution of another deed to a third person after breach of the condition, manifests in the most unmistakable manner his intention of declaring a forfeiture. It is equivalent to an actual re-entry or a declaration of forfeiture. The execution of his subsequent deed, being in hostility to his former grant, necessarily works a forfeiture. The execution and registration of the deed is an act of the

highest degree of hostility, and one which the original grantee on condition must take notice of, because it in the line of his title. The statement of a condition in the deed puts the grantee and those in privity with him on notice as to any subsequent deed executed by the grantor in hostility to the title thereby conveyed.

The Virginia statute (Code 1904, § 2418) declares that "any interest in or claim to real estate may be disposed of by deed or will." It was held under this provision that a right of action for land in the adverse possession of another, or a right of entry thereon after conditions broken, by analogy to contingent remainders and conditional limitations, which are also mere possibilities, may be assigned by deed or will. *Carrington* v. *Goddin*, 13 Gratt. 587; *Young* v. *Young*, 89 Va. 675; *Wilson* v. *Langhorne*, 102 Va. 639, 47 N. E. 872.

In *Wilson* v. *Langhorne*, 102 Va. 640, the court, referring to a former decision construing the statute, said: "The court in that case indulges in no refinement of construction. It is content to give plain words their usual and every day meaning, and the interpretation there placed upon the statute did away forever with the niceties by which the devolution of property had theretofore been embarrassed and hindered, and made capable of disposition by deed or will any interest in or claim to real estate."

Kentucky has a statute identical in language with the Virginia statute, and the Court of Appeals of Kentucky in construing it said: "The effect of this statute is to obviate at once all the difficulties growing out of the distinction, which had been established by judicial construction, between such estates as were alienable and such as were not. It will not be doubted, we suppose, that under this statute every conceivable interest in or claim to real estate, whether present or future, vested or contingent, and however acquired, may be disposed of by will or deed." *Nutter* v. *Russell*, 3 Metcalfe, 163. In *Kenner* v. *American Cont. Co.*, 9 Bush 202, the Kentucky court held that the right to enter for condition broken could be devised.

The Supreme Court of the United States in *Schlesinger* v. *Kansas City S. Ry. Co.*, 152 U. S. 453, said: "In the case of a private grant entry by the grantor or any act equivalent thereto, showing a purpose to take advantage of the breach of condition subsequent and to reclaim the estate forfeited by such breach, is

all that is required." In that case the forfeiture was declared in a subsequent conveyance to another grantee, and the court said that the grantor had manifested his intention to forfeit the former grant.

Reliance is placed by learned counsel on the New York cases, principally *Uppington* v. *Corrigan,* 79 Hun 488, a decision by the Appellate Division of the Supreme Court of that State. That decision leaves out of account the distinction between the rights of a grantor before and after condition broken. But in that case (which was one concerning the effect of a devise of lands previously granted away by deed on condition subsequent) the devise was made before breach of the condition. The effect of that decision was merely to hold that before condition broken the grantor had no interest which could be devised by will.

We think it clear, both upon reason and authority, that where, as in this State, the common-law doctrine of livery of seisin is abolished by a statute authorizing a conveyance of land, whether held in possession or not, a subsequent deed executed by an original grantor on condition is equivalent to re-entry, and is effectual for the purpose of declaring a forfeiture and vesting the title in the subsequent grantee. A hostile deed after condition broken serves to divest the defeasible title out of the grantee on condition and to convey the title. This is, as said by the Pennsylvania court, a proper application of the maxim that, the reason of the law ceasing, the law itself ceased.

The judgment of the circuit court is therefore affirmed.

HART, J., (dissenting). I dissent in this case. For the reason that a dissenting opinion is of little or no practical value, I shall not attempt an exhaustive discussion and review of the numerous adjudicated cases bearing upon the principles involved in the action. Suffice it to say that I have read and considered the cases cited by the able attorneys who have filed briefs in behalf of all parties interested in the decision, and their briefs, as I believe, exhaust the subject.

The opinion of the court does not decide whether the condition in the deed in question is precedent or subsequent. I think it a condition subsequent. It is necessary for me to state my conclusion on this point. If I thought it was a condition precedent, I would concur in the judgment, and not dissent.

"Conditions precedent are, as the term implies, such as must happen before the estate dependent upon them can arise or be enlarged, while conditions subsequent are such as, when they do happen, defeat an estate already vested." *Cooper* v. *Green,* 28 Ark. 54. This is but a reiteration of the rule announced by Washburn, Blackstone and Coke. It will be borne in mind that the opinion of the court has treated the condition in the deed as a condition subsequent. That is to hold that the estate was vested in the railway company by the execution of the deed. It is a rule of the common law that none may take advantage of a condition but grantors and their privies in blood, or, in the case of corporations, their successors. The right to forfeit an estate for breach of condition subsequent is confined to the grantor and his heirs, and cannot be transferred by alienation. Am. Dig. (Cent. Ed.) vol. 4, 1142. Note case of *Cross* v. *Carson,* 44 Am. Dec. 742; authorities cited in the brief of Murphy, Coleman & Lewis, *amici curiae.* This proposition has been so long established both by the text writers and by adjudicated cases that there is no quarrel or dispute between my brother judges and myself as to it. They have decided that this rule has been changed by our statute, and that our former decisions have recognized the change. I maintain the contrary view. They declare that sections 736 and 737 change the common law rule.

Sec. 736 reads as follows: "Any person claiming title to any real estate may, notwithstanding there may be an adverse possession thereof, sell and convey his interest in the same manner and with like effect as if he were in possession thereof."

At common law the owner of land could not convey it unless it was in his possession. To obviate this difficulty, the statute in question was passed. The statute simply means that, if A. and B both claim title to land, and B is in possession thereof, A may convey his claim of title; and his grantee may bring suit to recover the land. I think that was the only issue involved in the case of *Cloyes* v. *Beebe,* 14 Ark. 493, cited by the court to maintain its position that the statute has changed the rule of the common law on the subject. I think the court has confused the right of entry or bringing suit for possession of one who has been unlawfully dispossessed of his real estate with the right of entry or taking advantage of a condition in a deed which has been broken.

The statute was enacted for the purpose of enabling the claimant of real estate, who has been unlawfully deprived of his possession, to convey it. It is essentially different from the right to take advantage of a forfeiture or breach of a condition. In the latter case the title is vested in the grantee, and the grantor has no claim or title, but only the right to claim a forfeiture or breach of condition. This is not a claim of title, but only a right or personal privilege which the grantor may either waive or assert.

As we have already seen, by the rules of the common law, in a condition subsequent the title vested in the grantee by the execution of the deed. This is the difference between a condition precedent and a condition subsequent. See *Cooper* v. *Green, supra.* It is plain that, if the title is vested by the execution of the deed, it must be revested in the grantor in some way before he can be one "claiming title," as expressed in sections 736 and 737 of Kirby's Digest, *supra.* If I am correct in the views I have expressed, the case of *Lytle* v. *State,* 17 Ark. 608, only holds that the common-law doctrine of maintenance is not in force in this State, as applied to the case of one "claiming title to any real estate," and that such person may convey whatever title thereto he may possess.

I think a careful reading of the opinion in this case will show that this was the only issue raised by the pleadings and the evidence, and, if so, it is all that was decided. Section 737 reads as follows: "The term 'real estate,' as used in this act, shall be construed as co-extensive in meaning with 'lands, tenements and hereditaments,' and as embracing all chattels real."

Obviously, this refers to the preceding section, and, if my construction of the preceding section is right, section 737 only means that one claiming title to a hereditament which is held adversely by another may convey it. In short, if section 736 has no reference to a conveyance of right to re-enter or take advantage of a breach of a condition, the word "hereditament," as used in section 737, has no reference thereto. The difference between a right of entry of one unlawfully dispossessed of his real estate and the right of entry for breach of condition is clearly explained in the case of *Bangor* v. *Warren,* 34 Me. 324, and the distinction is recognized in the case of *Hooper* v. *Cummings,* 45 Me. 359.

In the State of New Jersey, previously to the passage of the act of March 14, 1851, a right to enter for a condition broken was

not assignable, and the condition of a deed could only be taken advantage of by a party to the deed, or by his privies in blood, or his personal representatives. The case of *Southard* v. *Railroad Co.*, 2 Dutcher (N. J.) 13, holds that it takes an express statutory enactment to make so important a change in the common law.

The court has sought to strengthen its opinion by citing the case of *Bagley* v. *Fletcher*, 44 Ark. 153, and *Beauchamp* v. *Bertig*, 90 Ark. 351, to the effect that a deed executed by an infant may be avoided by him after becoming of age by any act unequivocally manifesting an intention to avoid it, and that a reconveyance to a third person constituted such an act. I can see no analogy between the two questions. Nothing is said in the cases mentioned about the doctrine of re-entry, or the assignability of a right to re-enter. It is well settled at common law that a conveyance by the grantor of his right to avail himself of a breach of a condition in a deed operates as a discharge of the condition. Such conveyance constitutes a waiver of the condition by the grantor, and does not transfer it to his grantee. There is no room for dispute about the common law on the subject. The sole question is, has the statute changed it? It is conceded that the Legislature has the power to change the rule. If it has done so, that settles the matter. If it has not, courts have no right to encroach upon the common law, for this would be judicial legislation.

To continue the discussion would be fruitless. As above stated, my only purpose is to enter my protest against what I conceive to be a marked encroachment by the judiciary upon a long established and well defined rule of the common law.

In 1816, while Arkansas was a part of the Missouri Territory, a statute was passed adopting and recognizing the common law as a part of its system of laws. This statute remained to govern the subsequently formed Territory of Arkansas, and, with some changes of phraseology, was re-enacted as a part of the laws of this State, and remains in our statutes today. *Horsley* v. *Hilburn*, 44 Ark. 458; Kirby's Digest, § 623.

HARPER v. STATE.

Opinion delivered June 28, 1909.

1. LIQUORS—SALE TO MINOR—INTENT.—Under Kirby's Digest, § 1943, providing that "any person who shall sell * * * any liquors to any minor * * * shall be deemed guilty of a misdemeanor," etc., one who sells liquor to a minor is guilty though he honestly believed that the minor was of full age. (Page 424.)
2. SAME—PLACE OF SALE.—Where an order for liquor was mailed from another State to a dealer in a city in this State, with request that the goods be shipped by the evening train, and the dealer shipped the goods by train from such city, consigned to the purchaser, the sale was made in this State. (Page 425.)

Appeal from Sebastian Circuit Court, Fort Smith District; *Daniel Hon,* Judge; affirmed.

Brizzolara & Fitzhugh, for appellant.

1. Neither of defendants personally, or through their employees, ever sold liquor to the minor in Arkansas. The order came through the United States mail, and defendants had no knowledge or information that the purchaser was a minor. It was not a crime. 47 Ark. 555. The railroad was the agent of the purchaser. 45 Ark. 361; Black on Intox. Liquor, § 422.

2. The railroad was not the agent of the purchaser, and there was no delivery in Arkansas, and hence no sale in Arkansas: (1) Because defendants did not ship by the carrier nor in the manner named by the purchaser. (2) Because the vendor agreed to deliver the goods and prepaid the freight. Benjamin on Sales, 153; 141 Mass. 593; 88 Ark. 269; 24 Am. & E. Enc. L., 1071, 1075; 2 Benj. on Sales, § 1196, 1186, 1181; 37 Ark. 483; 31 *Id.* 155; 58 Ga. 56.

3. The delivery to a common carrier was not a delivery to the vendee in Arkansas. Benjamin on Sales, 156; 2 Wharton, Conf. Laws, (3 Ed.) § 486 a; 141 Mass. 364; 113 *Id.* 391; 91 Iowa, 109; 3 Page on Cont., § 1728.

Hal L. Norwood, Attorney General, *C. A. Cunningham,* Assistant, for appellee; *June P. Wooten,* of counsel.

1. It matters not whether they had knowledge or information that the purchaser was a minor. They were bound to determine for themselves, at their peril, whether or not he was

a minor. Black on Intox. Liquor, § 418; 36 Ark. 58; 37 *Id.* 108; *Ib.* 219; *Ib.* 399; 45 Ark. 361.

2. The sale was complete by delivery to the carrier at Fort Smith. 3 Page on Cont., § 1728; 116 Iowa 711; 51 Ark. 133; 43 *Id.* 353; 50 *Id.* 20; 44 *Id.* 556; 88 Ark. 269; 1 Benj. on Sales, § 181.

FRAUENTHAL, J. The defendants, George W. Harper and C. P. Wilson, were convicted of the offense of selling ardent liquors to a minor in the Fort Smith District of Sebastian County; and they have taken an appeal from that conviction to this court.

The evidence tended to establish the following facts: The defendants are licensed wholesale and retail liquor dealers, doing business in the city of Fort Smith, Arkansas. Christopher Russell is a minor about 15 years old residing at Warner in the State of Oklahoma, a station on the Midland Valley Railway 85 miles west of Fort Smith. On September 17, 1908, Christopher Russell, seeing a circular advertisement of defendants, sent to defendants a letter, in which he made an order for one gallon of whisky. The letter is as follows:

"Warner, Okla., September 17, 1908.

"Harper and Wilson.

"Enclosed you will find $3.00 for which please send me one (1) gallon of rock and rye whisky. I want 8 shorts. Be sure and send on the evening train today. Your customer,

"Christy Russell,

"Warner, Okla.

"Don't fail to send on evening train."

The three dollars sent in the letter was a sufficient amount to pay for the whisky and the charges for carriage from Fort Smith to Warner. The defendants did not know Christopher Russell, and did not know that he was a minor, but they accepted the order, and on September 18, 1908, they delivered to the Midland Valley Railway, a common carrier, at Fort Smith, Ark., a gallon of whisky, duly addressed to Christopher Russell at Warner, Oklahoma; and at their request the carrier executed a bill of lading for the whisky in which Christopher Russell was named as consignee. The whisky was shipped by freight train, and the defendants paid the freight. It appears

that there is a passenger train leaving Fort Smith on this railroad in the afternoon, and which arrives at Warner about 7 o'clock P. M., and that express packages are carried on this train, but ordinarily no freight. Christopher Russell got the whisky at the depot at Warner.

It is contended by defendants that they cannot be convicted of this offense of selling intoxicating liquors to a minor, for the reason that they did not know that Christopher Russell was a minor; that on this account they had no criminal intent, and therefore could not be guilty of a criminal offense.

The statute under which the defendants were convicted provides that "any person who shall sell or give away, either for himself or another, or be interested in the sale or giving away of, any ardent, vinous, malt or fermented liquors. * * * * to any minor," shall be guilty of a misdemeanor. Kirby's Digest, sec. 1943. The words "knowingly or wilfully" or words of like import do not appear in this statute. The offense is complete when the sale is made to a minor, and the guilty intent is not an essential ingredient of the offense. There are some courts that hold that in prosecutions of this nature the absolute good faith of the seller and his ignorance of the minority of the buyer is a good defense. But the principle adopted by this court and enunciated by Chief Justice ENGLISH is that vendors of intoxicating liquors are bound to "determine for themselves at their peril whether or not the purchaser is a minor; for, if they sell to one who is a minor, they are criminally liable, notwithstanding they are actually ignorant of the fact and honestly believed the person is of full age." *Redmond* v. *State,* 36 Ark. 58; Black on Intoxicating Liquors, § 418.

In the opinion delivered by Chief Justice ENGLISH some of the reasons are given for that ruling and that determination of the effect of this statute. Those reasons appear to us manifest and sound; and the result of such ruling is to effect a proper enforcement of a public policy announced by this statute against the selling or giving away of intoxicating liquors to a minor.

This decision has been followed by this court in a number of cases, and we can see no good or wholesome reason for changing it. *Crampton* v. *State,* 37 Ark. 108; *Edgar* v. *State,* 37 Ark. 219; *Pounders* v. *State,* 37 Ark. 399.

It is urged that, inasmuch as the common carrier was the agent of the minor and the liquor was purchased through such agent, in such event the defendants would not be guilty if they did not know or have any reasonable grounds of knowing that they were selling to a minor. And they cite *Gillan* v. *State,* 47 Ark. 555, to sustain that contention. But in that case the vendor sold directly to a negro, and made no contract with the minor. It subsequently developed that the minor had sent the negro to purchase the whisky for him. But there was no actual agreement on the part of the vendor to sell to the party who was the minor; and, as far as the vendor was concerned, the sale was made by him to the negro. In this case the defendants actually sold and intended to sell the liquor to Chrictopher Russell, the minor, and they simply were ignorant at the time of the fact that he was a minor.

It is contended that the sale in this case did not take place at Fort Smith but at Warner, Oklahoma; that this is true because the delivery of the whisky was made to Russell at Warner and not at Fort Smith. The sale occurred at the place where the contract and delivery were actually made. The contract of sale, like all other contracts, consists of an agreement between the parties and in addition thereto a delivery of the chattel. In this case the minor sent a letter to the defendants making an offer to buy the liquor, and this letter was received by the defendants at Fort Smith, and at that place the offer was accepted by them. When they accepted the offer, the contract was entered into, and the place of the agreement was therefore at Fort Smith. The defendants thereupon at Fort Smith appropriated and segregated from their stock the gallon of whisky, and delivered same to a common carrier at Fort Smith duly addressed to the minor, and went further and obtained a bill of lading for the whisky from the carrier for the minor, in which the minor was named as the consignee. Now, it is uniformly held that the delivery of goods to a common carrier, when made in pursuance of an order to ship, is in effect a delivery to the consignee; and more especially is this true when the title to the shipment, as evidenced by the bill of lading, is made in the name of the consignee. *State* v. *Carl & Tobey,* 43 Ark. 353; *Burton* v. *Baird,* 44 Ark. 556; *Berger* v. *State,*

50 Ark. 20; *Gottlieb* v. *Rinaldo*, 78 Ark. 123; *Templeton* v. *Equitable Mfg. Co.*, 79 Ark. 456; 1 Mechem on Sales, § 736, 739; Tiedeman on Sales, § 95.

The buyer in the first instance may designate the particular carrier by whom the goods are to be transported; but in event the contract of purchase is silent as to the particular carrier then a delivery by the vendor to a common carrier in the usual and ordinary course of business transfers the property to the vendee. *Templeton* v. *Equitable Mfg. Co.*, 79 Ark. 456.

It is urged that the buyer in this case by said letter directed that the whisky be sent by an express company, and not by the Midland Valley Railway. But this does not follow from the terms of the letter. The Midland Valley Railway, so far as the evidence shows, was the only common carrier of goods from Fort Smith to Warner; and, even if the request in the letter to send on evening train could be considered to be a direction to send by express, there is no evidence that the railway company did not itself carry express packages on its trains, or that there was a separate and distinct carrier that transported goods on the evening train. But we are of the opinion that the request in the letter that the whisky be sent on the evening train of the same day was only made and intended by the buyer for the purpose of obtaining the whisky as speedily as possible, and was not made as a designation of a particular carrier to transport the goods.

The defendants by their actions showed that they understood it in that way, for they proceeded in the ordinary and usual course of their business and delivered the whisky to the Midland Valley Railway within a reasonable time after receiving the order. And this is what in fact and in law the request in the letter amounted to. 24 Am. & Eng. Ency. Law, (2nd Ed.) 1075.

In this case the sellers accepted the order in Fort Smith, and at that place received the money and delivered the goods to a common carrier, whom they selected in good faith and in the ordinary course of business, and not contrary to any direction made by the buyer. They not only delivered the goods to the carrier without any qualifications or restrictions, but in the bill of lading had the carrier name the buyer as the consignee. The delivery thus became complete, and the title to the whisky

thereupon passed to the minor, and that took place at Fort Smith; and therefore the sale was completed at that place.

The rulings of the court in giving and refusing instructions were based upon the law as above announced. We find no error in these rulings of the court. The evidence sustains the verdict. The judgment is accordingly affirmed.

HURLEY v. OLIVER.

Opinion delivered July 12, 1909.

1. APPEAL AND ERROR—STRIKING OUT ANSWER—WHEN HARMLESS.—Error of the court in striking out a paragraph of an answer was not prejudicial if the court admitted all the testimony offered by defendants on the issue raised by the paragraph, and it does not appear that defendants were prevented by the court's ruling from introducing any additional testimony upon the same issue. (Page 430.)
2. DAMAGES—BREACH OF CONTRACT—PROSPECTIVE PROFITS.—Where plaintiff undertook to do certain work for defendants, and was prevented from doing it by defendants' fault, he is entitled to the profits which the evidence makes it reasonably certain that he would have earned if defendants had carried out their contract. (Page 432.)

Appeal from Monroe Circuit Court; *Eugene Lankford,* Judge; affirmed.

C. F. Greenlee, for appellants.

1. It was error to strike out from the answer the 6th paragraph. If plaintiff rendered himself incapable by reason of intoxication of performing the duties resting upon him under the contract, defendants had the right to take the property away from his management and control. He thereby first violated the contract. 85 Ark. 596, 599.

2. Damages for breach of contract cannot be measured by the loss of expected profits where the latter are uncertain and speculative and depend upon so many contingencies that their loss cannot be traced with reasonable certainty to the breach. 12 N. W. 640; 11 N. W. 828; 111 Fed. 96; 57 Ark. 203; 69 Ark. 210, 222.

Manning & Emerson, for appellee.

1. It was proper to strike out paragraph 6 from the answer. This was not a contract for employment of appellee by appellants to work for them in any capacity or to handle property for them, but a contract under which he was to sell them oak heading at a certain price and to buy their machinery at a certain price. It stated no defense to the action. But, if it was a defense, all the legal testimony tending to prove the allegations of the paragraph was admitted without objections, and the court's instructions likewise treated such allegations as in issue.

2. Loss of profits on account of a breach of contract is a proper measure of damages. 1 Sutherland on Damages, 113; 9 Exch. 341; 4 N. E. 264; 147 Fed. 65, 71. In this case the expected profits can not only be traced to the breach of the contract, but are a part of it and arise from and grow out of the provisions of the contract itself. 91 Mich. 156; 51 N. W. 930; 16 N. W. 232; 29 N. W. 711; 68 Mich. 312; 36 N. W. 88; 106 Mich. 542; 64 N. W. 474; 78 Ark. 336; 110 Mich. 6; 67 W. W. 976; 114 Mich. 34; 26 Mich. 239; 112 N W. 820; 61 N. W. 273; 95 N. W. 757; 47 So. 332; 153 U. S. 540; 71 Ark. 408; 78 Ark. 336; 80 Ark. 228.

HART, J. This is an action on contract brought by W. W. Oliver against F. W. Hurley and J. W. Ross, doing business under the firm name of Hurley & Ross, to recover damages for profits which he alleges he was prevented from earning by the defendants' breach of the following contract:

"This agreement, made this eighth day of February 1907, by and between Hurley & Ross, of Brinkley, Monroe County, Ark., and W. W. Oliver, also of Brinkley, Monroe County, Arkansas.

"Witnesseth that, in consideration of the sum of $2.50 per cubic cord, the said Oliver agrees to saw, cull, split, sap and stack on yard oak heading; said work to be done in first-class manner in every respect, same as is customary at Ross' factory, and as Hurley & Ross may from time to time direct. The said Hurley & Ross agree to furnish the machinery to do said work. It is hereby understood that the said Oliver is to purchase said machinery from Hurley & Ross at its cost price, including freight and expenses of getting saws in place to saw by allowing

50 cents per cord to be credited every two weeks on the purchase of said machinery. Hurley & Ross agree to furnish the money every two weeks to pay off said Oliver's men from the amount due said Oliver in excess of the 50 cents per cord credited on purchase price of the machinery, as hereinbefore agreed. Hurley & Ross agree to furnish a man to look after timber, each party to this contract to pay one half of this timberman's wages. Said Oliver agrees to keep said machinery in good repair, excepting ordinary wear and tear, and to furnish all supplies. This contract to be effective during one year beginning with this date. Now, if the said Oliver does not faithfully perform his part of within contract, it is agreed he will forfeit to Hurley & Ross what payments may have been made on said machinery at the time of said failure, and that the machinery is the property of said Hurley & Ross until fully paid for by said Oliver in the manner as agreed above.

"Hurley & Ross, pr. F. W. Hurley.
"W. W. Oliver."

"Fitch Jones, witness."

Defendants admitted making the contract, but denied having committed a breach thereof, and denied that plaintiff could have made any profit therefrom. Among other defenses they interposed the following, which is called paragraph 6th:

"Defendants state that plaintiff, after entering into said contract, rendered himself incapable of the duties resting upon him by its terms by becoming intoxicated and continuing so on intoxicating liquors, his condition being such that a reasonable, prudent person would not entrust one in such condition with control and management of his property."

The facts, briefly stated, are as follows: Hurley & Ross are manufacturers of lumber at Brinkley, in Monroe County, Arkansas. Oliver had been engaged as a sawyer of tight barrel heading by Hurley & Ross and their precedecessors in business for a period of 22 years. Hurley & Ross made an examination of the oak timber supply near Penter's Bluff in Independence County, Arkansas, and, wishing to obtain this timber and have it sawed into heading, made the contract which is the foundation of this action. Both Oliver and Hurley & Ross believed the mill could be operated without a line shaft, and the mill was equipped

accordingly. After a trial, this was found to be impracticable, and the line shaft, pulleys and belts were ordered and directed to be shipped to Penter's Bluff to be placed on the mill. After the line shaft and pulleys had arrived and were put in their proper place for the operation of the mill, and about the time the belt arrived, but before it had been attached to the mill, Hurley & Ross, over the objections of Oliver, took the mill out and moved it away. They claim that they did this on account of the continued intoxication of Oliver. They say he became and continued intoxicated to such an extent as to render it unsafe and impracticable to leave him in charge of the mill. Oliver says they moved the mill because they found the freight rate on heading from Penter's Bluff was too high, and denies that he was intoxicated. Oliver claims that the average run of the mill would have been 20 days per month. That he could average sawing 12 cords per day, and that the expense of running the mill would not have been more than $15 per day. He based his estimate on his past experience as a sawyer. He also testified that there was sufficient timber accessible to run the mill at Penter's Bluff for one year, which was the life of the contract. Hurley & Ross adduced testimony tending to show that his profits at best could not have been more than the wages of a sawyer, which he could have saved by doing that work himself. Hurley & Ross were to pay for the timber.

There was a jury trial, and a verdict for plaintiff in the sum of $1,000. From the judgment rendered thereon the defendants have appealed.

In his motion for a new trial counsel for defendants set out numerous assignments of error, but in his brief only two questions are presented for our determination; and the remainder will be considered as waived or abandoned.

The first is that the court erred in sustaining plaintiff's motion to strike paragraph 6 from defendant's answer upon the ground that the same constituted no defense to the cause of action set forth in the complaint.

The second is that the the court erred in submitting the question of profits as the measure of damages to the jury. We shall consider them in the order named.

1. In response to the contention of counsel for the defendants that the court erred in striking out paragraph 6 of their

answer, counsel for plaintiffs say that all legal testimony offered by defendants to prove the allegations made in paragraph 6 of their answer was admitted without objection, and that this amounted to a reconsideration by the court of its former ruling in striking out that paragraph.

In the case of *Roach* v. *Richardson,* 84 Ark. 37, it was held: "Where, without objection on plaintiff's part, defendant directed his evidence to an issue not raised by the answer, and the trial court treated the issues as thus joined, the answer will be treated on appeal as amended to correspond with the proof."

Again in the case of *White River Railway Company* v. *Batesville & Winerva Telephone Co.,* 81 Ark. 195, it was held: "Appellant can not complain because the court refused to permit it to amend its answer if the court had already permitted it to adduce all the testimony bearing upon the issue sought to be raised by the amendment."

These decisions are in accord with the uniform holdings of the court on this subject, so it may be said here that if the court admitted all the testimony offered by the defendants on the issue raised by paragraph 6 of their answer, no possible prejudice could have resulted to them from its former action in striking out this paragraph. We have made a careful examination of the record, and find that all competent evidence on the question of plaintiff's intoxication, or of his excessive indulgence in intoxicating liquors that was offered was admitted without objection. For instance, Mr. Hurley, one of the defendants was asked:

Q. "Mr. Hurley, you stated awhile ago that you didn't want Mr. Oliver in charge of the mill when in an intoxicated condition. I will ask you if you know his disposition when he was less intoxicated." A. "Yes, sir; he has been on a spree, and would stay that way for a long time, and for that reason I was afraid on account of the conditions up there. He had started in a pretty good gait, and I was afraid to continue him." (Objection to the pretty good gait, ask that it be excluded). Court: "That isn't proper testimony." Here it will be observed that no objection was made to Hurley stating all the facts within his knowledge as to the nature and extent of plaintiff's intoxication, but only to his stating his conclusions from the facts to the jury.

The inferences to be drawn from the facts were matters for the jury to determine.

Again, objections were made when defendants attempted to introduce evidence as to reports they had received as to the extent of plaintiff's intoxication. The objection was proper because such testimony would be hearsay evidence. We find from an examination of the record that in every instance where the defendants offered competent evidence on the question of plaintiff's intoxication, it was admitted without objection. As we have already pointed out, this amounted to a reconsideration of its former ruling by the court; and if the defendants wished to introduce additional evidence on that point, they should have stated to the court that they were taken by surprise at the action of the court in changing its ruling, and should have asked that the case be continued, or the trial postponed, for the purpose of allowing them to procure the attendance of additional witnesses on that point. Not having done so, the presumption is that they introduced all the witnesses they could have procured on that issue, and they can not now complain. The court in its instructions to the jury based the right of recovery upon condition that the breach of the contract was made "without the fault of the plaintiff."

2. Was a loss of the profits on account of a breach of the contract the measure of damages?

The evidence of both Hurley and Oliver shows that the defendants were to furnish or pay for the timber, and that Oliver was to manufacture it into oak heading for a stated sum per cubic cord. Oliver had worked for the defendants a great many years as sawyer. His particular line of sawing was tight barrel heading. Hurley himself testified that he knew the profits that could be made by Oliver under the contract, and that they would consist mainly, if not wholly, of the fact that he could do his own sawing. These facts, and as well the contract itself, shows that is was one for personal services. Hence we think that the profits were in contemplation of the parties when the contract was made. This view is strengthened by the fact that the contract provided that Hurley & Ross were to furnish the machinery to do the work, and that Oliver was to purchase said machinery at cost price and to pay for the same by allowing

fifty cents per cord on the amount earned, to be credited every two weeks on the purchase price of said machinery. The contract further provided that the machinery was to remain the property of Hurley & Ross until paid for.

In the case of *Beekman Lumber Co.* v. *Kittrell,* 80 Ark. 228, it was held: "Where plaintiff entered into a contract to perform certain work for the defendant, which he was prevented from doing by the fault of the defendant, he is entitled to recover the profits which the evidence makes reasonably certain that he would have made had the defendant carried out its contract." Mr. Justice RIDDICK, who delivered the opinion of the court, said: "The rule in reference to the recovery of profits is thus stated in a recent work: 'The recovery of profits, as in the case of damages for the breach of contract in general, depends upon whether such profits were within the contemplation of the parties at the time the contract was made. If the profits are such as grow out of the contract itself, and are the direct and immediate result of its fulfillment, they form a proper item of damages.' 13 Cyc. 53, 54. Such damages 'must be certain both in their nature and in respect to the cause from which they proceed. It is against the policy of the law to allow profits as damages where such profits are remotely connected with the breach of contracts alleged, or where they are speculative, resting only upon conjectural evidence or the individual opinion of the parties or witnesses.' 13 Cyc. 53; *Spencer Medicine Co.* v. *Hall,* 78 Ark. 336."

The language of the learned judge which follows is especially pertinent as an application of these principles to the facts of the present case, and we adopt it for that purpose. It is as follows: "Now, in this case the plaintiff had entered into a contract to perform certain work for the defendant, which he was prevented from doing, as the jury found, by the fault of the defendant; and we are of the opinion that the profits which the evidence makes reasonably certain that plaintiff would have made had defendant carried out its contract may be recovered." See also *Ramsey* v. *Capshaw,* 71 Ark. 408. For a recent application of the rule, see *Blumenthal* v. *Bridges, ante* p. 212.

The contract by its terms was to be effective one year from its date. The evidence adduced by the plaintiff tends to show

that he had had long experience in sawing with a mill similar to the one named in the contract under consideration, and that he had averaged sawing from 12 to 15 cords per day. His testimony also showed that it could be run on an average of 20 days per month. The price of the heading to be received by the plaintiff was fixed by the contract, and the cost of manufacturing the heading was testified to by plaintiff and his witnesses. While this testimony was contradicted by that of the defendants, it is not our province to pass upon the weight of the testimony. The verdict of the jury is conclusive upon us, if there is any evidence to warrant it. It is sufficient to say that the verdict is sustained by the evidence.

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

PINSON v. STATE.

Opinion delivered July 12, 1909.

BURGLARY—ENTRY INTO OPEN HOUSE.—Under Kirby's Digest, § 1603, providing that "burglary is the unlawful entering a house in the night time with the intent to commit a felony," one who at night enters a saloon open for business during business hours, and without fraud or deception practiced on the owner in making the entry, will be guilty of burglary if he enters with purpose formed before or at the time of entry to commit a felony.

Appeal from Sebastian Circuit Court, Fort Smith District, *Daniel Hon,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellant was convicted on an indictment which charged that he "on the 23rd day of February, 1909, about the hour of two o'clock in the night time of said day, unlawfully, feloniously, and burglariously, and with force did enter the store house of J. D. Broyles, with the intent then and there to commit a felony, towit: grand larceny of the goods and property of J. D. Broyles." There was testimony tending to prove that appellant in company with two others went into the saloon of Broyles

after midnight on the night alleged, and that appellant called the bartender to the cigar stand and engaged him in conversation. In the meantime the other two parties who entered the saloon with appellant went behind the screen or partition where there was whisky and stole same. Eleven quarts of rye whisky were stolen from the saloon that night. Without going into detail, it is sufficient to state that the evidence tended to prove that there was a conspiracy between appellant and others who entered the saloon with him on the night alleged to steal the whisky, and that they did steal whisky on that night which had a market value in Fort Smith of over ten dollars.

There was evidence to warrant a finding that appellant intended when he entered the saloon to steal the whisky. The court instructed the jury as follows, by reading sections 1603 and 1604 of Kirby's Digest and then declaring the law to be:

"1. To constitute burglary, a house or other building must be broken into or entered in the night time with the intent to commit a felony; but one who enters or breaks into a house in the night time with the intent to steal more than ten dollars worth of goods or other personal property is guilty of burglary, whether he steals that amount or not, if it is his intention in entering to steal more than ten dollars in value. If, after entering the store, he formed the intent to steal, and did steal more than ten dollars in value, he would not be guilty of burglary. The intent must have existed before or at the time of entering.

"2. If the jury find from the evidence, beyond a reasonable doubt, that the defendant, in the Fort Smith District of Sebastian County, within three years next before March 4, 1909, the date of the indictment, unlawfully entered the store house of J. D. Broyles in the night time, either by himself or with other persons, with the intent to commit grand larceny of the goods or personal property of J. D. Broyles to steal from his store goods or other personal property of more than the value of ten dollars, you will find the defendant guilty.

"3. If the business house and goods therein were in the possession of J. D. Broyles, and held and controlled by him, he would be held under the law to be the owner of the same.

"4. You are instructed that the market value of an article is the price for which it would sell in the regular way where

one person desires to sell, and another person desires to buy and has the means or ability with which to pay. No isolated sale is the market value of an article, but it is what it would sell for on the market in the regular way."

The appellant objected to each of these instructions, and duly excepted to the ruling of the court in giving them.

Appellant asked the court to instruct the jury as follows:

"1. Gentlemen of the jury: You are instructed to acquit the defendant, the State having failed to make out a case against him.

"2. You are instructed that, though the defendant entered the saloon in the night time, the said saloon being open during business hours, lights burning, bartender or bartenders on duty, and the business running in the regular way, the defendant entering at the regular door, as did other customers, that, under those conditions, the crime of taking goods therefrom could not, as a matter of law, amount to burglary, and you should acquit the defendant.

"3. If you find that the defendant did break and enter or did enter the said saloon as charged with the intent to commit the crime of petit larceny only, he is not guilty of burglary, and you are instructed to acquit him.

"4. The defendant pleads former conviction of petit larceny upon the identical facts as taken to establish this charge, and you are therefore instructed that if that plea is established you cannot convict the defendant upon any degree of larceny.

"6. If you fail to find from the evidence that the defendant, prior to entering the saloon, formed an intent to commit a felony therein, he is not guilty of burglary, and your verdict should be acquittal.

"7. One of the elements of burglary, under our statute, is an unlawful entry; and if you find from the evidence that said saloon was open, and the defendant entered during business hours in the regular way, the lights burning, and the bartender present, the business running in the usual course, as a matter of law, the defendant entered by invitation, and is not guilty of burglary, and you should acquit him.

"8. You are instructed, as a matter of law, the presumption is in favor of innocence, and the burden to establish a felonious

intent is upon the State; and if such an intent is not clearly proved beyond a reasonable doubt, you should find for the defendant.

"10. If you find from the evidence that there were other cases of liquor besides the one taken and carried away, to which the defendant had access and which he refused to take, this is to be regarded as evidence in his favor.

"11. Each juror should feel the responsibility resting upon him as a member of the body, and realize that his own mind must be convinced of the guilt of the defendant beyond a reasonable doubt before he can consent to a verdict of guilty; and if any one of the jury, after having considered all the evidence, and after having consulted with his fellow jurors, entertain such reasonable doubt, you can not in such case find the defendant guilty.

"12. If the business house and goods therein were in the exclusive possession of J. D. Broyles and held and controlled by him, he would be held, under the law, to be the owner of the same.

"13. Unlawful entering, as employed in our statutes, in the definition of burglary, signifies the violation of some prohibitory law."

Of these the court gave 3 and 6, but refused the other. The court modified prayers numbered 7 and 8 and gave them as modified as follows:

"No. 7. One of the elements of burglary, under our statute, is an unlawful entry; and if you find from the evidence that the said saloon was open, and the defendant entered during business hours in the regular way, the lights burning and the bartender present, the business running in the usual course, as a matter of law, the defendant entered by invitation, and is not guilty of burglary, and you should acquit him unless you find that at the time of entering he did so with the intent to commit grand larceny, to steal from the store house goods of the value of more than ten dollars.

"No. 8. You are instructed as a matter of law, the presumption is in favor of innocence, and burden to establish a felonious intent is upon the State; and if such intent is not established from the evidence, the jury should acquit."

Appellant objected to the rulings of the court in refusing its prayers and to the giving of prayers 7 and 8 as modified and duly excepted to the rulings.

Appellant in his motion for new trial assigned as error the various rulings to which he had saved exceptions. His motion was overruled, and he duly prosecuted this appeal.

J. D. Chastain, for appellant.

There is wanting in this case the element of unlawful entry necessary to constitute burglary, and even the element of common trespass. On the contrary, entering as he did through the open door along with other customers during business hours, he came by invitation, and no burglary is shown. 37 S. W. 438; 59 S. W. 888; 12 N. H. 42; 25 Va. 919; 73 Ark. 32; 42 Ark. 73; 6 Cyc. 209, 215.

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellee.

1. It was entirely proper for the court to refuse appellant's requested peremptory instruction, since unquestionably there was a question of fact for the jury to determine, namely, whether appellant along with others entered the saloon with intent to steal. 63 Ark. 94; 66 Ark. 362; 70 Ark. 74; 71 Ark. 305; 71 Ark. 445; 73 Ark. 566; 77 Ark. 556; 82 Ark. 86; 83 Ark. 246; 84 Ark. 57; *Id.* 620; 87 Ark. 70.

2. That the crime of burglary may be committed in entering a store house, saloon or other place of business during business hours is plain under our statute. Kirby's Dig. §§ 1603, 1604, 1605. California with a statute almost identical so holds. 142 Cal. 8; 144 Cal. 748. On the question of intent at the time of the entry, the rule is that the motives of the accused will be judged by the circumstances and such proof as is to be had. 11 Current Law, 490 and note.

WOOD, J. (after stating the facts.) It is unnecessary to discuss *seriatim* the objections of appellant to the rulings of the court. It suffices to say we find no reversible error in any of them. The most important question in the case, as conceded by appellant's counsel, is whether one who enters a store house, occupied as a saloon, in the night time, with intent formed in his mind before or at the very time he enters to commit a felony,

can be guilty of burglary where the house he enters is open for business, and the entry is through the open door during business hours, and without any apparent fraud or deception practiced on the owner in making the entry. The sections of our statute pertinent to the inquiry are as follows: Sec. 1603. "Burglary is the unlawful entering a house, tenement, railway car or other building, boat, vessel or water craft in the night time, with the intent to commit a felony." Sec. 1604. "The manner of breaking or entering is not material, further than it may show the intent of the offender." Sec. 1605, Kirby's Digest provides: "If any person shall, in the night time, wilfully and maliciously, and with force, break or enter any house, tenement, boat or other vessel, or building, although not specifically named herein, with the intent to commit any felony whatever, he shall be deemed guilty of burglary."

At the common law burglary was the unlawful breaking and entering in the night of another's dwelling with intent to commit a felony therein. 1 Bish. New Cr. Law, § 559; Russell on Crimes, p. 785. As will be seen, our statute, while retaining the elements of common law burglary, has also greatly enlarged upon these, so that, under the statute *supra,* the unlawful entering, without breaking, of the house, etc., in the night time with the intent to commit a felony is burglary. The unlawful entering, in the sense of the statute, is going into the house, etc., with the intention formed in the mind at the time the entry is made to commit a felony. No one has the right to enter upon the premises of another with the intent at the time he does so to commit a felony. No one is invited or has permission to do any such thing as that. A saloon keeper even extends to the public no such invitation as that, and one who enters a saloon with the predetermined purpose to commit some felony therein, whether by day or night, goes there *in invitum,* and, were such purpose known to the owner beforehand, he could prevent such person from entering his place of business. Therefore one who enters with such evil design perpetrates a fraud and deception upon the owner, for the owner invites only those who come for lawful purpose. Section 459 of the Penal Code of California provides: "Every person who enters any house, room, store * * * with intent to comit grand or petit larceny,

or any felony, is guilty of burglary." In *People* v. *Barry,* 94 Cal. 481, the Supreme Court, construing the section, says: "As to the acts which shall constitute burglary, that is a matter left entirely to the policy of the Legislature, within its constitutional powers; and when that body has said that every person who enters a store with the intent to commit a larceny is guilty of burglary, the language is so plain and simple that rules of statutory construction are not required to be consulted; the meaning is patent upon the face of the statute. No words are found in the statute qualifying the character, kind, time, or manner of entry, save that such entry must be accompanied with certain intent; and it would be judicial legislation for this court to interpolate other conditions into the section of the code." The court then proceeds to reason upon facts which showed that one had entered a grocery store during business hours, and had attempted to commit larceny, and concludes that the entry was unlawful, saying: "He is not one of the public invited, nor is he entitled to enter. Such a party could be refused admission at the threshold, or ejected from the premises after the entry was accomplished." The court adds: "If the presence of such party in the store is lawful, the fact that he gained ingress openly and publicly through the front door, rather than clandestinely by way of the skylight or the cellar, is not material, and the result would be that no burglary could be committed in a store during business hours, regardless of the nature of the entry." We adopt the reasoning of this case. See also *People* v. *Brittain,* 142 Cal. 8, and cases cited. Of course, in States where the common law rule prevails requiring both the breaking and entry to constitute burglary, decisions based upon such rule could not be authority for construing a statute where the unlawful entry without breaking is sufficient. Such are *State* v. *Newbegin,* 25 Me. 502, and *Clark* v. *Com.,* 25 Gratt. 908.

The case of *State* v. *Moore,* 12 N. H. 42, is more nearly in point. But, as pointed out by the Supreme Court of California, speaking of *State* v. *Moore,* 12 N. H. 42: "The primary question involved" in the latter case "was as to the sufficiency of the evidence to show a criminal intent in entering the building, and did not reach the matter as to the character of the entry."

We can readily see that there may be great difficulty oftentimes in proving that the entry was with the felonious intent

at the time of such entry to commit a felony. But that is no reason for saying that a party who enters during business hours through the open door in the regular way could not be guilty of an unlawful entry, and thus practically annul the statute. That is matter for the Legislature. As the law now stands, where the unlawful entry is shown, or where the evidence in each particular case as it may arise is sufficient to warrant the jury in finding that there was an unlawful entry, as it does in this case, it must be held, other conditions prescribed existing, that the party so entering is guilty of burglary.

There is no error for which to reverse the judgment, and it is affirmed.

ENO v. STATE.

Opinion delivered June 21, 1909.

APPEAL AND ERROR—WHEN EXCEPTIONS WAIVED.—Exceptions to the introduction of evidence are waived where they were not brought forward in the motion for a new trial.

Error to Jackson Circuit Court; *Charles Coffin,* Judge; affirmed.

Gustave Jones and *Ira J. Mack,* for appellant.

1. The venue is a jurisdictional fact which must be proved by the State in order to convict of a criminal offense. 77 Ark. 19; 58 Ark. 242.

2. There was no sufficient evidence as to the damage. No foundation was laid for the question, nor previous knowledge as to the value of the horses, no opportunity of knowing values shown in the witness nor any experience. The answer of the witness was mere guesswork and speculation. 68 Ark. 218; 70 Ark. 401; 47 Ark. 497; 59 Ark. 105; 17 Cyc. 49 and cases cited.

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellee.

1. The horses were proved to have been shot in the Hart field, which was shown to be in Jackson County. The venue was

fully proved. It may be proved by circumstantial evidence. 68 Ark. 337 and authorities cited.

2. The testimony of Willie Hawley as to the amount of the damages could be disregarded, and still there is evidence to support the verdict. If his testimony was improperly admitted, the verdict will stand, unless the error was prejudicial. 77 Ark. 31; 8 Ark. 313; 27 Ark. 306; 43 Ark. 535; *Id.* 219; 51 Ark. 132; *Id.* 184.

HART, J. Albert Eno was arrested and tried before a justice of the peace for the crime of malicious mischief, charged to have been committed by wilfully and maliciously shooting five horses in Jackson County, Arkansas, belonging to J. R. Hawley.

He was convicted, and duly appealed to the circuit court. On a trial *de novo* in the circuit court, the jury returned the following verdict: "We, the jury, find the defendant guilty, and assess his fine at ($20) twenty dollars, and the damages at ($50) fifty dollars." Judgment was entered on the verdict in favor of the State of Arkansas for the amount of the fine, and in favor of the owner of the horses for triple damages in accordance with the provisions of sec. 1893 of Kirby's Digest. From the judgment the defendant has duly prosecuted an appeal to this court.

Counsel for the defendant insists that the venue was not proved, and also that there is not sufficient evidence to sustain the verdict. The undisputed evidence shows that three horses and two colts belonging to J. R. Hawley were shot in August, 1907. That both he and defendant lived near the Hart field, and that the father of the defendant made a crop in the Hart field in 1907. The undisputed evidence also shows that the Hart field is situated in Jackson County, Arkansas. The evidence on the part of the State showed that the defendant admitted to several witnesses that he had shot the horses of J. R. Hawley in the Hart field. One of them stated that defendant pointed out to him the horses he had shot, and stated that he had shot them in the lower Hart field. Witness stated that he knew the horses were the horses of J. R. Hawley, and that the Hart field was in Jackson County, Arkansas. Other witnesses testified that shortly after the horses were shot they saw the tracks of some horses and colts and also an empty shotgun shell in the Hart

field. The testimony tended to show that the wounds were inflicted with a shotgun. The defendant denied having shot the horses, and evidence was introduced in his behalf tending to corroborate his testimony; but it has always been the settled rule in this State that the weight of the evidence is a question for the jury, and its verdict is binding on us, if there is sufficient evidence to sustain it. We are of the opinion that there was sufficient evidence to warrant the verdict and therefore, we will not disturb it.

Counsel for defendant also contends that the court erred in permitting the following question and answer:

"Q. How much were the horses damaged by reason of having been shot?"

"A. They were damaged something like a hundred dollars worth."

Counsel for defendant objected to the question, but did not assign it as a ground of his motion for a new trial.

Exceptions to the introduction of evidence are waived where they were not brought forward in the motion for a new trial, and will not be considered on appeal. *Planters' Mut. Ins. Association* v. *Hamilton,* 77 Ark. 27; *St. Louis, I. M. & S. Ry. Co.* v. *Baker,* 67 Ark. 531; *Young* v. *Stevenson,* 75 Ark. 181; *Allen* v. *State,* 70 Ark. 337; *Ince* v. *State,* 77 Ark. 418; *Choctaw & Memphis Ry. Co.* v. *Goset,* 70 Ark. 427; *Mt. Nebo Anthracite Coal Co.* v. *Williamson,* 73 Ark. 530.

Finding no prejudicial error in the record, the judgment is affirmed.

HANSON v. ANDERSON.

Opinion delivered October 11, 1909.

APPEAL AND ERROR—FUNCTION OF BILL OF EXCEPTIONS.—The office of a bill of exceptions is to bring on the record such matters as are not already a part of the record in the case; and where it fails to bring up the evidence in a case and the instructions given or refused by the court, alleged errors with reference thereto will not be considered.

Appeal from Lafayette Circuit Court; *Jacob M. Carter,* Judge; affirmed.

D. L. King, for appellant.

HART, J. This is an appeal by R. H. Hanson from a judgment rendered against him in the Lafayette Circuit Court in favor of Reuben Anderson for $82.60. The suit was originally brought by Anderson against Hanson in a justice of the peace court for $82.60 alleged to be due him for work done on a levee. On appeal, this court can only consider such assignments of error as appear upon the record. In cases at law, the record consists of what is generally called the record proper and the bill of exceptions. In the present case what counsel for appellant calls a skeleton bill of exceptions was filed. None of the evidence adduced at the trial, and none of the instructions given by the court, are contained in it. There is no direction to the clerk to copy the stenographer's report. The bill of exceptions, after reciting the term of the court at which the case was tried and the presiding judge, continues as follows: "The plaintiff, to maintain the issues on his part, introduced the following testimony: (None furnished the clerk.)"

The same notation is made concerning the testimony of the defendant and the instructions of the court.

At a subsequent term of the trial court, appellant Hanson filed a motion to correct the record, in which he states that Mr. Paul Cella was the stenographer of the court, and that he left no stenographic report of the evidence with the clerk. He further states that said stenographer claims to have no record of the case, and no recollection of having taken a stenographic report of the same.

The record is made when the bill is allowed by the judge and filed by the clerk. The court has nothing to do with making or directing to be made the record of the trial court. It can only compel the clerk to transmit to this tribunal the record of the trial court, properly transcribed and certified to by him. If the stenographer failed to do the duty required of him by the statutes, appellant should either have taken some appropriate action before the trial judge to compel him to perform it, or should have himself prepared and tendered to the presiding judge his bill of exceptions, before the time for so doing had expired. In short, either he should in apt time have applied to the presiding judge to compel the stenographer to furnish his

report of the trial, or he should himself, or by his counsel, have prepared and submitted to the presiding judge his bill of exceptions, just as if there had been no stenographer present at the trail to report the proceedings therof.

The office of a bill of exceptions is to bring on the record such matters as are not already a part of the record in the case. *Berger* v. *Houghton,* 84 Ark. 342, and cases cited; *Lesser* v. *Banks,* 46 Ark. 482; *St. Louis, I. M. & S. Ry. Co.* v. *Godby,* 45 Ark. 485.

The state of the record as presented does not warrant a reversal.

Judgment stands affirmed.

STIFFT v. STIEWEL.

Opinion delivered June 14, 1909.

STATUTE OF FRAUDS—SALE OF CORPORATE STOCK.—A contract for the sale of corporate stock for the amount of $30 or more is within the terms of Kirby's Digest, § 3656.

Appeal from Pulaski Circuit Court, Second Division; *Edward W. Winfield,* Judge; reversed in part.

Abe Stiewel brought suit against Charles S. Stifft, alleging that defendant was indebted to him in the sum of $4,300 and interest in payment of certain stock in the Bank of Little Rock alleged to have been purchased by plaintiff for defendant in September, 1902, and also that defendant owed $2,422 to the above-named bank upon an account, which had been assigned to plaintiff.

Defendant denied any indebtedness to plaintiff, and pleaded the statute of frauds.

There was a verdict for plaintiff in the sum of $8,368.03. Defendant has appealed.

Rose, Hemingway, Cantrell & Loughborough, and *J. W. & M. House,* for appellant.

1. The original complaint and all amendments thereto were abandoned when the substituted complaint was filed. 88 Ind.

274; 4 S. W. 511; 16 N. Y. Super. Ct. (3 Bosw.) 200; 1 S. W. 109. It is complete within itself, and does not refer to or adopt the original pleading as a part of it. 7 W. Va. 54; 35 Miss. 559; 9 Ia. 181; 71 Ind. 296; 8 Nev. 57; 77 Ia. 676; 97 Cal. 507; 77 N. W. 772. When an amended or substituted complaint is filed, the original and amendments thereto cannot be used as evidence against the plaintiff, except to contradict or impeach his testimony. 37 Cal. 154; 71 Cal. 126; 51 Cal. 222. It follows that the cause of action alleged in the substituted complaint is barred by the statute of limitations. While the statute is liberal on the subject of amendments, yet when an amendment sets up a different cause of action, and sets up new matters requiring different proof, it does not relate back to the date of filing the original complaint, but is subject to the plea of limitations from the date of its own filing. 12 S. W. 995; 28 S. W. 1017; 41 Fed. 744; 37 S. W. 17; 44 S. W. 556; 41 Am. St. Rep. 302; 139 Ala. 586; 69 Ala. 183; 37 Ala. 173; 46 Kan. 150; 27 Ore. 140; 51 S. W. 844; 60 Kan. 691; 45 Pa. 404; 81 Ala. 230; 107 Ia. 665; 158 U. S. 285. An action to enforce a common law liability cannot be amended so as to make a statutory liability and thereby defeat the statute of limitations, even though the facts or transactions upon which the complaint is based are the same. 231 Ill. 622; 4 Ill. App. 238; 165 Ill. 185; 35 Mich. 227; 56 Kan. 731; 59 Pac. 662; 113 Ga. 15; 59 N. W. 662; 108 Fed. 116. Both the statute of limitations and the statute of frauds were pleaded in the answer to the original complaint and amendment thereto. Each was a complete bar to the action. No amendment could be subsequently made stating a cause of action without being subject to both pleas. 90 Pac. 254; 191 Ill. 94; 98 Ill. App. 108; 210 Ill. 115; 193 Ill. 504; 80 Ill. App. 18; 69 Pac. 189; 1 Mackey (D. C.) 428; 64 Ark. 348; 59 Ark. 446; 70 Ark. 319; 75 Ark. 465. A new cause of action is stated if (1) the evidence required to sustain the original complaint will not support the amended or substituted complaint; or (2) if the allegations of the original and subsequent complaints are not subject to the same defenses. 105 S. W. 46, 48; 45 S. W. 283; 78 S. W. 826; 61 S. W. 708; 26 Ore. 452; 136 Ind. 418; 81 Pac. 1123. A parol contract for the sale of bank stock is within the statute of frauds. 47 Cal. 142; 15 Conn. 400; 60 Me. 430; 5

Am. Dec. 417; 37 Mass. 9; 128 Mass. 388; 29 Mo. App. 206; 54 S. E. 939; 127 Fed. 482; 53 N. E. 502; Smith on Law of Frauds, § 373 and note. If this plea was a bar to the original complaint, and not to the substituted complaint, they were not subject to the same defenses, and the latter stated a new cause of action.

2. As to the plea of limitations the bar had attached before the original complaint was filed. When thus barred, it requires a written promise recognizing the debt and promising to pay it, in order to extend it. A mere oral promise to extend the time is not sufficient. 86 Mo. 643; 32 Me. 169; 23 Me. 453; 58 Mass. 532; 17 Cal. 344; 1 Ida. 533; 37 Pac. 1103. If Stiewel purchased as agent, his right to sue began from the date of the purchase, and the statute runs from that date. 23 Me. 560; 121 N. C. 269; 19 Ark. 690; 20 Ark. 293; 83 Ark. 278 and authorities cited at p. 281; 9 Am. St. Rep. 477; 58 *Id.* 315; 34 *Id.* 717; 33 Ark. 651; 11 Ark. 29. The alleged verbal consent, if given by Stifft, was without consideration and void. 18 Am. Dec. 36; *Id.* 79; 51 Cal. 223; 47 Ill. 88; 103 Mass. 560; 52 N. C. 497; 76 N. C. 340; 86 N. C. 517; 5 Serg. & R. 358; 25 Am. Dec. 79; 44 Mass. 155; 3 Mont. 527; 23 Am. Rep. 99; 21 Ark. 18; 52 Ark. 174; 54 Ark 185; 66 Ark. 550; *Id.* 26; 55 Ark. 369; 33 Ark. 215; 56 Ark. 461. In order to take the contract for the sale of the stock out of the operation of the statute of frauds, there must have been some act of a character to place the stock unequivocally within the exclusive power of Stifft as absolute owner, discharged of all liens or claims for the price thereof. If there was any condition precedent to his acquiring title and possession, or if anything remained to be done by Stiewel to perfect delivery to Stifft, there was no sale under the statute, and the alleged verbal sale was void. 129 Mass. 420; 120 Mass. 290; 123 Mass. 141; 96 Am. St. Rep. 211; 47 N. Y. 449; 37 Me. 181; 22 Mo. 354; 43 N. E. 575; 64 Pac. 342; 54 N. E. 461; 56 Pac. 451; 81 Ark. 127. See also 1 N. Y. 126; 3 Johns. (N. Y.) 421; 76 Ark. 237; 54 Am. Rep. 879; 64 Barb. (N. Y.) 394; 15 Vt. 685; 10 Johns. (N. Y.) 364; 37 Me. 181.

Moore, Smith & Moore, for appellee.

1. The original and substituted complaints declared upon the same causes of action, the effect of the substituted complaint

being merely to amplify the allegations of the original complaint, and not to state different causes of action. Unless an amendment sets up a new cause of action, it will be treated as relating back to the commencement of the suit. 139 Ala. 586; 193 Ill. 594; 131 Fed. 680.

2. Purchase of stock made in pursuance of a parol agreement by an agent for his principal, or by one for the joint benefit of himself and others, is not within the statute of frauds. 41 Barb. (N. Y.) 162; Mechem on Agency § 457; 9 L. R. A. 465.

3. The action was not barred by the statute of limitations. Stiewel's right to sue for Stifft's interest in the stock did not accrue until he, Stiewel, as agent in the purchase, was required to pay the loans which were made for the purpose of paying for the stock. When he withdrew the stock as collateral, or when it became valueless, and the bank required him to give other collateral, then the renewal of the notes with other collateral made the obligation his own, and his right arose to demand that Stifft contribute in collateral or pay his proportion. From that time the statute commenced to run. Cases cited by appellant are not in point in the application he seeks to makes of them. Notably inapplicable are 23 Me. 560; 121 N. C. 269; 19 Ark. 690; 20 Ark. 293; 58 Am. St. Rep. 315; 9 Am. St. Rep. 477; 103 Mass. 560; 52 Ark. 174; 54 Ark. 185; 66 Ark. 26; *Id.* 550; 55 Ark. 369; 33 Ark. 215; 81 Ark. 127.

WOOD, J. First. Neither the original, nor what is designated as the "amended and substituted complaint," states a cause of action based on a contract of agency between appellant and appellee.

Treating this "amended and substituted" complaint as an amplification of the original, the first and second paragraphs thereof allege facts which show that between the 10th and 15th of September, 1902, appellee purchased stock of the Bank of Little Rock for which he paid $10,750.00; that on the 25th of September 1902, appellee, at the price he paid; *"verbally"* sold to appellant forty per cent. of the stock, amounting to $4,300, which sum remains unpaid. The appellee alleges in the first part of the first paragraph of his amended and substituted complaint: "that some time prior to the summer of 1902 he had,

under verbal arrangement with George W. Caruth and the defendant, Chas. S. Stifft, made some two or three years previous, purchased from various parties for the joint benefit of himself, the said George W. Caruth and the defendant all of the outstanding capital stock of the Bank of Little Rock that could be secured at a satisfactory price, which stock was from time to time divided among said parties in the proportion of one-third to each." But there is no allegation that the stock bought by appellee, in September, 1902, was purchased under the "arrangement" above mentioned. On the contrary, the allegation "that Geo. W. Caruth, one of the parties, had notified plaintiff and defendant that he did not care to participate further in the purchases" shows that the former arrangement for a joint purchase by the three had come to an end, and that any purchase of stock made by appellee thereafter could not have been under that "arrangement."

The second paragraph of the "amended and substituted complaint" shows that on September 25, 1902, appellant was contending that he was entitled to a half interest in the stock purchased by appellee after Caruth had withdrawn, and that appellee was contending that appellant was only entitled to one-third thereof under the arrangement that had formerly existed between the three; that appellee "yielded to the importunity of defendant [appellant], and consented *verbally* that his percentage of said stock should be increased from 33 1-3 to 40 per cent." Now, there is no allegation, either in the original or the "amended and substituted complaint, that appellee purchased the stock of T. K. May and of Fones and Barrieras, as the agent of appellant. There are no allegations that the purchase was made in pursuance of a contract whereby appellee was to make the purchase as the agent or partner of appellant. There are allegations to the effect that, after the purchase of the stock had been made and appellant had learned thereof, he *insisted* that he was entitled to a half interest in the purchase, and that appellee could not purchase the stock for his own benefit to the exclusion of appellant; and that appellee contended that appellant was not entitled to a half interest, and that appellee did not hold for appellant's benefit more than the one-third that he was entitled to under the arrangement existing between appellee, appellant and Geo. W. Caruth.

But these allegations of what were the contentions and differences of the respective parties as to the proportion in which the stock that had been purchased should be divided fell far short of alleging any definite contract of agency by which appellee was to purchase and had purchased stock for himself and appellant. But, even if it could be inferred from these uncertain allegations that appellee had purchased stock as an agent of appellant, the same allegations and those following show that in the disposition of the stock purchased by appellee he and appellant dealt with each other not as principal and agent but as strangers. Appellee asserted dominion of the stock purchased, and let appellant have the shares, not because he was bound, but because he chose so to do.

After setting forth their respective contentions as above, the allegation is that appellee (plaintiff) "yielded to the importunity of defendant, and consented verbally that his percentage of said stock should be increased from 33 1-3 to 40 per cent." Following this is the allegation that: "Plaintiff had, at the time of the purchase of said stock, arranged with the Mississippi Valley Trust Company of St. Louis to advance *him* the purchase price of said stock upon *his personal note,* with the stock pledged as collateral, at six per cent. interest, and plaintiff informed defendant at the conference of said arrangement, which was satisfactory to the defendant, it being agreed that defendant would not be called upon to pay for his proportion of the stock purchased until the plaintiff was required to take up said notes."

Principal and agent can not deal with each other in the manner indicated by the above allegations. Such allegations can not be molded in the mold of a declaration upon a contract of agency, but are consistent only with a declaration for cause of action based on a sale. So we conclude that the first and second paragraphs of appellee's pleadings state facts which constitute nothing more nor less than a verbal sale of stock made by appellee to appellant on the 25th day of September, 1902.

It is well established that a parol contract for the sale of corporate stock (other conditions existing) is within the statute of frauds. *Mayer* v. *Child,* 47 Cal. 142; *North* v. *Forrest,* 15 Conn. 400; *Pray* v. *Mitchell,* 60 Me. 430; *Colvin* v. *Williams,* 5 Am. Dec. 417; *Tisdale* v. *Harris,* 37 Mass. (20 Pick.) 9; *Board-*

man v. *Cutter,* 128 Mass. 388; *Fine* v. *Hornsby,* 2 Mo. App. 61; *Bernhardt* v. *Walls,* 29 Mo. App. 206; *Hightower* v. *Ansley,* 54 S. E. 939; *Cooper* v. *Bay State Gas Co.,* 127 Fed. 482; *Tompkins* v. *Sheehan,* 53 N. E. 502; Smith on Law of Frauds § 373 and note.

The statute was properly pleaded in defense, and the proof brought appellee's claim, as set up in the first and second paragraphs of his original and substituted complaint, within the operation of its terms. Sec. 3656, Kirby's Digest.

So much for appellee's pleadings. The uncontroverted evidence shows that appellee purchased the stock of May and Fones, not for himself and appellant, but for himself alone. He bought it in sharp competition with appellant and one Heisman, and he held and disposed of it, not as the agent and representative of some one else, but as the absolute owner. This is the only legitimate conclusion from all the evidence upon the subject. It could serve no useful purpose to discuss it in detail.

Second. The third paragraph of appellees' complaint, as finally amended, stated a cause of action based upon an account of appellant with the Bank of Little Rock evidenced by a charge ticket carried by the bank as cash which became the property of appellee when he purchased the assets of the bank at the sale thereof made by the receiver under the orders of the court.

The questions as to whether or not the facts alleged in this paragraph were true were all submitted to the jury upon correct instructions, and there was evidence to sustain the verdict except as to the amount that should be recovered.

In his amended complaint appellee alleges as follows:

"Plaintiff further represents that at the time of the aforesaid conference with the defendant, on or about the 25th or 26th of September, 1902, he represented to the defendant that he could also purchase the stock of W. A. May, which amounted to the face value of about $4,250, for about the same price as that paid for the stock of T. K. May, his father, and asked the defendant whether he should purchase it. The defendant was anxious to secure the stock, and agreed verbally that if plaintiff could secure it at about the same price he would pay for it when the draft with the stock attached was presented. Plaintiff represents in that connection that he secured said stock from W.

A. May for himself and defendant, under the arrangement aforesaid, to be apportioned as aforesaid, 60 per cent. to himself and 40 per cent. to defendant, for the sum and price of $2,422."

Under these allegations appellee could not recover more than forty per cent. of the amount for which he sued, because according to his own showing sixty per cent. of the amount was his debt to the bank, or rather to appellant when he paid it. In view of the allegations made by appellee, it was wholly unnecessary for appellant to plead this as a setoff, in order to get the benefit of it. The verdict therefore on the third count, under the pleadings and proof, could not have been for more than $969, with interest thereon at the rate of six per cent. per annum from the date of the transaction, September 29, 1902, to the date of the verdict.

The judgment will be modified by reducing it to that amount, and as modified affirmed, on the cause of action stated in the third paragraph.

The court should have directed the jury to return a verdict for the defendant (appellant) on the cause of action stated in the first and second paragraphs of the complaint as "amended and substituted." For this error the judgment based upon the cause of action alleged in these paragraphs is reversed, and the cause as alleged therein is dismissed.

McCRACKEN v. SISK.

Opinion delivered July 12, 1909.

1. PUBLIC LANDS—DONATION.—No title can be acquired under the donation laws of the State until all of the requirements of the statute have been fulfilled. (Page 455.)
2. SAME—DONATION—TITLE OF DONEE.—A donee of land under the statute cannot alienate or dispose of the land before he is entitled to a deed, and no greater right is given him than that of possession. (Page 455.)
3. SAME—DONATION—CONSTRUCTION OF STATUTE.—Under Kirby's Digest, § 4832, providing that "in case the donee should die before the expiration of the time herein required to submit final proof of the right to perfect, the same shall extend, first, to the widow of the donee," etc., *held* that where a donee died before making final proof,

leaving a widow, she was entitled to make final proof and take title in her own right and as her individual property. (Page 457.)

Appeal from Clay Chancery Court, Western District; *Eugene Schoonover,* Special Chancellor; affirmed.

F. G. Taylor and *J. L. Taylor,* for appellant.

1. Kirby's Digest, § 4832, did not intend to, nor does it, change the law of inheritance. On the death of McCracken, his rights vested in his heirs. The widow had a homestead right, but held the fee as trustee for the heirs. Thompson on Homestead and Ex. §§ 170-1.

2. The widow cannot acquire title adverse to the heirs. 44 Ark. 504; 35 *Id.* 84; 47 *Id.* 287.

G. B. Oliver, for appellee.

1. The donation of lands is a matter of grace, and the donee cannot complain of the terms. 40 Ark. 246; 37 *Id.* 132; 31 *Id.* 528.

2. Kirby's Dig., § 4832, gives the widow the right to perfect the donation, thus changing the law of inheritance, as formerly provided by §§ 4254, 4256, *Ib.* See Rev. St. U. S. §§ 2291-2, 2296, and 76 N. W. 233; 122 Fed. 588; 43 Cal. 314; 5 Neb. 291; 11 Okla. 635; 76 N. W. 1017; 4 Pac. 867; 11 *Id.* 781; 147 U. S. 242; 70 Pac. 521; 38 *Id.* 1043.

FRAUENTHAL, J. The appellants, who were the plaintiffs below, instituted an ejectment suit against the defendant, A. P. Sisk, which was subsequently transferred without objection to the chancery court. The plaintiffs claim title to the land as collateral heirs of one George McCracken, deceased; and the defendant claimed title thereto under a deed executed by the State Land Commissioner to Celia Sisk, who was the widow of said George McCracken, and a conveyance by Celia Sisk to defendant. On February 24, 1888, an application was made to the Commissioner of State Lands for the donation of the land by George McCracken; and, after receiving a certificate of donation therefor, he, with his wife, Celia McCracken, established his residence thereon and remained in possession thereof until his death, which occurred in October, 1889. He died without issue, and without father living, and left surviving him his widow, the said Celia McCracken, and his

mother, Jane McCracken. The said Celia McCracken afterwards married defendant, A. P. Sisk. On June 6, 1891, having completed the necessary improvement and period of residence on said land and being the widow of said George McCracken, she submitted final proof under the donation laws of the State and received a deed from the State for the land. The deed was executed to Celia Sisk, widow of George McCracken. In 1899, the said Celia Sisk conveyed the land to defendant, and she died in 1900. In October, 1905, the mother of George McCracken died leaving the plaintiffs as her only heirs-at-law. The chancellor rendered a decree in favor of the defendant, and the plaintiffs prosecuted this appeal from that decree.

The question thus presented for determination is whether a donee under the donation laws of Arkansas has an inheritable interest in the land before he has completed the term of residence and other conditions required by the statute to entitle him to make final proof; or whether the right to the land under the donation law goes by designation of person in the statute, upon the death of the donee. Section 4832 of Kirby's Digest provides: "In case the donee should die before the expiration of the time herein required to submit final proof of the right to perfect, the same shall extend, first, to the widow of the donee, and, if she be dead, then to the children of such donee, and, should they be minors, their duly appointed guardian or administrator of the estate of the deceased donee may make such final proof for the benefit of such minor heirs, and, should there be neither widow nor children surviving such donee, such right shall in such case descend to the father of the donee, and, if he be dead, then to the mother of such donee; and, if she be dead, then to the brothers and sisters of the deceased donee, any adult of which shall be competent to make such final proof, and in the event of the death of the donee it shall not be necessary that residence on the land shall be maintained thereafter, but the cultivation of the land must be continuously maintained, and no donation shall be liable for any debt contracted by the donee prior to the execution of the deed therefor, nor shall any alienation of the same be binding against the title of the State."

By section 4815 of Kirby's Digest it is provided that the "donee shall actually reside upon the land for a period of three

years," and shall make certain improvements before he will be entitled to make final proof and to receive a deed to the land. So that in this case the donee died before the expiration of the time required to submit final proof.

The exact nature of the right which the donee has in the land when he dies prior to the performance by him of the requirements of the statute has never been directly announced by this court. But this court has uniformly held that no title can be acquired under the donation laws of the State until all the requirements of the statute have been fulfilled. In the case of *McCauley* v. *Six,* 40 Ark. 244, it is said: "It has been several times held by this court that these donations are matters of grace. The donee is not required to pay any taxes for which the land was forfeited, and he must comply with all the statutory conditions of the grant, without any regard to their policy or necessity." *Surginer* v. *Paddock,* 31 Ark. 528; *Simpson* v. *Robinson,* 37 Ark. 142.

The donee under the statute cannot alienate or in any way dispose of the land, and no greater right is given him by any express term of the statute than that of possession.

The provisions of the homestead law of the United States designating the persons who have the right to complete the requirements of the statute and to receive patent after the death of the homestead settler and prior to the expiration of the term required to entitle him to make final proof are in many respects similar to the above provision of our donation law in that particular.

Section 2291 of the Revised Statutes of the United States provides: "No certificate, however, shall be given or patent issued therefor until the expiration of five years from the date of such entry; and if at the expiration of such time, or any time within two years thereafter, the person making such entry; or, if he be dead, his widow; or, in case of her death, his heirs or devisees, * * * proves by two credible witnesses that he, she or they have resided upon or cultivated the same, * * * then in such case he, she or they * * * * * shall be entitled to a patent as in other cases privided by law."

And section 2296 of the Revised Statutes of the United States provides: "No land acquired under the provisions of

this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."

In construing these provisions of the homestead law the Federal courts have held that a homestead settler has no devisable interest in the land until he has completed the term of residence required to entitle him to make final proof. And upon his death the right to complete such term and receive the patent passes to his widow.

In case of *McCune* v. *Essig,* 122 Fed. Rep. 588, the court said: "The estate granted to a homestead settler is granted on conditions precedent. These conditions are residence for the required time, cultivation and required proof. Until all of these conditions are complied with, the law gives him no more than the right to possession. It provides that, in case of his death before the completion of the conditions, his widow should have all the rights which he would have had. His right is extinguished by his death, and she, in virtue of the fact that she is his widow, is designated as the donee of the land. The statute provides for the rights of the children only in case of death of both father and mother before final proof."

This case was affirmed by the Supreme Court of the United States in *McCune* v. *Essig,* 199 U. S. 382.

In the case of *Hale* v. *Russell,* 101 U. S. 503, the court, in construing a donation act making a grant to the donee much stronger than our statute, said: "Until the settler was qualified to take, there was no actual grant of the land; and if such settler should die after residence thereon of less than the required period prescribed by the statute, he had no devisable interest therein."

In the case of *Bernier* v. *Bernier,* 72 Mich. 43, that court, in construing the above statute of the United States, said that it "does not treat the land as heritable, but makes the estate go by designation of person." That case was carried by appeal to the Supreme Court of the United States, and was affirmed in this particular. *Bernier* v. *Bernier,* 147 U. S. 246.

In the case of *Perry* v. *Ashby,* 5 Neb. 291, that court, in construing this provision of the homestead law, held that the widow, by completing the period of residence, "was entitled to

patent in her own right to the exclusion of the heirs of the settler."

In the case of *Gjerstadengen* v. *Van Duzen,* 7 N. Dak. 612, it is said: "Before a homesteader has earned a right to a patent he has no such interest in the land as will make it a part of his estate on his death. The patent thereafter issued to the persons specified in the Federal statute is issued to them, not as the heirs of the decedent who have inherited his title, but as original parties preferred by the statute." *Chapman* v. *Price,* 32 Kan. 446; *Jarvis* v. *Hoffman,* 43 Cal. 314.

There is a great analogy between the above provision of our donation law and the homestead law of the United States. The construction placed upon the above provision of the homestead law by the above decisions seems to us sound and reasonable; and we are of the opinion that the same construction should be given to the above provisions of our statute. The State has determined who shall be the beneficiary of its bounty under the donation laws. It has first named a qualified donee; and, after his death and before the requirements of the statute have been fulfilled, it then has named his widow as the person entitled to complete the requirements and to receive the title; not by any law of descent, but as an original party in her own right.

In the case at hand the donee died before the expiration of the time required by the statute to submit final proof of the right to a perfect donation. In that event the right to perfect the donation and submit final proof thereof was by the statute extended to the widow in her own right as an original donee, and to the exclusion of all children, if there had been any, and to the exclusion of all other persons. Upon making the final proof the widow was entitled to and did receive a deed to the land from the State in her own right and as her individual property, and which she could thereafter alienate as her separate estate.

It follows that the decree of the lower court is correct, and it is in all things affirmed.

BRIGGS v. STEELE.

Opinion delivered June 28, 1909.

1. USURY—WHAT CONSTITUTES.—To constitute usury, there must either be an agreement between the parties by which the borrower promises to pay, and the lender knowingly receives, a higher rate of interest than the statute allows for the loan or forbearance of money; or such greater rate of interest must be knowingly and intentionally reserved; taken or secured for such loan or forbearance. (Page 461.)
2. SAME—PRESUMPTION.—The wrongful act of usury will never be imputed to the parties when the opposite conclusion can be reasonably and fairly reached. (Page 462.)
3. SAME—CASE STATED.—Where plaintiff purchased goods from jobbers and wholesale dealers and sold them to defendant at a profit of from ten to twenty per cent. on the cost price, the transaction was not usurious if it was made in good faith and not for the purpose of evading the usury law. (Page 462.)
4. MORTGAGES—DEBTS SECURED.—Where a mortgage expressly states that it is given as security for an indebtedness which is specifically named in amount and kind, it cannot be enlarged to cover other indebtedness by a parol agreement made either at the time of its execution or subsequently. (Page 462.)
5. PAYMENTS—APPLICATION.—The rule relating to application of payments is that the debtor at the time of making payment has the primary right to direct the application; if he fails to make such application, the creditor has the right to make it; should he fail to make it, then the law makes it by applying the payment to the oldest items of the account that are payable at the date of the payment. (Page 464.)

Appeal from Lonoke Chancery Court; *John E. Martineau,* Judge; reversed.

Trimble, Robinson & Trimble, for appellant.

1. The contract and transactions were usurious and void. There was no sale of goods. Steele was not a merchant. The commission charge was a mere subterfuge to cover usury. Webb on Usury, § 80, p. 88.

2. The two notes to Steele, Sr., were not covered by the mortgage. It was usury to charge ten per cent. commission on the market price of the goods, or money furnished, then 20 per cent., and then adding 10 per cent. interest. Such transactions are illegal, and constitute usury. 12 La. 660; 12 *Id.* 723; 16 *Id.* 239; 5 So. 147; 19 Am. Dec. 449; 35 Ark. 217, 352; 65 *Id.* 92; *Ib.* 370; 33 Barb. (N. Y.) 350; 3 Sandf. Ch. 215.

3. Parol evidence is admissible to show the illegality of a note providing on its face for a legal rate of interest, and to show a contemporaneous verbal agreement to pay an usurious rate of interest. 62 Ark. 92. This illegality can not be cured by crediting the usury. 62 Ark. 217. Our statute makes the loan or forbearance of "goods" or any other valuable thing, as well as money, for a greater rate than ten per cent., usurious. Kirby's Digest, § 5390.

4. Appellant paid $634.12 on the mortgage debt. It was only executed to secure $500.00 and 10 per cent. interest, and the mortgage debt was overpaid by $134.12.

F. T. Vaughan and *Palmer Danaher,* for appellee.

1. No illegal interest or commission was charged. Adding the items for interest and commission, they totaled $160.27, or less than 10 per cent.

2. To constitute usury there must be an agreement on the part of the lender to receive and on the part of borrower to give for the use of money a greater rate than 10 per cent. 54 Ark. 566; 83 *Id.* 35. A mere exorbitant price for goods is not usury. 55 Ark. 265. A *sale* of goods is not a loan or forbearance within the usury statutes. 29 Am. & Eng. Enc. Law, 478.

3. No usury was proved, and there is nothing in the record from which it may be inferred. There never was an obligation on the borrower to pay more than ten per cent. Without this there cannot be usury. 29 Am. & Eng. Enc. Law, 481-2. The burden is on the borrower to show usury. 29 Am. & Eng. Enc. Law, 541; 57 Ark. 256. Usury must be clearly proved. 29 Am. & Eng. Enc. Law, 532. The presumptions are all in favor of the validity of the contract. Usury will never be inferred where from all the circumstances an opposite conclusion can be reached. 22 Enc. Pl. & Pr. 452; 74 Ark. 241; 63 *Id.* 249. Where the contract is fair on its face and the evidence doubtful or conflicting, the question of usury is for the trial court or jury, and the findings on this question will not be disturbed on appeal. 22 Enc. Pl. & Pr. 454; 29 Am. & Eng. Enc. Law 542; 55 Ark. 265; 25 Neb. 382.

FRAUENTHAL, J. This was a suit brought by the plaintiff, T. W. Steele, against the defendant, A B. Briggs, for the foreclosure of a real estate mortgage. The complaint alleged that on January 2, 1905, the defendant executed to plaintiff three notes,

aggregating $500, for merchandise and moneys which were thereafter to be furnished; that plaintiff made such advances to the amount of said notes and also additional advances, upon which was a balance due of $901.16; that on the day of the execution of the notes defendant and his wife duly executed to plaintiff a mortgage upon certain land to secure the above indebtedness. He sought a recovery for the above alleged balance and a foreclosure of the mortgage. The defendant filed an answer, in which he admitted the execution of the notes and mortgage, but in general terms denied that he was indebted to plaintiff and pleaded payment. Subsequently, by way of amendment to his answer, he interposed a plea of usury.

The clause in the mortgage which described the indebtedness which it secured is as follows:

"The foregoing conveyance is on condition that whereas the said A. B. Briggs is justly indebted to the said T. W. Steele in the sum of five hundred dollars for money loaned the said Briggs, as evidenced by three certain promisory notes of date of January 2, 1905, as follows towit: One note for two hundred dollars due and payable January 1, 1906; one note for two hundred dollars due and payable on or before January 1, 1907; and one note for one hundred dollars, due and payable on or before January 1, 1908, each note bearing interest at the rate of ten per cent. per annum from date until paid.

"Now if the said A. B. Briggs shall pay or cause the said notes to be paid with interest, according to the tenor and effect thereof, then this instrument shall be null and void."

The only evidence adduced in the trial of the case was the testimony of the plaintiff and his book-keeper. They testified to the correctness of the indebtedness claimed by plaintiff, and that sometime before the institution of the suit the defendant examined with them each item of the indebtedness and admitted and agreed to its correctness; and that defendant promised to arrange the matter by executing to plaintiff a deed to the land and receiving from the plaintiff a bond for title therefor, which in effect would have given defendant time in which to make redemption from such conveyance; and they testified that instruments of writing were drafted in accordance with that promise, but that afterwards defendant failed and refused to comply with that promise.

It would appear from the testimony that at the time of the execution of said notes and mortgage the defendant was only indebted to the plaintiff in the sum of $30.69, and that the notes and mortgage were given to cover merchandise and moneys which plaintiff would thereafter advance. The three notes were executed respectively for $200, $200 and $100, and matured respectively on January 1, 1906, 1907 and 1908, and each of the notes bore ten per cent. interest from date. The plaintiff furnished to defendant from time to time during the above years merchandise and moneys upon the consideration of said notes, and also furnished merchandise and moneys in addition thereto, and this additional indebtedness, together with the advancements made on the notes, amounted to the aggregate sum of $1,192.65. In addition to the claims for indebtedness for the said merchandise and moneys, the plaintiff testified that defendant owed for two notes which had been executed by defendant to the father of plaintiff on January 1, 1900, and which notes were then the property of plaintiff. These last two notes with interest amounted at the time of the trial to $322. Plaintiff also testified that defendant owed him $5 for drafting the written documents in 1908.

It appears from the testimony that the plaintiff was to charge interest on all moneys advanced at the rate of ten per cent. per annum, and that upon all merchandise furnished he should charge in the way of profit a commission upon the price paid by him to jobbers and wholesale dealers, the commission to be ten per cent. for the first year and twenty per cent. for the second year. The defendant made several payments from time to time, which aggregated $634.12.

The chancellor rendered a judgment in favor of the plaintiff for the total sum of $901.16, in which were included all of said notes, and decreed the same a lien upon the land by virtue of said mortgage and a foreclosure thereof.

It is urged by the defendant that, by virtue of the above agreement providing for a charge for interest and commissions, the indebtedness and mortgage were tainted with usury, and are therefore void.

To constitute usury, there must either be an agreement between the parties by which the borrower promises to pay, and

the lender knowingly receives, a higher rate of interest than the statute allows for the loan or forbearance of money; or such greater rate of interest must be knowingly and intentionally "reserved, taken or secured" for such loan or forbearance. It is essential, in order to establish the plea of usury, that there was a loan or forbearance of money, and that for such forbearance there was an intent or agreement to take unlawful interest, and that such unlawful interest was actually taken or reserved.

The wrongful act of usury will never be imputed to the parties, and it will not be inferred when the opposite conclusion can be reasonably and fairly reached. *Scruggs* v. *Scottish Mortgage Co.*, 54 Ark. 566; *Garvin* v. *Linton*, 62 Ark. 370; *Leonhard* v. *Flood*, 68 Ark. 162; *First National Bank* v. *Waddell*, 74 Ark. 241; *Citizens' Bank* v. *Murphy*, 83 Ark. 31; *Eldred* v. *Hart*, 87 Ark. 534.

In this case there is no evidence that there was any agreement to charge for the loan of the money a greater rate of interest than ten per cent. per annum; and the commission that was charged on the goods was for the purpose of securing a profit on the goods, and not an usurious rate of interest on money loaned. The plaintiff purchased the goods from jobbers and wholesale dealers, and he sold them to the defendant at a profit of from ten to twenty per cent. on the cost price to him. Such a transaction, if made in good faith for the purpose of securing a profit on the goods sold, and not for the purpose of evading the usury law, is not itself usurious and invalid. *Brakefield* v. *Halpern*, 55 Ark. 265.

In addition to this, the charges do not exceed the rate of ten per cent. per annum when the interest is calculated upon the moneys for the actual time that had run. The chancellor made a finding that the transaction was not usurious, and we are of opinion that his finding is well sustained by the evidence.

But the mortgage in this case was executed to secure the payment of $500, evidenced by three notes, which are described therein, and the mortgage does not provide for the security of any other indebtedness. A mortgage which expressly states that it was given as security for an indebtedness which is specifically named in amount and kind cannot be made to cover other obligations and liabilities. It cannot be made to cover

other debts or a larger amount of indebtedness than that which is expressly stated therein. It cannot be enlarged by parol agreement made at the time of its execution, and a parol agreement made subsequently to enlarge the indebtedness which it is to secure will be inoperative. *Whiting* v. *Beebe,* 12 Ark. 482; *Johnson* v. *Anderson,* 30 Ark. 745; *Martin* v. *Halbrooks,* 55 Ark. 569; *Moore* v. *Terry,* 66 Ark. 393; *Hughes* v. *Johnson,* 38 Ark. 285.

When a mortgage is executed for the express purpose of securing a particular indebtedness therein named, the holder of the mortgage cannot "tack" to that indebtedness any other debt or demand he has against the mortgagor, so as to stretch the security of the mortgage to cover that also. It therefore follows that the mortgage herein did not cover the two notes executed by the defendant to T. W. Steele on January 1, 1900, nor the charge of $5 for the drafting of the deed and instruments in 1908.

The defendant in his answer also pleaded payment, but generally, and without stating in what manner payments were made or the amounts thereof. He introduced no testimony whatever. In their reply brief, counsel for appellant for the first time refer to this issue, and attempt to sustain it upon the testimony of the plaintiff. But in his testimony the plaintiff denied that the indebtedness was paid. The burden of proof to show and establish payment was on the defendant. This has not been done.

The total amount of all the debt, including interest, as represented by all the notes and account to the date of the decree below, was $1,519.65. The payments of $634.12, applied to the debts not represented by notes, reduce that total to $885.53. In this balance are included the two notes executed in 1900 and the charge of $5 for the drafting of papers in 1908, and these with the interest calculated thereon amounted to $327; and this, being deducted from the last above sum, leaves $558.53, which is the amount due upon the notes described in and covered by the mortgage, with interest to the date of the decree. To that extent only should a lien be declared upon the land by virtue of the mortgage. For the said sum of $327 the plaintiff should have a personal judgment only against the defendant.

The decree is reversed, and the cause is remanded with instructions to enter a decree in accordance with this opinion.

ON REHEARING.

Opinion delivered October 11, 1909.

FRAUENTHAL, J. The appellant has filed a motion for a rehearing of this cause, and bases his motion upon the ground that his answer sufficiently sets forth a plea of payment, and that the testimony of the plaintiff sufficiently establishes a payment of all that portion of the indebtedness which is secured by the mortgage.

Upon further examination we are of the opinion that the plea of payment is sufficiently made. If the plea was too indefinite or uncertain, it was the duty of appellee to request a more definite and detailed allegation, if he desired it. And we are also of the opinion that the testimony of the plaintiff and the account which he has introduced present sufficient evidence to determine the issue made on the plea of payment.

From this testimony it appears that when the defendant on January 2, 1905, executed the three notes, aggregating $500, and the mortgage to secure that amount of indebtedness, he had then only received $30.69 of merchandise, and was actually indebted to plaintiff in no larger amount. These notes were really executed to cover that debt and also merchandise and moneys which the plaintiff had agreed to furnish to the defendant in the future.

According to the agreement of the parties, the sole consideration of these notes and of this mortgage was the merchandise which had been and would thereafter be furnished to the defendant. In accordance with that understanding, the plaintiff did furnish to the defendant during the year of 1905 merchandise and moneys to the amount of $500; and then, without further understanding as to security, continued to furnish additional items of merchandise on the account. All the items thus furnished were kept by plaintiff upon a running account upon his books. The first item of that account is the item of $30.69 above referred to; and in the regular order of their dates all the other items furnished to the defendant upon these notes and mortgage are charged upon this account. And thus the plaintiff continued to furnish to the defendant merchandise and moneys during the years of 1905, 1906 and 1907, all of which were entered upon this running account and aggregated $1,187.65. So that

the first items of the account to the amount of $500 were the consideration of and represented the above three notes, and constituted the indebtedness that was actually secured by the mortgage; and these items, being thus charged upon the running account, were in truth and effect the three notes; and the legal result of thus charging these items, which represented these notes, upon the account was in effect to charge the notes themselves upon the account as of the date when the items so furnished and charged would equal the amount of the notes. And the account was one continuous running acconut. At the time the payments were made no direction was made by the defendant as to the application thereof; and there was no agreement as to any special application of any of the payments. The plaintiff did not apply any of the payments to any special indebtedness. But the payments were entered generally as credits upon the running account. All the payments aggregated $634.12, and the items and dates thereof were as follows:

October 28, 1905, By cotton, 2,325 lb. at 10 1-2..$244.12
January 29, 1906, By cash 25.00
February 10, 1907, By deposit Ger. Nat. Bank.. 225.00
February 28, 1907, By cash 40.00
July 1, 1907, By cash 100.00

At the date of the first above payment all the items charged on the account amounted to $574.35. Of these items $500 were represented by the said three notes aggregating the same amount. At the date of the last payment the total of the items charged on the account amounted largely in excess of $1,000.

The rule relating to the application of payments is that the debtor at the time of making payment to his creditor has the primary and paramount right to direct the application thereof to such debt or demand as he may choose, whether same is secured or unsecured. If the debtor does not at the time of making the payment direct its application, then the creditor has the right to make the application. But in event such application is made by neither, and the payment is entered generally as a credit on a running account as of the date of payment, then the law makes the application, and applies the payment in liquidation of the oldest item of the account. *Cross* v. *Johnson,* 30 Ark. 396; *Johnson* v. *Anderson,* 30 Ark. 755; *Price* v. *Dowdy,* 34

Ark. 285; *Hughes* v. *Johnson,* 38 Ark. 294; *Kline* v. *Ragland,* 47 Ark. 111; *Lazarus* v. *Freidheim,* 51 Ark. 371; *Dunnington* v *Kirk,* 57 Ark. 598; *Fort* v. *Black,* 50 Ark. 256; *Goldsmith* v *Lewine,* 70 Ark. 516.

This rule is founded upon the reason that this manner of application of the payments more surely represents the intention of the parties. But under such circumstances, before there can be an application of a payment to one of the debts or to any item of debt, should there be several, such debt should be due and payable; otherwise it would be presumed to be the intention of the parties to apply the payment to that debt only which is actually due and payable at the time of the payment. If the debt is not due at the date of such payment, then it is not in contemplation of law the oldest item of the account, although it is the oldest item of charge. In such case the determination of the oldest item of the account is not fixed by the date of the charge alone; but it must be first in the date of its charge and also payable at the date of the payment, before application of such payment shall be made to such debt. 30 Cyc. 1243; *Frazier* v. *Lanahan,* 71 Md. 131; *Wolford* v. *Andrews,* 29 Minn. 250; *McMillan* v. *Grayston,* 83 Mo. App. 425.

In this case the items of the account which represented and went to make up the notes matured when the notes matured; the maturity of the notes fixed the time when, according to the agreement of the parties, the items represented by and the consideration of the notes should be paid; and until then no action could have been brought for their recovery. Therefore these items in the account were in truth and effect payable as of the date of the maturity of each note of which it was the consideration.

On October 28, 1905, when the first payment was made of $244.12, the account amounted to $574.35; of this account $500 was represented by three notes, and was therefore not payable on the date of the said first payment. But the balance of the account, towit: $74.35, was then payable; and therefore the payment should be applied to that part of the account. When so done, it would leave a balance of $169.77 of the payment. The only debt that the defendant then owed to the plaintiff was these three notes; and, inasmuch as defendant then made a pay-

ment, it will be presumed that the parties intended that it should be applied on these notes, although none of them had then matured, because that was the only indebtedness then owed by defendant. Applying this balance to the payment of $169.77 on the first note leaves a balance thereof of $40.23, and this became payable January 1, 1906. On January 1, 1907, the second note for $200 matured, so that on this later date items on the account to the amount of $240.23, represented by the two notes, became payable, and were therefore the oldest items subject to payment on the account on that date.

The payments made thereafter should therefore be applied to these items representing the amount due on the two notes. The payments after January 1, 1907, amounted to $365, and were more than enough to pay these items of the account amounting to $240.23, which represented the balance due on the two notes; and when so applied the said two notes were fully paid. But at the date of the last item of payment—July 1, 1907—the last note for $100 had not matured, that note maturing January 1, 1908. At the time of this last payment there were other items of charge on the account greatly in excess of all the payments. Inasmuch as this last note matured subsequent to the last payment, it was not at the date of these payments in legal contemplation the oldest item on the account, and therefore these payments should be applied to those other and older items of the account which were actually payable; and, inasmuch as these other items exceed all payments, the note for $100 was not paid. This note bore interest from its date at the rate of 10 per cent. per annum. But the consideration thereof was not furnished until August 16, 1905. It should bear interest at the above rate only from that date.

It follows therefore that the two notes for $200 each have been paid; and that the third note for $100, with interest as above indicated, has not been paid. To that extent only should a lien be declared upon the land by virtue of said mortgage. For the balance of the indebtedness, towit, $785.53, the plaintiff should have a personal judgment only against the defendant.

The motion for the rehearing of this cause is granted, and the former judgment of this court is modified so as to conform to this opinion.

The decree of the Lonoke Chancery Court is reversed, and this cause is remanded with directions to enter a decree in accordance with this additional and modified opinion.

LEE v. FOUSHEE.

Opinion delivered June 7, 1909.

1. SPECIFIC PERFORMANCE—MISTAKE.—Equity will decree specific performance where the testimony shows that defendant sold the land in question to plaintiff but failed to join his mother in making the deed because of a mistaken view that the title to the land was in her and not in him. (Page 473.)
2. STATUTE OF FRAUDS—PART PERFORMANCE.—A parol sale of land is taken without the statute of frauds where the vendee pays the purchase money, takes possession under his contract of purchase and makes valuable and permanent improvements. (Page 474.)

Appeal from Jackson Chancery Court; *George T. Humphries,* Chancellor; reversed.

STATEMENT BY THE COURT.

Plaintiff (appellee) alleged in his complaint that he is the son and only heir of the body of William A. Foushee; that said William A. was the son mentioned in section 7 of the will of Jos. P. Foushee; that said Jos. P. Foushee had died, and his will had been duly probated; that William A. had died, leaving plaintiff his son and sole heir of his body. That said section 7 of said will granted to said William A. and the heirs of his body the lands described, said bequest being as follows: "As an advancement, and at the value of one thousand dollars, I hereby give and bequeath to my beloved son, William A. Foushee, and the heirs of his body, the following lands (describing them)." That said William A. under said grant, after the death of Joseph P., went into possession thereof, using and occupying them until his death. That said grant gave a life estate to plaintiff's father, William A., the remainder going to plaintiff in fee. The complaint further alleged the wrongful possession of defendant (appellant) for three years past, and prayed judgment for possession and rents.

In his answer appellant (defendant below) uses this language: "Admits that said Jos. P. Foushee departed this life on the .. day of ...., and that he executed a will by which he devised the lands in controversy to Wm. A. Foushee, but denies that said Wm. A. Foushee took an estate for life only, but says said will vested in said Wm. A. Foushee said lands in fee simple." Then for cross complaint there are allegations of a sale by Wm. A. to Mary V., and of Mary V. to himself, in which he alleges appellant joined, and that Mary V. and appellee were jointly in possession, and both sold to appellant, putting him in possession; that he made valuable and lasting improvements, which he sets up and describes specifically. There were other allegations unnecessary to mention. Appellant prays for specific performance and for general relief.

Appellee denied all the material allegations of the cross-complaint. The cause was transferred to equity.

The testimony on behalf of appellee is as follows: Mrs. Hite testifies that Mrs. Mary V. Foushee was in feeble health a long while; that she was living with her at the time of her death; that the defendant came there to see her about buying the place; that he was not then with Mack (appellee); that Mrs. Foushee had $1,000 of her own; that Mack would come sometimes to see his mother, but that he and Lee were never there together; that Mrs. Foushee said that her reason for wanting to get rid of the place was that she was afraid of a judgment against old man Foushee by Rankin, and they would come back on her.

Witness C. R. Hite, on behalf of appellee, testified as follows: "Mack Foushee (appellee) rented a house from me about seven or eight blocks from his mother's. I made an abstract of the Foushee land that John Lee bought. He and Ike Goldman came to my office, and had the abstract with them. I told Lee he had better get Mack Foushee to sign the deed to make his title good, to make the conveyance good. Afterward John Lee told me he told his lawyer about it, and his lawyer told him not to pay any attention to me. I told him that it was material that Mack Foushee sign the deed. I told him at the time he came into my office with Mr. Goldman that it would be necessary for Mack Foushee to sign it in order to make the title good, and they came back afterwards, and told me what the attorney said."

Appellee testified as follows: "I am the only child of Wm. A. Foushee. I did not have anything to do with the sale of the land. I never heard her (witness' mother) and John Lee say anything about it; was never present when she had any negotiations with Lee at Mrs. Hite's or elsewhere. I don't know the date my mother made the deed. I was working at the button factory. Some one called up from Wolff-Goldman's store, and asked me to come up to the store. When I got to the store, she and Mr. Goldman were talking, and I walked up, and she said; 'Well, I have sold the place.' And I said: 'Well, I haven't signed the deed, nor I ain't going to.' And she said: 'Well, you don't have to, because the lawyers say it isn't necessary.' She had been mad at me. She didn't like my wife, and she wanted to get rid of the land. I asked her what kind of a deed she had made, and she told me she gave him a quitclaim deed; that John Lee wanted her to make a warranty deed, but she would not do it because she sold it, thinking that maybe McDonald or my wife would come back on her some time for some money. She had the check, and that time she and John Lee were talking about who would pay the taxes, and she and John Lee went to the bank, and she told me she got $1,500 for the place. I don't know who the check was payable to; never saw it, never indorsed; don't know anything about Hennessy's note being turned over to Lee; didn't have anything to do with it. I wasn't present when the deed was executed; didn't tell Judge Phillips I would sign the deed; didn't know John Lee was the one who bought the place until the day it was sold: I saw him in front of Wolff & Goldman's store, and I told him I would not sign the deed, and he said his lawyer told him it would not be necessary. He afterwards offered me $1,000. There was a lawsuit between McDonalds and Sallie Rankin, and my grandfather was guardian for Sallie Rankin, and he compromised her estate, and my mother was afraid the Rankins would beat McDonalds, and McDonalds would come back on her guardian for the money that they paid for the place. And my mother didn't get along with my wife. She said she would give her property away before my wife should ever have anything she had. When I got to the store, she (my mother) said she had already sold the place and made the deed. She wanted to try to get me to sign the deed. I told

her I would not do it, because it was made to my father and myself, and I didn't think she had a right to sell it. I went to see Judge Phillips about getting a divorce. He told me if I used any of this money I could not sue for the place. I did not talk to him but once, and that was in his office. I did not tell tell him that she had the money she and I sold the place for. I didn't tell him I didn't know very much about her business."

Appellant in his own behalf testified that he bought the land in controversy from J. M. Foushee (appellee) and Mary V. Foushee; that he made the contract for the purchase at the house of Mrs. Mary V. Foushee; that no one was present at the time except appellant, Mrs. Mary V. Foushee and J. M. Foushee; that afterwards he paid fifteen hundred dollars for it in pursuance of the contract; that he gave the check for it to Mrs. Mary V. Foushee, appellee's mother; that they turned the rent notes over to him, and that he went into possession of it the year he bought it. He says he met Mrs. Mary V. Foushee at Wolff & Goldman's store where the money was paid and the deed delivered to him. Mrs. Foushee stated that she and her son were there to execute the deed. The deed was drawn up at the request of Mrs. Foushee and appellee. Mrs. Foushee signed the deed at the store. J. M. Foushee was present. He did not tell appellant that he would not sign the deed, but did not sign it because appellant's lawyer had told him it was not necessary.

Isaac Goldman testified among other things as follows: "The day the trade was closed Mack Foushee and Mrs. Foushee were present. We were all around the door to our little office. Mack was there, and tried to get in and sign the deed, and one of the attorneys told him there was no use in his signing the deed. We paid Mrs. Foushee the money for John Lee, of course."

J. W. Phillips, the attorney for Lee, testified: "I was present at the time the deed was signed, and Mack Foushee was there, and said he had come to sign the deed, and I told him there was no need for him to sign the deed, and he said all right, that he was willing to sign it if it was necessary. I told Mack it was unnecessary for him to sign the deed because he had no interest in the land. I am acquainted with the decision in the 67th Ark. of *Williams* v. *Robinson*. Going by the abstract,

we considered that the will conveyed a title in fee simple, and, although they both sold the land, I didn't think it was necessary for him to sign the deed."

John Henck testified: "Was bookkeeper for Wolff-Goldman Mercantile Company. Took Mrs. Foushee's acknowledgment to the deed to Lee. To the best of my recollection Mack Foushee was present. He didn't sign it. He was told it was not necessary. I think Judge Phillips told him it was not necessary. After check was given her, they went away. I don't know which way they went. Cannot swear positively to the details given. I think J. M. Foushee was there. I won't be positive, but he was there about the time. The check was made payable to the order of Mary V. Foushee."

Sigmund Wolff testified: "Mack Foushee was there at the office. He didn't sign the deed because the attorneys did not think it necessary. Didn't have anything to do with the purchase. Lee directed me to draw the check. We loaned the money; interested in the suit. I heard the attorneys tell John Lee it was not necessary for Mack to sign the deed."

Mrs. Hite further testified: "I remember when Mrs. Foushee went to Wolff & Goldman's store to sign deed. Don't know the month. Mack left the house with her. Mrs. Foushee said they were going to sign a deed. I have heard Mack say he was willing to sign the deed. Mrs. Foushee wanted to sell the land on account of the Rankin suit. John Lee was out at my house. I don't know where Mack went when he left the house. She said she didn't want Mack's wife to get any of the money. I heard her say she was going to spend the money that she sold the place for all on herself to live on. The check was made payable to order of Mary V. Foushee, was for $1,500, and specified 'for land sold John V. Lee.'"

From a decree holding that appellant was the owner of the land in controversy and awarding him possession thereof, this appeal has been duly prosecuted.

Joseph W. Phillips, for appellant; *Otis W. Scarborough,* of counsel.

1. Either the original will, a certified copy of it or of the record thereof, or the record itself was the only competent evidence to establish appellee's claim. Neither was exhibited or introduced. 4 Enc. of Ev. 823; 24 Am. Dec. 57.

2. The preponderance of testimony makes it clear that appellee knew all about the transaction, participated therein, was ready and willing to sign the deed and went with his mother at the time the deed was executed for the purpose of signing jointly with her, and directed the payment of the money to her. Appellant was put in possession, made lasting and valuable improvements. A clear case for specific performance is established, and its denial works a fraud upon his rights. 83 Ark. 414; 16 Ark. 363; 21 Ark. 110.

3. By failing to speak out and notify appellant that he claimed title before the purchase money was paid and also by directing that the money be paid to his mother, appellee is estopped. Bishop on Contracts, 1st Ed. § 128; 55 Ark. 113. Appellee is also barred by his laches in failure to assert title in apt time. 55 Ark. 92; *Id.* 85; 3 Brown, Ch. Rep. 640; 7 How. 234; 87 Ark. 232.

Gustave Jones, for appellee.

1. Appellant has not denied the will—only the effect of language therein. What is not denied is admitted.

2. Appellant was told that appellee had title. There can be no estoppel as to the remainderman where the vendee is not misled. 51 Ark. 61. Besides, there is no proper plea of estoppel. The acts, representations or silence relied on must have been wilfully intended to mislead. 16 Cyc. 726; 49 Ark. 218; 59 Ark. 499.

3. Appellee derives title, not from his father or mother, but from his grandfather. There could be no recovery from him when the title failed which his mother sought to convey and warrant. 30 Ark. 632, 639.

4. Laches was not pleaded; but, if it had been, action was brought within a reasonable time after he was informed of his rights. 75 Ark. 382.

WOOD, J. (after stating the facts.) The appellee's complaint should have been dismissed for want of equity. For, conceding that appellee under the will of his grandfather was the owner of the land in fee at the death of his father (*Wilmans* v. *Robinson,* 67 Ark. 577), yet the decided preponderance of the evidence shows that he had sold same to appellant. We have given in the statement of facts the substance of all the evidence

that relates to the sale of the land by appellee to appellant, and practically all of it, except appellee's own testimony, shows that he made such sale. Appellant testifies that he made the contract with appellee and his mother to purchase the land from them for a consideration of fifteen hundred dollars, and that they afterwards met him at the store of Wolff & Goldman for the purpose of consummating the trade, *i. e.,* making him a deed and getting the purchase money. He shows that he met them there, and that he performed his part of the contract by paying the purchase money, and that Mrs. Mary V. performed her part by signing the deed, and that appellee was present ready and willing to sign, but was dissuaded from doing so by the advice of the attorney of appellant that it was unnecessary. The attorney was of the opinion that appellee had no title, and therefore it was unnecessary for him to sign. But the proof shows that he was there for that purpose. It is clear that the deed would have been signed by him but for the mutual mistake of law on his part and on the part of appellant caused by the opinion of counsel. The proof shows that appellee fully intended to sign the deed and thereby convey all the interest he might have. Equity looks on that as done which ought to have been done. "Equity imputes an intention to fulfill an obligation." These familiar maxims of equity are sufficient authority for denying to appellee under the evidence in this record the relief which he seeks, and for granting to appellant the relief sought by his cross-complaint. Smith's Principles of Equity, pp. 15, 16; 1 Pom. Eq. Jur. § 363, *et seq.,* 368; Fetter on Equity, §§ 10, 11.

The proof clearly takes the case out of the operation of the statute of frauds, for appellant paid the purchase money and went into possession under his contract of purchase made with appellee and his mother, and made permanent and valuable improvements. *Arkadelphia Lumber Co.* v. *Thornton,* 83 Ark. 414, and cases there cited.

The decree is therefore reversed, and the cause is remanded with directions to enter a decree in accordance with this opinion, decreeing the title to the land in controversy to be in appellant, and granting the prayer of his cross-complaint for specific performance, and dismissing appellee's complaint for want of equity.

WESTERN UNION TELEGRAPH COMPANY v. SOCKWELL.

Opinion delivered July 12, 1909.

1. TELEGRAPH COMPANY—NEGLIGENCE—EVIDENCE.—In a suit against a telegraph company for negligence in failing to deliver a message where defendant proved that its messenger delivered the message to a boy in charge of the telephone switchboard at a hotel, it was not error to exclude testimony of the messenger that he was told by such boy that plaintiff was stopping at the hotel, in the absence of evidence that it was the duty of the boy to give information of the persons stopping at the hotel or to receive messages sent to them. (Page 482.)
2. SAME—NEGLIGENCE IN FAILING TO DELIVER TELEGRAM—EVIDENCE.—In a suit against a telegraph company to recover damages for mental anguish caused by nondelivery of a telegram announcing the illness of the addressee's father it was not error to permit the addressee to prove that his father had given him forty acres of land, and that he had not visited his father oftener because he was financially unable to do so, as such evidence tended to show the affection that existed between father and son. (Page 482.)
3. SAME—NONDELIVERY OF TELEGRAM—NEGLIGENCE.—Where the name and address of the addressee of a telegram appeared in the city directory, the telegraph company could not excuse its negligence in failing to deliver the message to the addressee by proof that it followed its custom, where the address of a person was unknown to it, of inquiring at the various hotels in the city. (Page 482.)
4. SAME—FAILURE TO GIVE ADDRESS.—Where a telegraph company failed to deliver a telegram when it had the correct address of the addressee in a city directory, it cannot complain because the sender was negligent in not giving a more definite address. (Page 482.)
5. INSTRUCTIONS—ASSUMING UNDISPUTED FACT.—An instruction which assumed an undisputed fact was not erroneous. (Page 483.)
6. TELEGRAPH COMPANIES—NONDELIVERY OF TELEGRAM—MENTAL ANGUISH.—Where the undisputed evidence showed that the relation between plaintiff and his father was of an affectionate nature, it was not prejudicial error, in a suit for nondelivery of a telegram announcing his father's illness, to assume that plaintiff suffered mental anguish in being deprived of the opportunity to be with his father in his last illness. (Page 483.)
7. APPEAL—WAIVER OF OBJECTION.—Where appellant company failed to move for a new trial for insufficiency of the evidence to support the verdict, it will be held on appeal to have waived such objection. (Page 484.)

Appeal from Sebastian Circuit Court, Fort Smith District; *Daniel Hon,* Judge; affirmed.

STATEMENT BY THE COURT.

This is a suit by appellee against appellant for damages for mental anguish growing out of the alleged negligence of appellant in failing to deliver a telegram. The complaint contains, among other allegations, the following: Plaintiff says that his father, a man of advanced age, was prior to the 5th day of August, 1908, residing in Mountain Park, and that prior to said 5th day of August plaintiff alleges that his father had become sick and confined to his bed; that plaintiff was notified of such sickness, and was told that if any alarming symptoms occurred which would indicate the probable death of his said father a telegram would be sent to him at Fort Smith, Arkansas.

Plaintiff alleges that on the 5th day of August, 1908, his father grew rapidly worse, and that his brother, R. O. Sockwell, on said 5th day of August, at the time of 7 o'clock and forty minutes P. M., delivered to the Western Union Telegraph Company at Mountain Park for transmission for a valuable consideration the following telegram, towit: "Come at once. Father is very low."

Plaintiff alleges that said message was received at the office of the Western Union Telegraph Company at Fort Smith, Arkansas, at 8:15 P. M. on said 5th day of August, but that the said Western Union Telegraph Company did not deliver said message to this plaintiff until the 20th day of August, 1908, at 7:10 A. M., and that when the plaintiff learned of his father's sickness his said father had died and had been buried.

Plaintiff alleges that he was greatly devoted to his said father, and that his said father was greatly devoted to him (plaintiff), and that, had he received said message prior to his father's death, he would have promptly gone to his father's bedside and lingered with his father pending his dissolution; that by reason of the failure of the aforesaid defendant to deliver said message, and in consequence of the plaintiff's inability to be with his father prior to and at the time of his death, the plaintiff alleges that he has suffered great mental anguish and has been damaged in the sum of $2,000.

The answer denied all these allegations. The appellee testified as follows: "That he was born in 1886, and lived and worked with his father until his marriage 4 or 5 years since.

After his marriage his father gave him forty acres of land out of the home farm, and he lived on that until the fall of 1904. In April, 1905, he came to Fort Smith and entered the service of the street car company, with whom he has ever since remained, as motorman at first, and later as conductor. That he had visited his father at his home in Oklahoma some three hundred miles away once, and his father had visited him in Fort Smith in July preceding his death. That he did not visit his father more because of his being financially unable to do so. That the relations between his father and himself were those of affectionate father and son. That he was notified by letter a few days prior to August 5, 1908, of his father's illness, and at once wrote to him to advise him in case his father's condition became critical. That he heard nothing further from home until August 14, when he was informed by letter from his mother of the death and burial of his father. That he took the first train for Weatherford, Oklahoma, and visited his mother and the family. That he then learned that a telegram had been sent him, and was given a copy of it by the Western Union operator at Weatherford. On his return home, August 20, he went to the office of defendant in Fort Smith, and Manager Stannard delivered to him the message on which this suit is based."

Appellant objected to the testimony as to the financial condition of plaintiff and to the testimony as to the gift of the 40 acres. Objections overruled, and exceptions saved.

R. O. Sockwell: He was 25 years old, a brother of appellee, and resided with their father in Kiswa County, Oklahoma, on August 5, 1908. "To the best of his knowledge and belief," his brother, E. C. Sockwell, resided in Fort Smith "during the month prior to August 5, 1908." Prior to August 5 he notified his brother that their father was sick with typhoid fever, and that notice would be given him if he got worse. On August 5 his father became worse, and witness delivered to M. V. Holland, the rural mail carrier, the telegram described in the complaint, to be taken to appellant's agent at Mountain Park for transmission.

S. Cornet: Was the agent for defendant at Mountain Park, Oklahoma, on August 5, 1908, and on that date received from M. C. Holland the message in suit for transmission.

M. C. Holland: He conveyed the telegram from the sender, R. O. Sockwell, to defendant's agent at Mountain Park.

The appellant's witness, H. C. Stannard, testified as follows: Was manager for defendant at Fort Smith. Its office force at night consisted of one operator, one night clerk and one delivery boy. That these composed the office force on the night of August 5, 1908. That the message was delivered to the addressee on August 20, 1908. That there was a city directory in defendant's office in Fort Smith, much worn by use, which contained the name and address of plaintiff. Appellant asked the witness to state the proper or usual method of attempting to find an addressee, when no further address than the name of the town was given. Objected to. Counsel for appellant then stated that he proposed to show by the witness that he had been in the telegraph business as manager for thirty years; that when messages were received in a place as large as Fort Smith, with no more address than a name, and no one in the office knew such a person, the delivery boy would take the message to the principal hotels and inquire there for the addressee; that this was the general practice in trying to locate an unknown person. The court refused to permit the testimony, and appellant excepted.

Ira Lunsford: Was the operator who received the message and hung it upon the receiving hook. He had never heard of appellee.

Ray Greenlee: Was night clerk in appellant's office at Fort Smith on August 5, 1908, and received the message that night. He took it from the hook, copied it, registered it and gave it to the messenger boy, Logsden. He had never heard of appellee.

Eugene Logsden: Was appellant's delivery boy on night of August 5, 1908, and received the message between 8 and 9 that night. He had never heard of appellee. He took the message to the Hotel Main, the principal hotel in the city, and found a boy about 14 years old, named Hennessy, behind the clerk's desk. The message was delivered to Hennessy, and he receipted for it. Hennessy was in charge of the hotel 'phone switchboard, and had been in the habit of receiving and receipting for messages addressed to the hotel or to persons stopping there. That he had so received such messages in the presence of and with the knowledge of the clerk.

Counsel for appellant asked witness what Hennessy said to him, but appellee objected. Counsel for appellant stated that he expected to show by this witness that Hennessy told the messenger that Sockwell was stopping at Hotel Main.

The court refused to permit this testimony to be given, and appellant excepted.

The court over appellant's objection gave the following instructions:

"1. All telegraph companies doing business in this State shall be liable in damages for mental anguish or suffering, even in the absence of bodily injury or pecuniary loss, for negligence in receiving, transmitting or delivering messages, and in all actions under this section the jury may award such damages as they conclude resulted from the negligence of said telegraph company. Therefore, if you find from a preponderance of the evidence in this case that plaintiff's brother, R. O. Sockwell, delivered to the defendant telegraph company, on the 5th day of August, 1908, the following telegram in substance: "Come at once. Father is very low," that said telegram was addressed to the plaintiff at Fort Smith, Arkansas, that said message was received at the office of the Western Union Telegraph Company at Fort Smith, Arkansas, at 8 P. M. on the said 5th day of August, and that said telegraph company did not deliver said message to the plaintiff until about the 20th day of August, 1908, and that said plaintiff had a known residence in the city of Fort Smith on the day and date set out in this complaint, and that in the meantime his father had died and had been buried, and that, on account of the delay in delivering the said message, plaintiff was precluded from being with his father in his last illness and at his death, and that said failure to deliver was on account of negligence of defendant's agents and employees, you will find for the plaintiff in whatever sum you should believe to be a compensation to him for the mental anguish occasioned to him by his inability to be with his father during his last illness and death.

"2. Whether sending the message to the plaintiff without giving any further address than the city and State was such negligence on the part of the sender of the telegram as to excuse the defendant for failure to deliver is a question of fact for the jury.

"3. It is also a question of fact for the jury to determine whether the accepting and undertaking to deliver the message without any further address than that given and failure to deliver same promptly was negligence on the part of the defendant under all the evidence in the case."

The court, over the objections of appellant, refused prayers numbered 1, 2, 3, and 4, which in effect told the jury that it was the duty of the sender of a telegram to give such an address as would enable the telegraph company to deliver the same by the exercise of ordinary care, and that in a city of 25,000 or more population a message which gave nothing more than the name of the addressee, unless he was so generally known that he could be found by the exercise of ordinary diligence, would not be a sufficient address; and that if the jury found from the facts to exist, and that the failure of appellant to deliver the telegram promptly was because of the want of *such correct* address, they should find for the defendant.

Also prayers numbered five and six as follows:

"No. 5. If you find that plaintiff was unknown to the employees of defendant at the office when the message was received, and that the delivery boy took the message at once to the Hotel Main, the principal hotel in said city, where he was told by one of the hotel employees that plaintiff was stopping there; that he thereupon delivered the message to said employee, and that said employee was one who habitually received and receipted for messages left at the hotel, then you will find for defendant.

'No. 6. If you find that none of the employees in defendant's office when the message was received knew plaintiff; that the delivery clerk took it directly to the Hotel Main, which was the principal hotel of the city; that Fort Smith has a population of 25,000 or more; that the delivery clerk delivered said message to an employee of the hotel, who was in the habit of receiving messages directed to persons in care of said hotel or stopping there, who receipted for the same; and if you further find that it is the common and usual practice of delivery clerks, when they have a message for an unknown party, to inquire at the hotels, then defendant was not negligent in making such delivery; and if you further find that defendant did not learn until long after

the death of plaintiff's father that said message had not been received by the addressee, then you will find for defendant."

There was a verdict in favor of appellee for $800.

The motion for a new trial alleged the following errors:

In excluding the evidence of the messenger that he was told by the party in charge of the office at Hotel Main that the addressee was stopping there; in permitting evidence of appellee's financial condition; in refusing to allow Stannard to testify as to usual method of finding addressee when meassage did not contain specific address; in refusing each of appellant's six requests for instructions; in giving each of the three instructions.

The motion was overruled. Judgment was entered in accordance with the verdict, and this appeal was taken.

George H. Fearons, Mechem & Mechem and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

1. The burden of proof was on the plaintiff to show that the delay caused damage to him. It does not show that he was in Fort Smith when the message reached there, nor when his father died, nor that he would or could have reached him before his death, had the message been promptly delivered. 87 Ark. 307; 27 Am. & Eng. Enc. of Law, 1076.

2. The admission of evidence that plaintiff's father had given him 40 acres of land, and that he did not visit his father more frequently on account of his financial condition, was erroneus, the manifest object of introducing it being to create an impression in the minds of the jury of his poverty.

3. Stannard's testimony offered by appellant was competent as tending to show that the failure to deliver promptly was caused, in part at least, by the sender's negligence in not giving a sufficient address. 82 Ark. 127; 116 S. W. 895; 60 S. W. 87; 62 S. W. 136; 74 S. W. 943; 76 S. W. 613; 3 So. 566. It was competent also on the question of damages.

Oscar L. Miles, for appellee.

The case should be affirmed. A casual reading of the pleadings and evidence will show that every issue raised by the pleadings was fully established by the evidence, and the court's instructions merely epitomize the law announced by this court in similar cases. 78 Ark. 551; 82 Ark. 527.

WOOD, J., (after stating the facts.) We will consider the questions in the order presented in the motion for new trial.

1. It was not error to exclude the offered testimony of the messenger boy that he was told by Hennessy that Sockwell was stopping at the Hotel Main. It was not shown that it was the duty of the boy in charge of the "hotel 'phone switch-board" to give information of the persons stopping at the hotel. Even had it been shown that appellee was at the hotel, the offered evidence did not tend to prove that it was the duty of the 'phone boy to receive messages sent to the patrons of the hotel, or to give any information concerning them. The offered testimony was pure hearsay.

2. The testimony of appellee that his father had given him forty acres of land, and that he had not visited his father more because he was financially unable to do so, was not prejudicial error. The connection in which this evidence was elicited shows that its purpose was not to show appellee's poverty or financial condition, as appellant contends, but to show the state of feeling, the affection, that existed between father and son.

3. There was no error in refusing to allow the witness Stannard to testify as to the proper or usual method of attempting to find an addressee when no further address was given than the name and town. This witness testified "that there was a city directory in appellant's office in Fort Smith, much worn by use, which contained the name and address of plaintiff." It could not be said, in view of this evidence, that the name and address of appellee were unknown to appellant. It shows that his name and address were at hand in the directory. But, instead of consulting this, appellant proposed to show what was the usual custom, and that it followed that custom. In view of the above evidence, no matter if there was such a custom as appellant offered to prove, it was palpable negligence on the part of appellant to follow the custom, instead of taking the positive information in its possession. Any evidence which tended to show that appellant failed to consult and follow this certain information, but instead resorted to some other method less definite, would necessarily show negligence on the part of appellant.

4. In view of the fact that appellant showed that it had the name and address of appellee at the time the message to

him was received at Fort Smith, it was not error for the court to refuse the prayers of appellant to have the question submitted to the jury as to whether the sender of the telegram had given *such correct* address as would enable appellant by the exercise of ordinary care to deliver the message. It follows that prayers of appellant numbered 1, 2, 3 and 4 on the subject of the negligence of the sender and prayers numbered 5 and 6 on the subject of the custom of delivering telegrams were properly refused. It follows also that prayers numbered 2 and 3 given at appellee's request were more favorable to appellant than was warranted by the undisputed evidence. Appellant can not therefore complain of these. Appellant having the name and the correct address of the addressee of the message, as its own evidence shows, was in no position to claim that appellee was negligent in not giving a more definite address. Appellant failed to exercise ordinary care to ascertain where the addressee could be found, which it might have easily done by consulting the city directory in its hands.

5. Appellant contends that the first instruction given at the instance of appellee is erroneous in 'assuming that plaintiff had a known residence at Fort Smith at the time of this occurrence." The instructions left to the jury to determine from a preponderance of the evidence as to whether or not appellee had a known residence in the city of Fort Smith, which was really more favorable to appellant than it had the right to ask on this question, for the undisputed evidence of appellee is that in April, 1905, "he came to Fort Smith and entered the service of the street car company, with whom he has ever since remained."

Appellant also contends that the instructions assume that appellee had suffered some mental anguish on account of his inability to be with his father, when that was a question for the jury. The evidence was that the relations between appellee and his father "were those of affectionate father and son." It was not prejudicial error to assume that an affectionate son would suffer mental anguish by being deprived of the opportunity of being with his father in his last illness.

The contention here that there was no evidence to show when appellee's father died, and therefore no evidence to show

that appellee would or could have reached him before his death had the message been promptly delivered, is borne out by the record. But one of the grounds for which a verdict may be vacated and a new trial granted is as follows: "The verdict is not sustained by sufficient evidence." Sec. 6215, Kirby's Digest, subdiv. "sixth." The motion for new trial contains no such ground. Had the attention of the trial court been called specifically to this in the motion for new trial, we would then be in position to say that the court had erred in overruling the motion. But on review here we reverse only for errors in the rulings of the lower court. Therefore it must be held that the failure of the appellant in its motion for a new trial to object to the sufficiency of the evidence to support the verdict was a waiver of such ground there and here. The trial court was not given the opportunity to set aside the verdict on the ground that there was no evidence to sustain it. Moving for new trial waives all exceptions taken at the trial and not incorporated in the motion. 1 Crawford's Digest, "Appeal and Errors," p. 122, IVb, where the cases are collated. Therefore appellant cannot succeed upon his contention, raised here for the first time, that the evidence does not sustain the verdict.

Finding no reversible error, the judgment is affirmed.

ON REHEARING.

Opinion delivered October 18, 1909.

WOOD, J., (dissenting). Appellee's mental anguish, according to the allegations of his complaint, grew out of his "inability to be with his father prior to and at the time of his death." There is no evidence to show when appellee's father died. There is no evidence to warrant the finding that if the telegram had been delivered promptly to appellee he could have reached his father's bedside prior to his death. In the absence of this evidence, appellee fails to prove the cause of action alleged.

While the motion for new trial does not assign as error that there was no evidence to support the verdict, the objection to the first instruction and the exception to the ruling of the court in giving it, carried forward into the motion for new trial, raises the question here. For it was error to submit to the jury the question as to whether or not "on account of the delay in delivering the

said message plaintiff was precluded from being with his father in his last illness and at his death," when there was no evidence to show that appellee could have reached his father's bedside before his death, had the message been promptly delivered. Instructions must be based upon the evidence. It is prejudicial to submit abstract questions that are material to the issue.

I have reached the conclusion on reconsideration that the above is the correct view to take of the case, and that the same should be reversed for the error in giving instruction number one. *St. Louis S. W. Ry. Co.* v. *Jackson, ante* p. 14, and authorities there cited.

BATTLE, J. I concur.

MALONEY v. STATE.

Opinion delivered October 4, 1909.

1. FORGERY—SUFFICIENCY OF UTTERING.—To constitute the crime of uttering a forged writing, it is sufficient if an instrument capable of injuring another be offered with the knowledge of the falsity of the writing and with the intent to defraud; it not being necessary that the writing should have been actually received as genuine by the party to whom the same is offered, or that the attempt to defraud should be successful. (Page 488.)
2. SAME—OFFERING AN UNINDORSED CHECK.—Forgery may be committed of an unindorsed check, as the transferee thereof without a written indorsement may become the true owner thereof. (Page 489.)
3. SAME—FORGERY OF A FICTITIOUS NAME.—To constitute a forgery, the name alleged to be forged need not be that of any person in existence. (Page 489.)
4. SAME—FICTITIOUS NAME—INFERENCE.—When the jury in a forgery case find from the evidence that the name signed to the alleged forged instrument was that of a fictitious person, the inference arises that the person who uttered and published such instrument as true either forged the same or knew it to be forged. (Page 489.)
5. SAME—FICTITIOUS DRAWER OF CHECK.—It is competent to show that the person whose name is affixed to a check as drawer is fictitious by evidence of the proper officer of the bank upon which the check is drawn that no person of such name kept an account with such bank. (Page 490.)

6. SAME—SUFFICIENCY OF EVIDENCE.—Testimony of the cashier of a bank which succeeded to the business of the bank upon which the alleged forged check was drawn that the names of all depositors in the drawee bank having deposits therein were transferred to the first-named bank, and that the drawer's name did not appear thereon, was insufficient to prove that the drawer had not been a customer of the drawee. (Page 490.)

7. EVIDENCE—SILENCE AS ADMISSION.—To render a damaging statement made by another admissible against the accused, it must appear that the accused heard the remark and that the circumstances in proof naturally called for a reply on his part. (Page 490.)

8. SAME.—Statements made by a witness in the presence of the accused before the examining court did not call for a denial from him, as he was not required to testify in the case. (Page 491.)

9. SAME—FORMER TESTIMONY OF ABSENT WITNESS.—Before the former testimony of an absent witness can be introduced against the defendant in a criminal case, it must first be shown that such absent witness is dead, beyond the jurisdiction of the court or upon diligent inquiry cannot be found. (Page 491.)

Appeal from Ouachita Circuit Court; *George W. Hays,* Judge; reversed.

Hal L. Norwood, Attorney General and *C. A. Cunningham,* Assistant, for appellee.

1. The indictment is sufficient in form fully to apprise the appellant of the particular crime with which he stood charged and against which he should defend himself. It fully meets the requirements of the statute. Kirby's Digest, § 1712. And a conviction or acquittal under it would prevent the State from putting the defendant in jeopardy a second time for the same offense. 5 Ark. 444; 19 Ark. 613; 73 Ark. 487.

2. If there was any error in admitting the testimony of the witness Ketchum, that was waived. Moreover, it was not prejudicial. 77 Ark. 31; 51 Ark. 184; *Id.* 132; 43 Ark. 219; *Id.* 535.

FRAUENTHAL, J. The defendant, Frank Maloney, was convicted of the crime of uttering a forged writing, and sentenced to the penitentiary for a term of two years; and from the judgment of conviction he prosecutes this appeal. The indictment upon which he was tried, with the caption omitted, was as follows:

"The grand jury of Ouachita County, in the name and by the authority of the State of Arkansas, on oath, accuse the defendant, Frank Maloney, of the crime of uttering a forged writing, committed as follows, towit:

"The said defendant, on the 9th day of April, 1909, in Ouachita County, Arkansas, did unlawfully, wilfully and feloniously utter and publish as true to Spence Wooley a certain forged and counterfeit writing on paper purporting to be a check on the Bank & Trust Company of Walnut Ridge, Arkansas, in words and figures as follows, towit: 'Walnut Ridge, Ark., April 8, 1909, No. 614. Bank & Trust Company: Pay to the order of George Collins $6.17, six seventeen (6.17) dollars, C. B. McDonald.'

"The said forged writing being then and there passed, uttered and published by the said Frank Maloney to the said Spence Wooley, with intent then and there feloniously to obtain possession of money, the property of said Spence Wooley, he, the said Frank Maloney, then and there well knowing the said paper to be forged and counterfeited; against the peace and dignity of the State of Arkansas."

The evidence tended to establish the following facts: On April 9, 1909, the defendant, in company with a person named Harris, entered the restaurant of one Spence Wooley in the city of Camden, Arkansas, and ordered supper. After finishing the meal, he gave to Spence Wooley the written instrument or check set out in the above indictment, and requested him to cash same, and to take therefrom the amount necessary to pay for the supper. Not having sufficient money to cash same, Wooley carried it to Mr. Harper and requested him to cash it, which he declined to do. He then showed the check to a policeman, who suggested that he see if the party had the money at the bank. Wooley then returned to defendant, and told him that he was unable to get the check cashed. The defendant then stated that he only had fifteen cents, and asked his companion, Harris, for some money, who did not have it. About that time the policeman appeared and arrested the defendant. Wooley was not acquainted with defendant, nor with his companion, and had not seen either of them before. The cashier of the First National Bank of Walnut Ridge testified that his said bank became the suc-

cessor of the Bank & Trust Company of Walnut Ridge, Arkansas, in February, 1909, a short time before the alleged commission of this offense, and that the balances of deposits due all parties, as appeared on the books of the Bank & Trust Company, were transferred to the books of the First National Bank; and that his said bank had no deposit in the name of C. B. McDonald, and had no customer by that name. There was no other testimony relative to C. B. McDonald, the alleged drawer of the check, or as to his alleged signature; and no testimony whatever to as to George Collins, the alleged payee in the check.

It would appear from the testimony that there had been an examining trial of the defendant before a justice of the peace, and at that trial the party called Harris had been a witness. At the trial of the defendant in the circuit court the policeman, W. N. Ketchum, testified, over the objection of the defendant duly saved, that he had taken from the possession of Harris on said April 9th a little book, which book had been exhibited to the cashier of said First National Bank, and who stated that it was the kind used by the Bank & Trust Company. Over the objection of the defendant this witness, Ketchum, also testified that at the examining trial of defendant the party Harris testified that defendant signed a check while sitting in a hotel in Camden. There was no testimony as to where the person Harris was at the time of the trial in the circuit court. There was no testimony that any inquiry had been made for him or any effort to obtain his presence at the trial.

The defendant filed a motion in arrest of judgment on the ground that the indictment does not allege facts sufficient to constitute an offense. The crime of uttering a forged writing consists in offering to another a forged instrument with a knowledge of the falsity of the writing and with intent to defraud. Those essential elements of the crime are well charged in the indictment. To constitute the offense, it is not necessary that the writing should have been actually received as genuine by the party to whom the same is offered, or that the attempt to defraud be successful; the uttering is complete if the forged instrument is offered as genuine, or declared or asserted, either directly or indirectly, by words or by actions as good. Wharton's Criminal Law (10th Ed.) § 708; 5 Ency. of Evidence, 865;

Elsey v. *State,* 47 Ark. 572; *People* v. *Caton,* 25 Mich. 390; *State* v. *Horner,* 48 Mo. 520; *Smith* v. *State,* 20 Neb. 285; 13 Am. & Eng. Ency. Law (2nd Ed.) 1102; 19 Cyc. 1388; *Holloway* v. *State,* 90 Ark. 123.

The instrument set out in the indictment was capable of working a legal injury. Although not indorsed by the alleged payee in the instrument, it had legal efficacy. The gravamen of the offense is the guilty intent which accompanies the attempt to defraud. As said by Mr. Bishop: "Since the offense of uttering is an attempt, it is complete when the forged instrument is offered; an acceptance of it is unnecessary, while yet it does not take away or diminish the crime." 2 Bish. New Crim. Law, § 605. If one, with intent to defraud, offers a forged instrument to another which is capable of injury, he has committed this offense, although the person to whom it is offered might not accept it without a written assignment. But in the instrument set out in the indictment one might obtain a right or an equitable title without a written assignment. *Smith* v. *State,* 20 Neb. 284; *Lawless* v. *State,* 114 Wis. 189; *Brazil* v. *State,* 117 Ga. 32. And the check could be transferred without a written assignment thereof so as to make the transferee the true owner thereof. *Heartman* v. *Franks,* 36 Ark. 501; *Lanigan* v. *North,* 69 Ark. 62.

It is urged by the defendant that there is not sufficient evidence to sustain the verdict, for the reason that it is not proved that the name of C. B. McDonald, affixed to the check as the alleged drawer, was a forgery. In a prosecution for uttering a forged writing, before there can be a conviction, the State must prove that the instrument offered was forged, and that the defendant knew it was forged. It is true that no witness testified that this was not the signature of C. B. McDonald; but if C. B. McDonald was a fictitious person, and such name was signed to the instrument, then it would be a forged writing. "To constitute forgery the name alleged to be forged need not be that of any person in existence. It may be wholly fictitious." 13 Am. & Eng. Ency. Law (2nd Ed.) 1088. It is for the jury to determine under the evidence whether the person whose name appears signed to the instrument is a real or fictitious person. If they should find upon evidence that the name was of a fictitious

person, then the inference arises that the person who utters and publishes such instrument as true either forged the same or knew it to be forged. *Williams* v. *State,* 126 Ala. 50; *Brewer* v. *State,* 32 Tex. Crim. Rep. 74; *Davis* v. *State,* 34 Tex. Crim. Rep. 117; *State* v. *Vineyard,* 16 Mont. 138.

And it is competent to show that the person whose name is affixed to a check as drawer is fictitious by the evidence of the proper officer of a bank upon which such check is drawn that no person bearing such name kept or had an account with such bank or was a customer of such bank. 2 Greenleaf on Evidence, § 109; *Barnwell* v. *State,* 1 Tex. Cr. Appeals, 745; *Williams* v. *State,* 126 Ala. 50.

But in the case at bar the official of the bank did not testify that the name of C. B. McDonald did not appear on the books of the Bank & Trust Company, the bank upon which the check was drawn, or that that bank never had such a customer. The witness, C. W. White, testified that he was cashier of the First National Bank, which had succeeded the Bank & Trust Company; and while he also testified that the names of all depositors of the Bank & Trust Company with balances were transferred to the books of the First National Bank, and that the name of C. B. McDonald did not appear on these latter books, still this would not necessarily prove that such a person had not been a depositor of the Bank & Trust Company, for there may have been such a customer of that company, who, though not having a balance to his credit, may have issued this check, either in ignorance of the exact condition of his account or by way of overdraft. Nor was there any testimony introduced that diligent inquiry or search had been made for such person in that community and within the territory in which the Bank & Trust Company had business relations, and that such person was not known, in order to show that the name was of a fictitious person.

It therefore follows that the above testimony of the cashier was not sufficient to show that the name affixed to this check was fictitious, and thereby to raise the inference that it was forged and so known by the defendant who uttered it.

At the trial of the cause the court permitted the witness W. N. Ketchum to testify that at the examining trial of the defendant a party by the name of Harris was a witness, and

that said Harris testified in the presence of defendant that the defendant signed a check in the hotel in the city of Camden; and also to other statements of Harris made at the examining trial tending to incriminate the defendant. Now, this testimony was admissible only on one of two grounds:

(1) On the ground that this was a damaging statement made in the presence of the defendant, and because he did not then and there deny the same, his silence can be used as evidence against him. But, as is said in the case of *Bloomer* v. *State,* 75 Ark. 297, "to render such evidence competent, it must be shown that the accused heard the remark, and that the circumstances in proof naturally called for a reply on his part." The statements made by Harris were in the course of giving testimony in court. The circumstances did not call upon the defendant to deny them and there in the presence of the court make a reply; and under the statute of our State he was not even required to afterwards take the stand as a witness and deny the statements. This testimony was not therefore under the circumstances of this case admissible on the ground that the statements were made in the hearing of the defendant without reply or denial from him.

(2) And this testimony was not admissible on the ground that it was proof of the testimony of an absent witness given on a former trial. Before such testimony can be heard, a sufficient foundation must be laid for its admission. It must be first shown that such absent witness is dead, beyond the jurisdiction of the court, or upon diligent inquiry cannot be found. *Pope* v. *State,* 22 Ark. 372; *Shackelford* v. *State,* 33 Ark. 539; *Green* v. *State,* 38 Ark. 305; *Vaughan* v. *State,* 58 Ark. 353; *Harwood* v. *State,* 63 Ark. 130. The record in this case fails wholly to show that the whereabouts of Harris were unknown, or that he was out of the jurisdiction of the court, or that any inquiry whatever had been made for him. It follows, therefore, that this evidence as to the testimony and statements made by the party Harris was inadmissible. That its admission was highly prejudicial follows from the character of this alleged testimony by which the essential element of the charge against the defendant would be established. By this incompetent testimony the State attempted to prove that the defendant himself

wrote the check, and himself forged the name of C. B. McDonald thereto; and which he thereafter uttered. The admission of this evidence was therefore erroneous.

The judgment of the Ouachita Circuit Court herein is reversed, and this cause is remanded for a new trial.

BATTLE, J., absent, and not participating.

DOUGLASS v. STATE.

Opinion delivered October 4, 1909.

1. VENUE—SUFFICIENCY OF PROOF.—The venue of a crime may be proved by circumstantial evidence, and need not be proved by direct evidence. Thus proof that a horse alleged to have been stolen ranged in a certain locality in the county when it was missed and that afterwards it was found in defendant's possession in the same county was sufficient to justify a finding that the horse was taken, driven or carried away in such county. (Page 495.)
2. SAME—BURDEN OF PROOF.—It is sufficient in a criminal case for the State to prove the venue by a preponderance merely of the evidence. (Page 495.)
3. LARCENY—POSSESSION AS EVIDENCE OF GUILT.—Proof that defendant had possession of stolen property, standing alone, raises no presumption of guilt, and is not sufficient to sustain a conviction of larceny. (Page 495.)
4. SAME—POSSESSION AS EVIDENCE OF GUILT.—Proof in a larceny case that defendant had possession of recently stolen property is evidence of his guilt; and when his possession is unexplained, the evidence of guilt is strengthened. (Page 495.)
5. SAME—POSSESSION AS EVIDENCE OF GUILT.—Where stolen property is found in the possession of the accused, and he claims title thereto, if he made the claim in good faith, he is not guilty of larceny; but if the explanation of his possession involves a falsely disputed indentity or is based on fabricated testimony, the inference of his guilt is strengthened, and his complicity in the larceny sufficiently established. (Page 495.)
6. NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—Newly discovered evidence that is of a cumulative character, or that tends to contradict certain testimony on the part of the State, is not sufficient ground for a new trial. (Page 497.)

Appeal from Miller Circuit Court; *George W. Hays*, Judge; affirmed.

Pratt P. Bacon, for appellant.

1. There is no proof that the horse was stolen in Miller County. Giving the evidence the strongest probative force, it only shows that the horse was in appellant's possession in Miller County for five months after it is alleged to have been stolen.

2. There is no proof of a larceny. No witness testified that appellant stole the horse from Paup; and, although there is proof that Paup lost a horse in May, the evidence of appellant and his witnesses is positive that appellant raised the animal in controversy from a small colt. 67 Ark. 155. Physical facts and the testimony are contrary to Paup's claim of ownership; but, if it be conceded that he owned the horse, there is still lacking any proof of felonious intent, a burden of proof which the State has not met. 32 Ark. 238; 60 Ark. 9; 68 Ark. 529; 85 Ark. 360; 34 Ark. 632.

3. In the interest of justice appellant ought to have been given an opportunity to show, by evidence newly discovered, that Paup had said before the trial that he did not know whether this was his horse or not.

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellee.

1. Venue may be proved by circumstantial evidence as well as by direct testimony. 3 Rice on Ev. 345; 4 Pa. 269; 29 Ark. 293; 62 Ark. 497.

2. The horse was taken from the range without authority from the owner. Afterwards appellant was found in possession of it. The burden was on appellant to prove his possession lawful. Possession of property recently stolen, if unexplained, is evidence tending to prove defendant's guilt. 55 Ark. 244; 34 Ark. 443. His claim of ownership is proof of intention to convert the horse to his own use. 79 Ark. 432.

3. Evidence newly discovered which is merely cumulative, or goes only to impeach the credibility of a witness, is not a ground for new trial. 66 Ark. 525; 74 Ark. 382; 72 Ark. 404; 40 Ark. 477; 47 Ark. 199; 55 Ark. 324; 45 Ark. 333.

FRAUENTHAL, J. The defendant, Cato Douglass, was tried upon an indictment charging him with the larceny of a horse; and the jury returned a verdict of guilty, and assessed his

punishment at one year in the penitentiary. He seeks a reversal of this conviction upon the following grounds: (1) because the venue was not proved; (2) because the evidence is not sufficient to sustain the verdict; and (3) because of newly discovered evidence.

The evidence tended to prove that the horse that the defendant is charged with having stolen was the property of W. M. Paup; that it was permitted to run on the range near what is called Clear Lake in Miller County, Arkansas, and that it was last seen at that place in May, 1908. Shortly after that there was an overflow in that portion of the county, and either just before or during the time of this overflow the horse disappeared. The overflow continued until July following, and the horse was next found in October or November, 1908, in the possession of the defendant, near the locality called Lost Prairie in Miller County, and about ten or twelve miles from the range where the horse had been accustomed to run. When found in the possession of the defendant, the mane of the horse had been cut off, his tail pulled out, and he had been altered, and branded dimly on the shoulder; and all this had been done after the horse had disappeared from the range in May. The defendant claimed to be the owner of the horse, and that he had owned him from the time he was foaled. A number of witnesses testified on the part of the State that the horse was the property of Paup, and had disappeared in May; and a number of witnesses testified on behalf of the defendant that the horse was the property of the defendant, and raised by him. One of the witnesses testified that when he discovered the horse in the possession of defendant in the fall of 1908 and told him in effect that it was Paup's horse, the defendant became angered at him, and made demonstration to fight him. It is not deemed necessary to give any further or in any detail the various facts and circumstances adduced in evidence; and the above only presents the general nature of the case made out against the defendant. The question as to whether the testimony relating to the claim of ownership made by defendant was *bona fide* or fabricated was peculiarly within the province of the jury to determine; and we cannot say that all the facts and circumstances adduced in evidence are not sufficient to sustain the finding of the jury against the defendant's claim of ownership and his good faith in making that claim.

It is urged by the defendant that the venue of the offense in Miller County is not proved. It has been held by this court that the venue of the crime may be proved by circumstantial evidence, and need not be proved by direct evidence; and it may be proved by a preponderance of the evidence. *Bloom* v. *State,* 68 Ark. 336; *Wilson* v. *State,* 62 Ark. 497; *Wilder* v. *State,* 29 Ark. 293.

The testimony in this case tends to show that the horse ranged in Miller County near Clear Lake when it was missed, and that afterwards it was found in the possession of the defendant about 10 to 12 miles distant in Miller County. This was sufficient evidence to justify a finding that the horse was taken, driven or carried away in Miller County.

It is contended on behalf of the defendant that there is not sufficient evidence to sustain the conviction herein for the reason that the evidence does not show a felonious and criminal intent on the part of the defendant. It is urged that the defendant claimed the property as his own, and, even if he was mistaken in that claim of ownership, his possession of the property would not be sufficient evidence of a criminal intent to steal. This is true if his claim of ownership was made in good faith. In order to constitute larceny, the taking must be done with felonious intent; the taking of the property and its possession is only a fact, and in itself it is not sufficient to raise a presumption of a guilty intent; and, standing alone, it would not be sufficient to sustain a conviction of larceny. *Mason* v. *State,* 32 Ark. 238; *Gooch* v. *State,* 60 Ark. 5; *Sutton* v. *State,* 67 Ark. 155; *Jones* v. *State,* 85 Ark. 360.

But the possession of property recently stolen does raise a presumption tending towards guilt, and is a link in the evidence against the accused; and when that possession is unexplained, it is a further link in the evidence of guilt against the accused to go to a jury for its consideration. *Boykin* v. *State,* 34 Ark. 443; *Blankenship* v. *State,* 55 Ark. 244; *Denmark* v. *State,* 58 Ark. 576; *Gunter* v. *State,* 79 Ark. 432.

When the stolen property is found in the possession of the accused, and he makes a distinct assertain of title and ownership thereto, it is evidence that he intended to convert the same to his own use and to deprive the owner thereof. If he makes an

explanation of his possession by claiming to be the owner thereof, then the question to be determined is whether such claim of ownership is made honestly and in good faith. If it is made honestly and in good faith, then, no matter how mistaken the accused may be, he would not have that felonious intent from which the larceny could be inferred. But, on the contrary, if the explanation of the possession and the claim of ownership of the property "involve a falsely disputed identity or is based on fabricated testimony, then the inference of his guilt is strengthened," and his complicity in the larceny is sufficiently established. *Shepherd* v. *State*, 44 Ark. 39; Wharton's Criminal Evidence, (8th Ed.) § 758.

In the case at bar the defendant claimed to own the horse and to have owned and been in possession of it from the time it was foaled; and he introduced a number of witnesses who testified in accord with him. If this testimony is true, the defendant is not guilty. But if this testimony is fabricated and false, then it not only sustains the contention of the State that the horse was owned by Paup, but it further sustains the contention that the defendant had the felonious intent to wrongfully convert the same to his own use and to deprive the true owner thereof. These witnesses appeared before the jury, and all the facts and circumstances of this case were detailed before them. It was peculiarly their province to pass upon these questions, and this they have done.

In the course of its instructions the lower court said to the jury:

"Gentlemen of the jury, if you find from the evidence in this case that this was the property of Mr. Paup, but that this party took this horse through an honest mistake, believing that it was his property, though you may believe that it was the property of Mr. Paup, then you should acquit the defendant."

The jury was the judge of the credibility of defendant and the witnesses who testified in his behalf. To their testimony the jury did not give credence. The jury must have found that the horse was the property of Paup; that the defendant took the horse and carried it away, and did not raise it as he claimed; that he did not take it through any mistake, but that he set up a false claim of ownership knowingly, and fabricated testimony to sustain that false claim.

We have examined the evidence, and we cannot say that there is not sufficient evidence to sustain that finding of the jury. It follows, therefore, that there is sufficient evidence to sustain the verdict.

It is contended by the defendant that since the trial of the cause he discovered certain evidence material to his defense. But this evidence is wholly and entirely cumulative to that introduced by him, or simply contradictory of certain testimony on the part of the State; and therefore it is not sufficient ground for a new trial. *White* v. *State,* 17 Ark. 404; *Wallace* v. *State,* 28 Ark. 531; *Campbell* v. *State,* 38 Ark. 498; *Walker* v. *State,* 39 Ark. 221; *Redman* v. *State,* 40 Ark. 445; *Foster* v. *State,* 45 Ark. 328; *Hudspeth* v. *State*, 55 Ark. 324; *Maxey* v. *State,* 66 Ark. 523; *Jones* v. *State,* 72 Ark. 404.

A great number of witnesses appeared and testified in this case, both on the part of the prosecution and of the defense. Every fact and phase of the case was testified to by numerous witnesses, and this alleged newly discovered evidence could shed no further light on the case. The defendant has had a full and fair trial, and we cannot say that the verdict of the jury is not sufficiently sustained by the evidence.

Judgment affirmed.

BATTLE, J., not participating, absent.

WALKER v. STATE.

Opinion delivered October 4, 1909.

1. CONTINUANCES—DISCRETION OF COURT.—Continuances are largely in the discretion of the court, and that discretion will not be controlled unless there is a manifest abuse of it. (Page 501.)
2. SAME—WHEN DISCRETION OF COURT NOT ABUSED.—An application for continuance in a criminal case upon the ground that the applicant was confined in jail, and that on account of the sickness of his attorney he was unable to prepare his defense, was properly denied when he failed to show wherein he was unable to prepare his defense. (Page 501.)
3. HOMICIDE—CURING ERROR BY REDUCTION OF PUNISHMENT.—Where the trial court in a murder case arbitrarily refused to grant a change of

venue asked by defendant upon the ground that the court knew that defendant could get a fair trial in the county, and the defendant was convicted of murder in the second degree and sentenced for twenty-one years upon undisputed testimony showing that he was guilty of that degree of murder, whatever prejudice there was in the refusal to grant a change of venue will be removed by giving defendant the lowest punishment for murder in the second degree. (Page 501.)

4. SAME—QUOTIENT VERDICT—WHEN ERROR CURED.—Where the jury in a murder case, having fixed the degree of punishment, determined the number of years of punishment by lot, the error may be cured by remitting so much of the punishment as exceeds the minimum punishment fixed by law. (Page 502.)

Appeal from Monroe Circuit Court; *Eugene Lankford,* Judge; affirmed with modification.

Thomas & Lee, for appellant.

1. Under the conditions shown in this case, and the positive proof of the defendant's sickness prior to and at the time of the trial, the consequent inability to prepare for trial and the danger to his health, it was manifest abuse of discretion to deny his motion for a continuance and to force him into trial. 9 Cyc. 188; *Id.* 96; 71 Ga. 481; 38 Ga. 50; 29 Ga. 271; 80 Ill. 236; 78 Ill. 212; 100 Ky. 194; 34 La. Ann. 100; 1 Bay (S. C.) 1; 53 S. W. 623; 14 Tex. App. 129; 14 Cent. Dig. Tit. "Criminal Law," § 1316; 3 Am. & Eng. Enc. of Law, 813; 60 Ark. 564; 78 Ark. 228; 85 Ga. 281; 32 Ga. 443; 88 Mo. App. 50.

2. Appellant's motion for a change of venue was in due form as prescribed by law. The court erred in overruling it without hearing evidence touching the credibility of the supporting witnesses. 25 Ark. 445; 54 Ark. 243; 68 Ark. 476; Kirby's Dig. § 2318; 85 Ark. 536; 83 Ark. 36; 76 Ark. 279.

3. The verdict was by lot, which is a ground for new trial; and the affidavit of jurors was proper to show that it was decided by lot. Kirby's Dig., § 2422, subdiv. 3; 24 Am. Rep. 808 and note; Thompson on Trials § 2602; 59 Ark. 132.

4. It was error to refuse an instruction to the effect that if the evidence raised a reasonable doubt as to whether at the time of the shooting the defendant was under reasonable apprehension that deceased intended to inflict upon him great bodily harm and that he fired in self-defense, the jury should acquit.

Sackett on Instructions to Juries, 472; 74 Ill. 230. To justify a conviction in a criminal case, the evidence of guilt must be clear, abiding, and fully satisfying the minds and conscience of the jury. Strong suspicion, or strong probability even, of guilt is not sufficient. 45 Ark. 544.

5. The evidence of Oliver Stevens as to matters about which deceased and the wife of defendant were talking, in absence of the latter, was incompetent. 75 Ark. 218.

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellee.

1. From the time the indictment was returned to the time of the trial, there was ample opportunity for defendant to prepare for trial. His present counsel had been employed in his defense since the first week of the term. Sickness of one member of the firm, and engagement of the other member on business in another court, was not a sufficient showing for a contiuance. 9 Cyc. 171 and cases cited; *Id.* 172 and cases cited; 99 Ga. 446. The court heard the testimony as to the condition of appellant's health. While there was some conflict, it cannot be said that there was any abuse of discretion in his decision that defendant was physically able to stand trial. The court was the proper judge of this testimony. 71 Ark. 62; 70 Ark. 364; 40 Ark. 114.

2. There was no sufficient notice of the intention to apply for a change of venue. Kirby's Dig. § 2318.

3. We confess error as to the verdict, in this: the defendant's punishment was decided by lot. But the jury fairly arrived at their verdict as to the degree of the crime. The punishment should be reduced to five years' imprisonment, and the judgment modified accordingly and affirmed. 66 Ark. 270.

HART, J. Joe Walker was indicted by the grand jury of Monroe County for the crime of murder in the first degree. He was tried before a jury, and found guilty of murder in the second degree, his punishment being assessed at a term of 17 years in the State penitentiary. He has duly prosecuted an appeal to this court.

On the 20th day of April, 1909, the defendant, Joe Walker, shot and killed Tom Walker in Monroe County, Arkansas. The weapon used was a shotgun, loaded with No. 2 buckshot. About

a week before the killing occurred, the defendant had some hard words with his wife in regard to his correcting her son, Oliver Stephens. On account of their trouble about her boy, who was ten years old, the defendant's wife moved away from his house. The deceased and Joel Stephens at her request assisted her in moving. On the morning of the killing, the defendant went to the place in the neighborhood where his wife had removed to visit her. When he went in, he heard Tom Walker say to her that she need not be afraid of anybody. He spoke to them both. Tom Walker then went out on the fence, and sat there awhile. He then stepped back and sat down on a log in front of the house. While in the house he was told that Tom Walker was going to kill him. The defendant stayed in the house about one and one-half hours. The facts in regard to the killing as testified to by the defendant are as follows:

"I picked up my gun, told the chaps goodbye, kissed her and the chaps, too: told her I wanted her to come back home; walked out of the house on the steps; turned short off to go just like I come; didn't want any trouble with Tom or any one else. Tom said, 'Come here, Joe; I want to see you a minute.' I said, 'All right.' Of course I didn't know but what he wanted to apologize to me for the way he had treated me; started on out there; started to set down on the log with him, and he said, 'You needn't bring your God d—n gun here, you God d—n son of a bitch.' He got up; probably he made a step or so coming toward me with his knife in his hand. 'You God d—n son of a bitch, I ain't afraid of you.' I just put my gun up that way and fired; didn't put it to my shoulder. When I fired, he fell back over the log, turned on his left side. I looked at him; didn't know where it hit him; thought he was going to get up. He turned over. I went back the way I come. Went to where Bob Connell was in the field; told him what had occurred; didn't go home at all. Then went to the sheriff and surrendered."

Defendant further testified that Tom Walker was about 10 feet away when he was shot. That he raised up off the log, made one step forward in a stooping position, and then the gun was fired and blew him back over the log.

The defendant's stepson, Oliver Stephens, was the only other person who saw the killing. He was a witness for the

State, and detailed the circumstances leading up to the killing substantially the same as the defendant. He testified that Tom Walker was sitting on the log whittling when he was shot, and then fell over the log backwards.

Counsel for defendant first assigns as error the refusal of the court to grant their motion for a continuance. It is well settled that continuances are largely in the discretion of the court, and that discretion will not be controlled unless there is manifest abuse of it. *Rucker* v. *State,* 77 Ark. 23; *Puckett* v. *State,* 71 Ark. 62, and cases cited.

The motion for a continuance in this case sets up that the killing occurred on the 24th day of April, 1909; that the defendant immediately surrendered himself into custody, and was placed in jail, where he remained until the date of trial; that the circuit court convened on the 24th day of April, 1909; that he was indicted for murder in the first degree, and on the 12th day of May, 1909, the case was set for trial on May 26, 1909; that since the killing the defendant has been confined in jail, and has been sick most of the time; that during a part of the time one of his attorneys has been sick, and the others are occupied with business engagements made prior to their employment in this case; that on this account proper preparation for the defense could not be made.

Testimony was introduced and heard by the court in support of his motion, and by the State to controvert the testimony in regard to defendant's sickness. It was not shown in what manner defendant was not able to prepare his defense. It is not shown that he failed to procure or name to his counsel any witness whose testimony was material to the defense. Only one eyewitness saw the killing, and he testified at the trial. The defendant testified in his own behalf, and admitted the killing. It is not shown that he was deprived of any evidence which might possibly have secured him an acquittal, and we can not say the court abused its discretion in not granting his motion for a continuance.

Counsel for defendant next insist that the court erred in not granting their motion for a change of venue. They contend that the court arbitrarily refused to grant the motion, upon proper application therefor, and that the refusal falls within the rule announced in *Ward* v. *State,* 68 Ark. 466, and other cases in

this court, where it is held that it is error arbitrarily to refuse to grant a change of venue asked by the defendant upon the ground that the court knows that defendant can get a fair and impartial trial in the county.

No prejudice could have resulted to the defendant from the refusal of the court to grant his motion for a change of venue; for, according to the undisputed testimony in the case, which is above abstracted, he was guilty of murder in the second degree. See *Duncan* v. *State,* 49 Ark. 550. As the judgment will be modified to the extent of giving him the lowest punishment therefor for the reason hereinafter given, no prejudice resulted to him. *Jones* v. *State,* 88 Ark. 579; *Warren* v. *State;* 88 Ark. 322; *Hamby* v. *State,* 72 Ark. 623.

Counsel for defendant complains that the court erred in not giving certain instructions asked by them on the subject of reasonable doubt and the appearance of danger. It is not necessary to set out these instructions or to discuss them for these questions were fully covered by other instructions given by the court.

Counsel for defendant also complains that Oliver Stephens was permitted to detail a conversation had between the deceased and the wife of the defendant in the absence of the defendant. An examination of the record does not bear out their contention, but expressly shows that he was not permitted to detail the conversation, but only to state that on the morning of the killing the deceased came to where his mother was staying to see her about a rent note.

The record shows that the jury found the defendant guilty of murder in the second degree, but that they decided his term of imprisonment by lot. The Attorney General confesses that this was error, but urges that this did not affect the finding of the jury that the defendant was guilty of murder in the second degree, and furnishes no reason why the verdict in that respect should be set aside. The Attorney General asks that the precedent made in the case of *Williams* v. *State,* 66 Ark. 264, a precisely similar case, be followed, and that the sentence be remitted to 5 years, the lowest punishment for murder in the second degree. Because the defendant might have been prejudiced by this method of arriving at the term of imprisonment, this will be done.

It is therefore ordered that the judgment be modified, so as to allow the sentence to stand for 5 years' imprisonment only, and that the judgment so modified be affirmed.

CHOWNING v. STATE.

Opinion delivered October 4, 1909.

1. ASSAULT WITH INTENT TO KILL—INTENT.—To constitute the crime of assault with intent to kill, under Kirby's Digest, § 1588, a specific intent to take the life of the person assaulted must be shown. (Page 505.)
2. CRIMINAL LAW—DRUNKENNESS AS DEFENSE.—Where offenses can be committed only by doing a particular thing with a specific intent, it may be shown that at the time of doing the thing charged the accused was so drunk that he could not have entertained the intent necessary to constitute the crime. (Page 505.)
3. ASSAULT WITH INTENT TO KILL—DRUNKENNESS AS DEFENSE.—To a charge of assault with intent to kill it is a good defense that the accused was so drunk that he could not have entertained the necessary intent. (Page 505.)

Appeal from Cross Circuit Court; *Frank Smith,* Judge; reversed.

STATEMENT BY THE COURT.

The appellant was convicted of the crime of an assault with intent to kill one Joe Lewellen. The evidence for the State tended to support the verdict. The evidence for appellant tended to show that at the time of the assault appellant was under the influence of intoxicating liquor to such an extent as to be incapable of forming the specific intent to take the life of Lewellen. Appellant testified that "he remembered getting drunk, but lost consciousness, and knew nothing about his fight with Lewellen."

The court among other instructions gave the following:

"2. The crime of assault to kill is committed when one person assaults another under such circumstances that, had death resulted from the assault, the person committing the assault would have been guilty of the crime of murder in either the first or

murder in the second degree. It becomes necessary, therefore, that the crime of murder and its degrees be defined to you."

"8. A specific intent to kill is not necessary to constitute the crime of murder in the second degree under our statute, the law being that the intention to drink may fully supply the place of malice aforethought. So that, if one voluntarily become too drunk to know what he is about, then, without provocation assaults and beats another to death, he commits murder the same as if he was sober."

The court refused the following: "If you find and believe from the evidence that the defendant was intoxicated to that extent that he was not conscious of what he was doing, being drunk to the extent that he could have no specific intent to kill, under the law he would not be guilty of murder in either the first or second degree. He therefore could not be guilty of an assault to kill."

The appellant duly excepted to the ruling of the court in giving and refusing the above prayers.

J. C. Brookfield and *J. T. Patterson,* for appellant.

The specific intent to kill is a material element of the crime of assault with intent to kill, and proof of such specific intent cannot be dispensed with. If defendant at the time of the assault was too drunk to know what he was doing, he was incapable of forming such specific intent. Instructions 2 and 8 were therefore erroneous. 54 Ark. 283; 49 Ark. 156; 1 Bishop's New Crim. Law, 9th Ed., § 53; *Id.* § 398.

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellee.

1. When a plea of drunkenness is set up as a defense, the burden of proof is on the defendant to establish that plea. 40 Ark. 511. In this case the circumstances, testimony of the witnesses and the finding of the jury are contrary to appellant's plea. Their verdict should stand.

2. The second instruction has been approved by this court. 34 Ark. 275. The eighth instruction is correct. One can only be convicted of assault to kill when he would have been guilty of murder had death resulted. It was necessary to instruct as to what constitutes murder. Kirby's Dig., § 1557; 76 Ark. 286.

WOOD, J., (after stating the facts). The instructions were misleading. To constitute the crime of an assault "with intent to murder or kill" under the statute (Kirby's Dig., § 1588) a specific intent to take the life of the person assaulted must be shown. See *Lacefield* v. *State,* 34 Ark. 275; *Scott* v. *State,* 49 Ark. 156; *Chrisman* v. *State,* 54 Ark. 283. It takes both the "evil intent and the simultaneous resulting act" to complete a crime of this nature. 1 Bish., Crim. Law § § 729-30-31-35.

Where the offense can be committed only by doing "a particular thing with a specific intent, it may be shown that at the time of doing the thing charged the accused was so drunk that he could not have entertained the intent necessary to constitute the crime." *Chrisman* v. *State, supra; Wood* v. *State,* 34 Ark. 341.

In *Byrd* v. *State,* 76 Ark. 286, which the Attorney General cites to sustain the ruling of the court, we held that, "if one voluntarily becomes too drunk to know what he is about, and then without provocation assaults and beats another to death, he commits murder in the second degree, just as if he was sober."

But the case is not applicable here for the reason that it was a case of murder in the second degree, and there may be cases of murder in the second degree where no specific intent to kill is shown. As Judge RIDDICK says: "No specific intent to kill is necessary to constitute the crime of murder in the second degree under our statute." "To commit murder (in the second degree) one need not intend to take life, but to be guilty of an attempt to murder he must so intend. It is not sufficient that his act, had it proved fatal, would have been murder." 1 Bishop, Cr. Law, § 730.

The court erred in its charge. The judgment is therefore reversed, and the cause is remanded for new trial.

BROOKS *v.* STATE.

Opinion delivered October 4, 1909.

1. PERJURY—INSTRUCTION.—Where the undisputed evidence in a perjury case showed that the alleged false matters sworn to were material, failure of the court to instruct the jury that the alleged false evidence

must be shown to be not only false but also material to the issue was not error. (Page 508.)

2. SAME—MATERIALITY OF TESTIMONY.—Where there is no dispute about the facts sworn to, the question of materiality is for the court. (Page 509.)

3. SAME—CORROBORATION—INSTRUCTION.—Where the uncontradicted testimony in a perjury case shows that there was testimony corroborating the prosecuting witness as to some particular false statement, the failure of the court to tell the jury that there must be corroborating evidence was not prejudicial. (Page 509.)

Appeal from Sebastian Circuit Court, Fort Smith District; *Daniel Hon,* Judge; reversed as to Stewart, affirmed as to Brooks.

STATEMENT BY THE COURT.

Appellants were convicted on separate indictments in the Sebastian Circuit Court of the crime of perjury. The indictments charged in apt language that Hallie Stewart was on trial before the police court of the city of Fort Smith for the offense of using a room for immoral purposes, *i. e.,* with having used the room with one Wm. Brent for purposes of prostitution, and that the police court had jurisdiction. It was alleged that the perjury consisted in appellants swearing falsely that Grant Brooks was not at the room on the night when it was alleged that Hattie Stewart and Wm. Brent used the same for immoral purposes; that Grant Brooks did not see Wm. Brent and Hallie Stewart together in the room; that Grant Brooks did not knock Hallie Stewart down at her room on that night, and that Grant Brooks did not have a difficulty with Wm. Brent at her room that night.

The testimony of L. F. Fishback, the police judge, shows that appellants were witnesses in the case against Hallie Stewart pending before him, that they were duly sworn, and testified to the facts as alleged in the indictments. He further testified that Hallie Stewart had a wound on the bridge of her nose just between the eyes, that her eyes were swollen and discolored.

Eliza Brent testified: I am the wife of Wm. Brent. On Monday morning, March 20, 1909, I heard that my husband and Grant Brooks had had some kind of a difficulty on the Saturday night before. I went to Schulte's stable, and got one of the men to show me Grant Brooks. Brooks told me the trouble between him and my husband was over a crap game. I insisted

that it was not over a crap game, but over Hallie Stewart, and he said that if I wanted him to tell me the truth he would do so; that my husband was at Hallie Stewart's house on Saturday night, and she sent for him; when he got there she had on a gauze shirt and a pair of drawers, and Wm. Brent was just putting on his clothes.

Wm. Brent testified as follows: I was at Hallie Stewart's room on Saturday night, March 19, 1909. Grant Brooks came into the room where we were. At the time Grant Brooks came into the room Hallie Stewart was putting on her clothes. Brooks knocked Hallie Stewart down and took a swing at me, but did not hit me.

The appellants were each witnesses in their own behalf. Hallie Stewart testified: I know Wm. Brent and Grant Brooks. I was arrested on the 21st of March, 1909, upon the charge of having used a room for immoral purposes with Wm. Brent. I was charged with using it on the night of March 19. I was tried in police court on March 23, and testified in my own behalf. I said, in the police court, that Wm. Brent was not at my room on the night we were charged with having used the room for the purpose of prostitution; that Grant Brooks did not knock me down on that night; that Grant Brooks and Wm. Brent did not have a difficulty at my room on that night over me. Wm. Brent was not at my room on the night in question, nor was Grant Brooks. Grant Brooks did not see us in my room together; they did not have any difficulty there over me, and Grant Brooks did not knock me down that night. I wore smoked glasses on the day of my trial, and had been wearing them a few days before. I had fallen over some material that was being used in building the new cracker factory, and received the cut where this scar is (indicating). The cut was on my nose and nearly between the eyes. My eyes were discolored from my fall, and not from a blow given me by Grant Brooks nor any one else.

Grant Brooks testified: I was summoned as a witness, was sworn and testified in the police court of Fort Smith on the 23d of March, 1909, in a cause against Hallie Stewart, charged with using a room for the purpose of prostitution. I said I was not at Hallie Stewart's room on the night she was charged with using it for the purpose of prostitution with Wm. Brent; that I

did not see Hallie Stewart and Wm. Brent in her room together; that I did not knock her down that night in her room; that I did not have a difficulty with Wm. Brent over her that night in her room; that I had not been in her room for two months before the time I was testifying; that I had had no trouble with Wm. Brent for about four years.

The court read to the jury section 1968, Kirby's Digest, which provides: "Perjury is the wilful and corrupt swearing, testifying or affirming falsely to any material matter in any cause, matter or proceedings, before any court, tribunal, body corporate or other officer having by law authority to administer oaths;" and gave the following:

"2. If the jury finds from the evidence beyond a reasonable doubt that the defendant in the Fort Smith District of Sebastian County, within three years next before the finding of the indictment, was sworn as a witness in the police court of the city of Fort Smith, and after being sworn gave the evidence set out in the indictment, and that said evidence was false, and that the defendant at the time of giving said evidence knew it to be false, and testified to same wilfully and corruptly, knowing that it was false, you will find the defendant guilty.

"3. You are further instructed that if you find that the defendant gave the testimony set out in the indictment which is alleged to be false, the same is to be taken and considered by the jury as true until overturned by evidence which shows it to be false and which satisfies your minds of its falsity beyond a reasonable doubt."

The causes for convenience were on the motion of the parties and by consent consolidated and tried at the same time, and are so presented here.

Edwin Hiner, for appellants.

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellee.

WOOD, J., (after stating the facts.) There was no error in the instructions. The first instruction was a definition of perjury in the language of the statute. The second instruction did not tell the jury that the alleged false evidence must not only be shown to be false, but also material to the issue. This, how-

ever, was not necessary upon the undisputed facts of this record. For, if the alleged false evidence was given, it follows as matter of law that at least a part of it was material to the issue. The charge against appellants in the police court was using a room for prostitution. It was therefore material as to whether Wm. Brent was occupying the room with Hallie Stewart on the night alleged. Where the undisputed evidence shows that the alleged false matters sworn to were material, it is not error to fail to instruct that such matters must be material to the issue. See *State* v. *Nees,* 47 Ark. 553. There being no dispute about the facts sworn to, the question of materiality was for the court. *Grissom* v. *State,* 88 Ark. 115.

Appellants' counsel contends that the third instruction is erroneous because it fails to tell the jury that appellants could not be convicted upon the uncorroborated testimony of one witness.

In *Thomas* v. *State,* 51 Ark. 138, this court announced the rule as follows: "On a trial for perjury, the oath of the defendant which is charged to have been false is to be considered equal to that of a credible witness. One witness is sufficient to prove what he swore, but not to establish its falsity; and where there is only one accusing witness, his testimony must be corroborated, not merely as to slight or immaterial circumstances, but as to some particular false statement. See *Grissom* v. *State, supra.*

But where the uncontradicted testimony shows that there was corroborating evidence as to some particular false statement, the failure of the court to tell the jury that there must be corroborating evidence is not prejudicial error.

It is also urged that the evidence is not sufficient to sustain the verdict.

This contention is well taken as to appellant Hallie Stewart, but not as to Grant Brooks. We have set forth the evidence in detail in the statement, and a close scrutiny of it fails to disclose any corroboration of the testimony of the witness William Brent to the effect that he was with Hallie Stewart in the room on the night that it was alleged that the room was used for immoral purposes. The testimony of Brent was the only evidence that he was in the room of Hallie Stewart that night except the statement of Grant Brooks. But the statement of Grant Brooks can not be taken as evidence against Hallie Stewart.

As to appellant Brooks, however, the testimony of Eliza Brent tending to prove that he admitted being at Hallie Stewart's on the night alleged, and admitted seeing Wm. Brent there and having a fight with him, is sufficient corroboration of the testimony of Wm. Brent that he saw Grant Brooks at the room of Hallie Stewart on the night mentioned, and is sufficient corroboration of the testimony of Wm. Brent as to the falsity of the testimony of Brooks to the effect that he was not at the room of Hallie Stewart on the alleged night and did not see Brent there. The judgment as to Hallie Stewart is therefore reversed, and the cause as to her is remanded for new trial.

The judgment as to Grant Brooks is affirmed.

GREEN v. STATE.

Opinion delivered October 4, 1909.

1. HOMICIDE—PREVENTION OF FELON'S FLIGHT.—It is only where killing is the only means of preventing the escape of a felon that his slayer is held in law to be justified. (Page 512.)
2. SAME—MANSLAUGHTER—INSTRUCTION.—An instruction in a murder case to the effect that if defendant had no intention of killing deceased, an escaping felon, but shot to make him stop, and the shooting was done in a careless and reckless manner, the jury should find him guilty of involuntary manslaughter, was not objectionable as meaning that, even if it was necessary to kill the felon in order to prevent his escape, yet, if defendant fired the shot without intending to kill him, but did so carelessly, he was not justifiable; especially where the ambiguity in the above instruction was cured by another given by the court. (Page 512.)

Appeal from Union Circuit Court; *George W. Hays,* Judge; affirmed.

Patterson & Green, for appellant.

The state of facts proved by the appellant constitutes a complete justification for the killing, whether it was done intentionally or unintentionally. The deceased had committed a felony and was escaping, and defendant was authorized by law, with or without a warrant of arrest, to prevent his escape, if possible, and to slay him if in the pursuit he could not overtake him.

Kirby's Dig., § 2120; 43 Ark. 99, 105. As to the degree of proof to show justification or excuse, see 59 Ark. 3799; 69 Ark. 177. And on the weight of the evidence this court should reverse this case. 34 Ark. 632.

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellee.

1. The verdict of the jury will not be disturbed unless there is a total lack of evidence to support it. 21 Ark. 305; 24 Ark. 251; 82 Ark. 218; 70 Ark. 512.

2. Under the evidence it was the duty of the court to instruct on all degrees of homicide. 74 Ark. 262; 52 Ark. 273. There is no error in the instructions; but, if there had been, appellant cannot avail himself of them, because, while he objected to each, he saved no exceptions. 73 Ark. 407; 74 Ark. 335.

McCULLOCH, C. J. Appellant was tried on an indictment charging him with the crime of murder, and was convicted of involuntary manslaughter, and sentenced to the penitentiary for a period of one year. He killed one Minor Killgore, and admits the killing, but seeks to justify it. The evidence tends to establish the following circumstances attending the homicide:

Appellant came upon Killgore in a field of weeds, attempting to have carnal intercourse forcibly with his (appellant's) niece, a little girl about twelve years of age. Appellant was first attracted by the child's screams, and when he came upon the couple Killgore sprang up and ran away. Appellant hallooed several times for him to halt, and when at a distance of about forty yards he fired a shot which struck Killgore in the back of the head, immediately producing death.

This is appellant's own version of the tragedy, and it is supported by other testimony corroborating him as to the attempt on the part of deceased to ravish the child. He stated on the witness stand that he did not take deliberate aim, and that it was not his intention to kill Killgore at the time he fired the shot, but that he fired only to stop him and bring him to justice. It is earnestly insisted by counsel for appellant that the evidence is not sufficient to sustain the verdict; but, after careful consideration, we are of the opinion that the verdict should not be disturbed on that account. The evidence warranted a finding by the jury that, though the deceased had committed a felony, and

appellant was within the line of his duty as a private citizen in attempting to arrest him, yet the killing was unnecessary. The jury had a right to apply their judgment to the facts presented, and say by their verdict whether it was reasonably necessary for appellant to shoot in order to prevent Killgore's escape. A felon's flight does not justify his pursuer in killing him unless that is necessary to prevent escape. Reasonable care should be exercised by one placed in such a situation, either as an officer or a private citizen, to prevent the escape of a felon without doing personal violence; and it is only where killing is necessary to prevent the escape of the felon that the slayer is held in law to be justified. *Carr* v. *State,* 43 Ark. 99.

It is insisted that the court erred in giving the following instruction: "11. The court tells the jury that if they believe from the evidence beyond a reasonable doubt that the defendant, Ben Green, shot Minor Killgore with a pistol as alleged in the indictment and killed him, but at the time he fired the pistol shot he had no intention of killing the deceased, but shot only to make the deceased stop, and the shooting was done in a careless and reckless manner, the jury will find him guilty of involuntary manslaughter and assess his punishment at imprisonment in the State penitentiary for a period not exceeding twelve months."

This instruction is criticised on the alleged ground that the jury might have understood it to mean that, even if the circumstances were such that it was necessary to slay the fleeing felon in order to prevent his escape, and appellant had a right to do so, yet, if appellant fired the shot without any intention to inflict a death wound and did so carelessly, then he would not be justifiable, but would be guilty of involuntary manslaughter. In other words, the contention is that this instruction is susceptible of the meaning that, even if it was necessary to kill the felon in order to prevent his escape, yet, if appellant fired the shot without any intention of killing him, but did so carelessly, he was not justifiable. We do not think that this instruction is open to that construction. But, if there were any doubt as to its true meaning, the same must have been, in the minds of intelligent jurors, completely removed by the following instruction which was given at appellant's request:

"3. The jury are instructed that if a felony be committed and the felon fly from justice, it is the duty of every man to

use his best endeavors for preventing the felon's escape; and if in the pursuit the felon be killed, when he cannot be otherwise overtaken, the homicide is justifiable. And if you find from the evidence in this case that Minor Killgore, the deceased, had committed rape upon Odie May Killgore, or had assaulted said Odie May Killgore, with the intent to commit rape, and that defendant, Ben Green, detected said Minor Killgore in the commission of said rape or the attempt thereof, and that said defendant then and there killed said Minor Killgore in an attempt to arrest him, you will acquit the defendant, provided you further find from the evidence that said killing was necessary to prevent the escape of said Minor Killgore."

We find nothing in the record that would justify us in disturbing the verdict.

Judgment affirmed.

TATE v. STATE.

Opinion delivered October 4, 1909.

WITNESS—IMPEACHMENT.—A witness for the defense in a case of larceny of several hogs may be impeached by showing that he had made an inconsistent statement as to his and the defendant's conduct immediately after the hogs were killed, as the evidence does not tend to contradict the witness upon a collateral matter.

Appeal from Jefferson Circuit Court; *Antonio B. Grace,* Judge; affirmed.

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellee.

1. Defendant's witness, Tillman, had testified to a state of facts incompatible with the statements made by him in his conversation with Durden, which was overheard by the witness Kelly. Tillman on cross examination specifically denied having had such conversation, and Kelly's testimony in rebuttal was properly admitted to impeach him. 68 Ark. 544; 67 Ark. 598; 47 Ark. 70; 24 Ark. 620; 15 Ark. 359.

2. There was evidence to support either contention as to the ownership of the pigs. The jury's verdict is conclusive upon this court that appellant did not own them, but knowingly stole them. 73 Ark. 407; 67 Ark. 537; 65 Ark. 257; 76 Ark. 326.

McCULLOCH, C. J. Defendant, Mose Tate, was convicted of hog stealing, and appeals to this court. He and Willis Tillman, Will Lasky and George Robinson were jointly indicted for the crime, and he was tried separately and convicted. The evidence shows that the parties named killed several pigs owned by one Bannister Tate, and carried them to defendant's home and converted them to their own use. The pigs were killed in the woods near Bannister Tate's home. There is no controversy about the fact of these parties killing and carrying away the pigs; but defendant contends that he owned them. The evidence was conflicting on this issue, but it was sufficient to sustain the finding of the jury that Bannister Tate owned the hogs, and that these parties killed them with the knowledge that they did not belong to defendant Mose Tate and with the felonious intent to deprive the owner of his property.

Aside from the question as to the sufficiency of the evidence raised in the motion for new trial, the only assignment of error is as to the ruling of the court in permitting witness Kelly in rebuttal to testify concerning a conversation between Willis Tillman, some time after the pigs were stolen, and Will Durden, a State's witness, who was nearby in the woods and saw these parties shoot the pigs. Witness Kelly testified that Will Durden asked Tillman why they ran off when they (Durden and one Golden) fired a gun, and that Tillman replied: "We heard some turkeys in the woods, and thought that we would go down there and see if we could kill one." The foundation for the contradiction of Tillman was properly laid. He was asked while on the witness stand if he had not made that statement to Will Durden, and denied that he had done so. He was accused of this crime in the same indictment, and was a witness in behalf of the defendant. He gave a contradictory account of the conduct of the parties immediately after the hogs were killed, by saying that they put the pigs in sacks and rode over to defendant Mose Tate's home. This statement made to Durden gives another account as to what they did, and was admissible for the purpose

of impeaching the credibility of Tillman as a witness. It is not an attempt to contradict the witness on a collateral matter, as the conduct of these parties immediately after shooting the pigs, when they discovered Durden and Golden in the woods, was under investigation for the purpose of ascertaining the intent with which they killed the pigs—whether they killed them in good faith, believing them to be the property of defendant Mose Tate, or whether they did so with the criminal intent to deprive the true owner of his property.

Judgment affirmed.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY v. MCNAMARE.

Opinion delivered June 28, 1909.

1. VENUE—RIGHT TO CHANGE OF.—Under Kirby's Digest, § 7998, providing that "where the plaintiff shall have instituted suit in a county other than that of his residence, or of the county where the occurrence of which he complains took place, unless compelled to do so to get service on the defendant, the defendant shall have the right to a change of venue upon presentation of his petition duly verified," a defendant in a civil case is entitled as matter of right to a change of venue where his application therefor, duly verified, shows that the suit was not brought either in the county in which plaintiff resided at the time the suit was commenced or in the county in which the occurrence complained of took place, and it is unnecessary that such application should be supported by the affidavits of two credible witnesses, as required in other cases. (Page 518.)
2. CONFLICT OF LAWS—EXTRATERRITORIAL EFFECT OF REMEDIAL STATUTE.—Under Rev. Stat. Mo., § 2865, providing for a survival of a cause of action "whenever the death of a person shall be caused by a wrongful act, neglect or default of another," a cause of action originating in that State may be enforced in the courts of this State. (Page 521.)
3. MASTER AND SERVANT—VALIDITY OF REGULATION.—The act of Missouri of February 28, 1907 (Laws Mo. 1907, p. 181), requiring all railroads "to fill or block all switches, frogs or guard rails," etc., is not unconstitutional in providing that contributory negligence on the employee's part shall not be a defense. (Page 523.)
4. SAME—VALIDITY OF REGULATION OF INTERSTATE COMMERCE.—The act of Missouri of February 28, 1907 (Laws Mo. 1907, p. 181), requiring

railroads to fill or block all switches, frogs or guard rails, etc., is not, in so far as it relates to interstate commerce, in conflict with any act of Congress on that subject, and is valid until Congress legislates on the same subject. (Page 524.)

Appeal from Marion Circuit Court; *Brice B. Hudgins,* Judge; reversed.

STATEMENT BY THE COURT.

This is an action by Ruth E. McNamare, widow of F. McNamare, against the St. Louis, Iron Mountain & Southern Railway Company to recover damages for alleged negligence in killing her husband while in the employment of said railway company.

The material facts upon which the suit is based are as follows: On the 18th day of February, 1908, plaintiff's husband was in the employment of the defendant as a brakeman on one of its freight trains, running from Cotter, Arkansas, to Crane, Missouri. On said date one of the defendant's freight trains, upon which her said husband was a brakeman, was running north on defendant's railroad at or near Melva, Missouri, and the conductor ordered her husband, who was in the rear of said train, to walk over the cars and notify the engineer to head in on a switch in the yards at Melva for the purpose of allowing a passenger train to pass. In obedience to the order, McNamare went forward and notified the engineer. The engineer, instead of heading into the switch, went to the other end of it for the purpose of backing into it. It was the duty of McNamare to assist in operating the switch. For that purpose, as the engine approached the switch stand, he jumped off of it. His foot was caught in an unblocked frog or guard rail, and was held so firmly that he could not unloose it so as to get out of the way of the train. The train ran over him, severing his legs from his body, which resulted in his death. In getting off of the engine he jumped on the side next to the switch, instead of on the opposite side, as he was required to do by the rules of the company.

There was a jury trial and verdict for the plaintiff in the sum of $7,500.

From the judgment entered on the verdict the defendant has appealed.

E. B. Kinsworthy, S. D. Campbell and *Thos. T. Dickinson*, for appellants.

1. The statutes of Missouri are penal statutes, and are so dissimilar to the statutes of Arkansas relating to wrongful death and survival of action, and so against the policy of our laws, that this action cannot be maintained in our courts. 60 Pac. 747; 84 Mo. 679; 16 S. W. 487; 174 Mo. 225; 52 Fed. 371; 18 Kans. 46; 98 Mass. 85; 46 Fed. 269; 143 Mass. 301; 67 Vt. 76; 25 Oh. St. 667; 9 S. W. 540; 64 Oh. St. 133; 72 Md. 144; 5 L. R. A. 364; § § 2864-5 Rev. St. of Mo.; Laws of Mo., 1905, p. 135; *Id.* Laws 1907, p. 181, 252; Kirby's Dig., § § 6289, 6290; 64 Oh. St. 133; 7 Am. Dec. 467; 69 Id. 740; 105 Am. St. 820; 14 *Id.* 344; 71 Ark. 258; 32 *Id.* 120; 70 *Id.* 494.

2. The statutes of Missouri are contrary to the constitutions of Missouri and the United States, and "the public policy" of the United States as declared by Congress and the judicial department. Const. of Mo., art 2, § § 10, 30; *Id.* art. 4, § 53; 111 S. W. 500; Const. U. S., 5th amend., § 1, art 1, § § 8, 10. Congress has entered the field of exclusive jurisdiction and legislation as to interstate commerce matters, and state statutes are void. 6 Fed. Stat. An. 752-756; *Ib.* 1907 Supp., pp. 68-69, Employers Liability Act, etc.; 117 N. W. 686; 111 S. W. 500; 207 U. S. 463.

3. Defendant was entitled to a change of venue. Kirby's Dig., § § 7096-8; 81 Ark. 499.

4. The place where the injury occurred was not a *yard,* divisional or terminal point, and the act did not require blocked or filled frogs therein. 110 Mo. 286; 101 Mich. 599; 152 U. S. 145, 150; 57 Ark. 377; 149 Ind. 172; 57 Fed. 145; 110 Mo. 317.

5. McNamare was injured through his own contributory negligence; he assumed the risk and violated the rules of the company with which he was familiar, hence there can be no recovery. 41 Ark. 542; 46 *Id.* 569; 61 *Id.* 549; 57 *Id.* 461; 63 *Id.* 427; 106 Mo. 74; 110 *Id.* 395.

6. The courts of this State are without jurisdiction to render judgment for death occurring in Missouri. Authorities *supra;* 84 Mo. 679; 54 Am. Rep. 105; 16 S. W. 487; 97 Am. St. 553; 52 Fed. 371; 79 Ark. 62; 26 Am. Rep. 742; 18 Kans. 46; 98 Mass. 85; 60 Pac. 747; 174 Mo. 225; 215 Ill.

47; 46 Fed. 268; 67 Vt. 76; 147 Mass. 301; 20 Am. St. 461; 83 *Id.* 739; 5 L. R. A. 364; 32 Ark. 120; 70 *Id.* 494.

Jones & Seawel and *Hamlin & Seawel,* for appellee.

1. The right of action is given by section 2865, and the measure of damages is governed by section 2866, as amended by act of 1907, Rev. St. of Mo., 1905, p. 155, etc.: 67 Mo. 272; 78 *Id.* 195; 69 *Id.* 536; 98 *Id.* 74; 155 *Id.* 610; 173 *Id.* 654; 91 *Id.* 509; 97 *Id.* 253; 106 *Id.* 74; 109 *Id.* 518; 90 *Id.* 403; 94 *Id.* 286. The damages are compensatory and not penal. Cases *supra* and 75 Mo. App. 535; 80 *Id.* 93; 178 Mo. 528; 94 *Id.* 286. This is the doctrine held in Arkansas. 62 Ark. 254; 76 *Id.* 362; 67 *Id.* 295; 71 *Id.* 445; 50 *Id.* 155; 87 Ark. 65; 103 U. S. 11; Minor, Conflict of Laws (1901), § 200; 56 L. R. A. 193 and notes.

2. The statute is constitutional, and is not a regulation of interstate commerce. The United States "Employers Liability Act" was not in force when the injury occurred. 207 U. S. 463; 77 Ark. 483; 86 Ark. 412; 128 U. S. 96; 86 Ark. 246; 129 U. S. 34; 68 L. R. A. 168; 169 U. S. 613; 80 Ark. 404; 115 U. S. 463; 26 Cyc. 980-1230.

3. The petition for change of venue was properly refused. It was properly supported, and plaintiff was a resident of Marion County. 54 Ark. 243; 71 *Id.* 180; 76 *Id.* 276; 80 *Id.* 360; 74 *Id.* 172; 83 *Id.* 38; 86 Ark. 357.

4. It was a question of fact whether or not the place of accident was a *yard,* and the verdict was conclusive. 78 Ark. 28; 67 *Id.* 426; 65 *Id.* 426; 85 *Id.* 221. The act requires all * * * frogs, etc., to be filled or blocked whether in yards or on their *roads.*

5. The doctrine of assumed risk and contributory negligence are unavailing under the statute. 122 Mo. App. 227-233; 37 C. C. A. 499; 48 L. R. A. 68; 46 Mo. App. 266; 73 Mo. 219; 112 S. W. 985; 29 Cyc. 622.

HART, J., (after stating the facts.) 1. Counsel for appellant assign as error the action of the court in refusing to grant it a change of venue. In its petition for a change of venue appellant states "that it verily believes that it cannot obtain a fair and impartial trial in this, Marion County, on account of the undue prejudice against the petitioner in said county. It further says the plaintiff is not a resident of Marion County, Arkansas,

but is a resident of the State of Missouri; that her cause of action, if any she has, and the occurrence of which she complains did not take place in Marion County, Arkansas, but occurred in the State of Missouri, and plaintiff was not compelled to institute her suit in Marion County in order to get service on the defendant;" and ends with a prayer to grant it an order changing the venue of this case to some other county in the State of Arkansas, against which there was no valid objection, and for all other proper relief.

The facts are that appellee came to Marion County after the suit was brought, a few weeks before the date of the trial, and resided there at the time of the trial. At the time her husband received the injury complained of, they resided at the town of Cotter, in Baxter County, Arkansas, through which county appellant's line of railroad also extended. The injury complained of occurred in the State of Missouri. The action was not commenced in the county of the plaintiff's residence nor in the county where the occurrence she complains of took place, and it was not necessary to bring the suit in Marion County in order to get service on the appellant. Hence, upon presentation of its petition duly verified, appellant was entitled as a matter of right to a change of venue.

We will quote the two sections of our statutes relative to the question: Section 7996 provides: "Any party to a civil action, trial by jury, may obtain an order for change of venue therein by a motion upon a petition stating that he verily believes that he cannot obtain a fair and impartial trial in said action in the county in which the same is pending on account of the undue influence of his adversary, or of the undue prejudice against the petitioner, or his cause of action, or defense, in such county. The petition shall be signed by the party and verified as pleadings are required to be verified, and shall be supported by affidavits of at least two credible persons to the effect that affiants believe that the statements of the petitioner are true.

Section 7998: "Upon presenting the petition, which may be resisted, and notice to such judge, he may make an order for the change of venue in such action if, in his judgment, it be necessary to a fair and impartial trial, to a county to which there is no valid objection, which he concludes is most conven-

ient to the parties and their witnesses; provided, that, in case where the plaintiff shall have instituted suit in a county other than that of his residence, or of the county where the occurrence of which he complains took place, unless compelled to do so in order to get service on the defendant, the defendant shall have the right to a change of venue upon presentation of his petition duly verified."

The language, "upon presenting the petition, which may be resisted," plainly contemplates the petition duly verified and the supporting affidavits. This is so for the reason that it provides for a resistance, which could not be done, and which would not be necessary to be done, unless a petition for change of venue duly verified and with supporting affidavits, as required by the statute, had been filed. In short, there would be nothing to resist unless the requirements of section 7996 had been complied with.

The proviso contained in the latter part of section 7998 is a limitation upon the preceding part of the section. Where the conditions contained in the proviso exist, they defeat the operation of the first part of the section. In other words, the proviso conditionally limits the operation of the statute relative to a change of venue. It provides that when the conditions exist the change of venue shall be granted as a matter of right upon presentation of the petition duly verified. If the Legislature had intended that the supporting affidavits should accompany the petition as a prerequisite to the granting of a change of venue, it would have used the language "upon presentation of his petition duly verified together with the supporting affidavits." But the expression of the one excludes the use of the other.

In the case of *St. Louis Southwestern Railway Co.* v. *Furlow*, 81 Ark. at p. 499, the court said: "The statute plainly means that if the plaintiff commences an action in a county other than that of his residence, or other than that of the county in which this occurrence of which he complains took place, unless he is compelled to do so in order to get service on the defendant, the latter shall have the right to a change of venue upon presentation of his petition in proper form, duly verified, containing allegations of the statutory grounds of prejudice or undue influence and supported by the affidavits of two credible witnesses." The use of the words, "and supported by the affidavits of two credible

witnesses," used by the court, was not necessary to a proper determination of the issue under consideration, and the views we have expressed in the present case are in harmony with the rest of the opinion.

2. Appellee alleges in her complaint that she is entitled to maintain this action under section 2864 of the Revised Statutes of Missouri (1899). Counsel for appellant contend that section 2864 is penal in its character, and that the courts of one jurisdiction will not enforce the penal statutes of another. The allegations of the complaint do not state a cause of action under section 2864, but do state a cause of action under section 2865 of the Revised Statutes of Missouri.

"The right of action given in section 2864 is for a death caused by the negligence of the servant operating the defendant's instrument of transportation, whether it be a locomotive, car, train of cars, steamboat, its machinery, stage coach, or other public conveyance, while the right of action given in the two sections next following is for a death caused by the negligence of the defendant, which may mean his own negligence, as for instance, in furnishing an unsafe vehicle, or it may mean his negligence through his servant in some particular other than the particular specified in section 2864, for which, if the person injured had not died, he would have had a cause of action." *Casey* v. *Transit Co.*, 205 Mo. 721; *Crohn* v. *Kansas City Home Telephone Co.* (Mo. App.), 109 S. W. 1068.

The complaint in this case alleges that the death of McNamare was caused by the negligence of appellant in failing to block its frogs and guard rails as required by the act approved February 28, 1907. See Laws of Missouri, 1907, p. 181. Hence it states a cause of action under section 2865, and not under 2864, of the Missouri Revised Statutes.

Section 2865 does not create a new cause of action, but simply transmits one that theretofore existed, and would have ceased to exist upon the death of the injured party but for its provisions. *Strottman* v. *St. Louis, I. M. & S. Ry. Co.*, 211 Mo. 227.

Section 2865, Revised Statutes of Missouri, 1899, is as follows: "Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled

the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured."

It will be seen that the recovery permitted by this statute, giving a right of action for death by wrongful act, is not a penalty inflicted by way of punishment, but is merely compensatory for the damages sustained by the widow to whom under the Missouri statutes the right of action was transmitted on the death of her husband.

It is well settled that an action under such statutes may be maintained in another State having a statute substantially similar in import and character. *St. Louis, I. M. & S. Ry. Co.* v. *Haist,* 71 Ark. 258, and numerous cases cited in note to the case of *Raisor* v. *Chicago & Alton Ry. Co.,* on page 806 of 2 Am. & Eng. Ann. Cases. Counsel for appellant urges upon us that the statutes are not substantially similar in their character. As we have already shown, the statute of Missouri under which the suit was brought is similar to ours in that it is not a suit for a penalty, but for damages as compensation; and also that it does not create a new cause of action, but simply provides for the survival of the cause of action where death ensues. There is no objection that the right of action is enforced by the widow as provided by the laws of Missouri, instead of by the personal representative for the benefit of the estate and for the beneficiaries of the deceased, as provided by our statutes. In *Dennick* v. *Railroad Company,* 103 U. S. 11, the United States Supreme Court said of a similar action: "It is indeed a right dependent solely on the statute of the State; but when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we can not see why the defendant may not be liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here. It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is statutory right or a common-law

right. Whenever, by either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties." To the same effect see *Boston & M. R. Co.* v. *McDuffey,* 79 Fed. 934. Therefore, we are of the opinion that under the principles above declared the suit can be maintained in this State.

3. It is next contended that the act approved February 28, 1907 (Laws of Missouri, 1907, p. 181), is unconstitutional. The act reads as follows:

"Sec. 1. That all companies or corporations, lessees or other persons owning or operating any railroad or part of railroad in this State are hereby required, on or before the first day of September, nineteen hundred and seven (1907), to adopt, put in use and maintain the best known appliances or inventions to fill or block all switches, frogs and guard rails on their roads, in all yards, divisional and terminal stations, and where trains are made up, to prevent, as far as possible, the feet of employees or other persons from being caught therein. Any company or corporation, lessees or other person, owning or operating any railroad or part of a railroad in this State, who shall fail to do any act or thing in this section required to be done, or shall cause any act or thing not to be done, or shall aid or abet any such omission, shall be deemed guilty of a violation of this law, and shall forfeit and pay the sum of ten ($10.00) dollars for every such offense, and each day shall constitute a separate and distinct offense. At every term of a court of record of this State having criminal jurisdiction, the judge thereof shall direct and charge grand juries to make special inquiry as to violation of this law.

"Sec. 2. When any employee or other person shall be injured, maimed or killed by reason of the noncompliance with the provisions of this act, then in any action for damages which may be instituted against any railroad company, corporation or lessee for such injuring, maiming or killing proof of contributory negligence or carelessness on the part of any employee or other person so injured, maimed or killed shall not relieve such railroad company (corporation) or lessee from liability."

Counsel first urge that the act is unconstitutional because it takes away the defense of contributory negligence from the

railroad company, and thereby deprives it of its property without due process of law. The rule on that subject as laid down by Mr. Elliott is as follows: "There are many modern statutes requiring the performance of specified acts and denouncing a penalty against persons who fail or refuse to perform the designated acts. In some of the books it is suggested that the doctrine of contributory negligence does not apply where the injury is caused by a violation of the statute. The overwhelming weight of authority is, however, that the doctrine does apply, unless the statute abrogates the rule of the common law. Principle and authority, as we believe, require the conclusion that, although the violation of a statute may give a right of action to one who is injured thereby, it does not, unless expressly or by necessary implication so declared, give a right of action to one who is himself guilty of contributory negligence." 3 Elliott on Railroads, § 1315. See, also, 2 Labatt, Master and Servant, § § 951 and 952; *Quackenbush* v. *Wis. & Minn. Rd. Co.*, 62 Wis. 411. Here the act expressly deprives the railway company of the defense of contributory negligence. The policy of the law on which the defense is excluded is that it is in the nature of a penalty for the neglect of the railroad company to comply with a regulation of the Legislature deemed necessary for the lives of its employees. We are of the opinion that such acts fall within the police power of the State, and are within the scope of legislative authority.

Again it is urged by counsel for appellant that Congress by act of April 22, 1908, has assumed jurisdiction over injuries to employees engaged in interstate commerce, and that such jurisdiction is exclusive.

In the case of *Chicago, Rock Island & Pacific Rd. Co.* v. *State,* 86 Ark. 412, this court held that the Arkansas statute requiring railroad companies to equip certain freight trains with at least three brakemen, insofar as it relates to interstate commerce, is not in conflict with any act of Congress on that subject, and is valid until Congress legislates on the same subject. The court, speaking through Chief Justice HILL, said: "There is no direct interference with the legislation of Congress relied upon by the act in question. Each may stand; each covers its own field; and there is no apparent ground of conflict possible in the operation of the two acts, for they do not reach the precise subject-matter."

So in the present case it may be said that Congress has not required railroad companies engaged in interstate commerce to fill or block all switches, frogs and guard rails on their roads or in their yards, and there is no conflict, therefore, between the act now under consideration and the act of Congress of April 22, 1908, commonly known as the Employers' Liability Act.

4. Counsel for appellant also contend that the court erred in submitting to the jury the question whether the place where McNamare received the injuries which resulted in his death was a yard on appellant's line of railroad, and urges that the court should have declared as a matter of law under the evidence adduced that such place was not a yard, within the meaning of the act of Missouri of February 28, 1907, above quoted. The case seems to have been tried on the theory that the act does not contemplate that all switches, frogs and guard rails on the road shall be filled or blocked, but that only such as are in yards, divisional and terminal stations and where trains are made up fall within the provisions of the act. Inasmuch as the question of filling or blocking frogs, switches and guard rails on all parts of the road may arise on a new trial of the case, and for the reason that neither the Supreme nor Appellate Courts of the State of Missouri have to our knowledge construed the act, we will refrain from considering this assignment of error.

5. Other assignments of error are urged upon us for our consideration, but they are upon questions of evidence and on the improper remarks of counsel in their argument to the jury, and they need not arise on a retrial of the cause. Hence we will not now consider them.

For the error in not granting appellant a change of venue as indicated in the opinion, the judgment will be reversed, and the cause remanded for a new trial.

MCCULLOCH, C. J., (concurring). I concur in the judgment of reversal, because I think the trial court erred in hearing evidence as to the existence of the grounds for change of venue set forth in the petition, and in overruling the petition. But I do not concur in that part of the opinion which holds that "where the plaintiff shall have instituted suit in a county other than that of his residence, or of the county where the occurrence of which he complains took place, unless compelled to do so in order to

get service on the defendant," the change may be granted on presentation of a verified petition without supporting affidavits. I think the statute means that under such circumstances the petition must be verified, and must also be supported by the affidavits of at least two credible persons, as provided in section 7996 of Kirby's Digest, but that the grounds of the petition cannot be inquired into. This was what we stated in *St. Louis S. W. Ry. Co.* v. *Furlow,* 81 Ark. 496, to be the proper construction of the statute.

Section 7996 of Kirby's Digest provides in general terms what a party shall do in order to obtain a change of venue, and it requires the supporting affidavits of at least two credible persons. Section 7381 of Sandels & Hill's Digest, which was amended by the act of April 13, 1899, reads as follows:

"Upon presenting the petition and notice to such judge, he shall make an order for the change of the venue in such action to a county to which there is no valid objection, which in his judgment is most convenient to the parties and their witnesses."

Now, the only change wrought in the law by the act of 1899 is to allow the grounds stated in the petition to be inquired into by the court except in cases where the plaintiff improperly institutes the action in a county other than that of his residence or where the injury complained of occurred; and it is clear to me that the Legislature did not intend to change the form or substance of the petition, or to relieve the petitioner from the necessity of presenting supporting affidavits to his petition in order to show the good faith of his allegations that he "verily believes that he cannot obtain a fair and impartial trial of said action in the county in which the same is pending." My opinion is that the Legislature only intended to make the petition and the supporting affidavits of credible persons conclusive as to the existence of grounds for a change of venue, where the plaintiff has instituted an action in the wrong county, the same as the law stood as to all actions before the passage of the act.

The language of the act of 1899 fully bears out my construction. It begins with a declaration that "upon presentation of the petition, which may be resisted," etc., the court or judge shall make the order for a change if in his judgment it be necessary

to obtain a fair trial. What is meant by the word "petition" as thus used? Surely not a bare petition, without supporting affidavits; for section 7996, which is neither amended nor repealed, expressly provides that the petition must be accompanied by supporting affidavits. Now, if the Legislature used the words "presentation of the petition" in the beginning of this section without intending to dispense with the necessity for supporting affidavits, then it is reasonable to suppose that there was no intention, in using the words "presentation of the petition duly verified" in the concluding part of the section, to dispense with the requirement for supporting affidavits.

I think that in actions instituted in a county other than that of the plaintiff's residence, and other than the county where the injury complained of occurred, unless compelled to do so in order to get service of summons, the act of 1899 made no change in the requirements at all, and in such cases the defendant must still, as before, present a petition duly verified by affidavit, and supported by the affidavits of at least two credible persons. The inquiry of the court is then limited to the ascertainment whether or not the supporting affiants are credible persons; and if they are found to be such, the change of venue must be granted as a matter of course.

PITCOCK v. STATE.

Opinion delivered July 12, 1909.

1. CONTEMPT—EVASION OF SERVICE OF WRIT.—Where a party to a suit in equity, after receiving actual notice of the issuance of a writ of injunction therein, evaded the service of the writ and violated the injunction, he will be held to have been in contempt of court if the court possessed jurisdiction of the cause. (Page 533.)
2. SAME—DISOBEDIENCE OF WRIT ERRONEOUSLY ISSUED.—If a court had jurisdiction of the parties and subject-matter of the cause of action in which an injunction was issued, the fact that the injunction was erroneously and improvidently issued does not excuse disobedience upon the part of those who were bound by its terms. (Page 533.)
3. JUDGMENTS—NECESSITY OF JURISDICTION.—Where the pleadings in a case show on their face that the court is wholly without jurisdiction of

the subject-matter set forth therein, any preliminary order made or final judgment rendered is void. (Page 533.)

4. STATE—WHEN SUIT HELD TO BE AGAINST.—A suit the purpose of which is to restrain an attempted breach by the Penitentiary Board of a contract alleged to have been entered into by such board on behalf of the State whereby convict labor should be furnished to the plaintiff is in effect a suit against the State, and cannot be maintained. (Page 534.)

5. SAME—SUIT AGAINST OFFICERS.—Where the pleadings show that a suit is in effect against the State, though nominally against certain State officers, the trial court had no jurisdiction, and a temporary restraining order issued by it will be quashed on certiorari. (Page 538.)

Certiorari to Pulaski Chancery Court; *John E. Martineau,* Chancellor; reversed.

Hal L. Norwood, Attorney General, and *James H. Harrod,* for petitioner.

1. Where an injunction is issued without authority of law, that is, in a matter over which the court had no jurisdiction, no one can be punished for disobeying it. 43 Ark. 63. Under the laws of this State no court has jurisdiction to grant a temporary injunction unless (1) it is specially authorized by statute; or (2) it affirmatively appears from the complaint that the plaintiff is entitled to the relief demanded, and that the acts sought to be restrained would, if committed, cause great or irreparable injury. Kirby's Dig., § 3965. Before a temporary restraining order can be granted to prevent the violation of a contract, the contract must be free from doubt. High on Inj., § 695. The complaint on its face shows that it is a suit against the State, and is ruled by 123 U. S. 443. It does not show that plaintiff would suffer great or irreparable injury. High on Inj., § 35.

2. If the injunction was legally issued, petitioner could not be held to have violated it. Unless notice has been given of intention to apply for an injunction, it, when issued, must be indorsed on the summons and served by the sheriff. Kirby's Dig., § § 3982, 3983. Mere verbal notice is not sufficient. The law provides that notices must be in writing, and how served. Kirby's Dig., § § 6267-8. However, petitioner's testimony is *undisputed* that he had given the order to bring the prisoners in *before* counsel spoke to him over the telephone.

Murphy, Coleman & Lewis, for respondent.

If the complaint in the case of *Arkansas Brick & Manufacturing Company* v. *Pitcock* was such that the court had the power to hear and determine the allegations therein, it had jurisdiction to issue the injunction. This court has expressly held that the lower court had jurisdiction in such cases. 70 Ark. 588. See also 1 Black on Judgments, § 215; 34 Ark. 110.

When the court upon a hearing of the complaint and in the exercise of its discretion decides that a temporary restraining order should go, it is the duty of the party against whom the injunction was issued to obey it. He has his remedy, if it is improvidently issued, to apply to the court itself to dissolve it or modify its terms, and he cannot on his own motion disobey the injunction and then purge himself of contempt by claiming that the court had no jurisdiction to issue the order. High on Inj., § 847; Bailey on Jurisdiction, § 3041, p. 336; 78 Ark. 266; 9 N. Y. 263; 232 Ill. 402; 114 N. W. 628; Bailey on Jur., § § 2, 3, 4; 10 Am. & Eng. Enc. of L. 1105; 25 Mo. App. 639; 144 Fed. 284; 143 Fed. 375; 62 Fed. 826.

2. If a party is informed of the application for an injunction, it is not necessary that he have notice that the injunction has actually issued. Kirby's Dig., § 3984; High on Injunctions, § § 852, 853; 144 Fed. 1011; *Id.* 279.

McCULLOCH, C. J. Certiorari to the chancery court of Pulaski County to review and quash the judgment of that court adjudging petitioner, J. A. Pitcock, to be guilty of contempt in disobeying an injunction.

On January 14, 1909, the Arkansas Brick & Manufacturing Company, a corporation, instituted suit in the Pulaski Chancery Court against appellant J. A. Pitcock, superintendent of the Arkansas State Penitentiary, and Geo. W. Donaghey, Governor of the State, O. C. Ludwig, Secretary of State, Hal L. Norwood, Attorney General, Jno. R. Jobe, Auditor of State, and Guy B. Tucker, State Commissioner of Mines and Agriculture, composing the Board of Commissioners of the Arkansas State Penitentiary, to restrain them from violating an alleged contract which had been entered into between them and the plaintiff for furnishing to the latter of the labor of State convicts. It is alleged in the complaint that on February 3, 1899, a written con-

tract was duly entered into between the Arkansas Chair Factory, a corporation, and the superintendent and financial agent of the State Penitentiary, with the approval of said Board of Commissioners, whereby the convicts of the State were hired to said corporation at price of fifty cents per day for each man worked, for a period commencing on that day and ending January 1, 1909; that, according to the terms of said contract, it was agreed that forty able-bodied convicts were hired for the first year, and as many thereafter as needed, not exceeding two hundred; that the board should furnish all necessary buildings to be used under the contract (except certain ones specified), and also clothe and feed the convicts; that prior to July 31, 1899, said Arkansas Chair Factory, with the consent of said board, assigned said contract to plaintiff; that on the last-named date said contract was by mutual consent of the parties amended so as to permit the working of convicts by plaintiff outside of the walls of the Penitentiary in manufacturing, agriculture, railway building and other pursuits, and that said board should furnish to plaintiff three hundred able-bodied men on demand of the plaintiff after January 1, 1900, and that plaintiff should work not less than one hundred men at all times; that plaintiff complied with its part of the contract, and at great expense prepared to work said convicts; that the Board of Commissioners complied with said contract except that after January 1, 1901, they failed to furnish the number of convicts required by the contract, and only furnished a far less number; that since the first day of January, 1900, and up to the time of the commencement of this suit, the plaintiff has continuously demanded from said board the amount of convict labor called for by said contract, but that the board and superintendent at various times and under various pretexts failed to furnish the amount of labor so demanded, but that in each instance, when the requisite number were not furnished on demand, said Board of Commissioners represented to the plaintiff that it would subsequently make good the deficit thus caused by furnishing to said plaintiff such an amount of convict labor as to make it receive eventually the aggregate number of convicts called for by said contract, and that "in each instance the said superintendent and board expressly promised to make good said deficit and adopted resolutions to this effect, which were spread

at length upon the minutes of said board, and the plaintiff could not other than rely upon said representations and promises, and for this reason it accepted the same;" that, "in reliance upon said representations and promises of the board and believing that the State would carry out its contract with it in all respects, it was induced to make the large expenditures hereinbefore stated, which were absolutely necessary in order to prepare the proper facilities for making it profitable to the plaintiff to use the amount of labor due it under said contract, and which it fully expected would eventually be furnished to it;" that the said members of the Board of Commissioners, pretending to act as the Board of Penitentiary Commissioners, had on the 14th day of January, 1909, made and were about to enforce a resolution in substance declaring said contract to be at an end and directing the superintendent of the Penitentiary to withdraw all convicts from the premises and works of the plaintiff and place them on the State farm or within the walls of the Penitentiary.

It is further alleged in the complaint "that the Board had no authority in law to make said pretended order, and that the same is null and void; that the said board had no authority to take the said convicts from the plaintiff until the balance of the convict labor due to the plaintiff, as aforesaid, has been furnished to the plaintiff in full; that the said resolution was passed, not because of any default on the part of the plaintiff in carrying out the terms of said contract, and not because the board does not acknowledge the violation of said contract on its part as herein alleged, but solely on the ground that the board pretends to possess the arbitrary power of withholding said labor from the plaintiff on the theory that the State is not amenable to any legal proceeding against it, and that the members of the board can shield themselves by this protection in favor of the State."

The prayer of the complaint is as follows: "Premises considered, the plaintiff prays that a temporary restraining order be made, restraining the defendants, and each of them, from taking any action looking to the withdrawal of the convicts now in its possession, and particularly from taking from plaintiff's brick works any of the men now engaged in labor therein, and requiring said Board of Penitentiary Commissioners, and the super-

intendent of said Penitentiary, to carry out the terms of the agreement hereinbefore set forth—that is, to require said board and superintendent of the Penitentiary to furnish the plaintiff a sufficient number of able-bodied convicts to repay it for the labor of the convicts so withheld, withdrawn and taken from it by the Board of Commissioners as set forth herein. Plaintiff prays that upon the final hearing a decree be entered as above prayed, and that the said order of the board directing the superintendent to take away from the plaintiff the convicts now held by it, and refusing to carry out the terms of the agreements before stated, be declared null and void."

It will be seen from the foregoing statement of facts that the contract, dated February 3, 1899, as amended on July 31, 1899, is the same contract which was the subject of litigation in the case of *McConnell* v. *Ark. Brick & Mfg. Co.*, 70 Ark. 568, and it is so pleaded in this action, it being alleged that the contract had, by the Pulaski Chancery Court, and by the Supreme Court on appeal, been adjudged to be valid and enforceable.

Upon the filing of said complaint, the same was presented to the chancellor at chambers, and he at once granted a temporary injunction in accordance with the prayer of the complaint, restraining said members of the Board of Commissioners and the superintendent of the Penitentiary from withdrawing said convicts. The injunction was duly issued by the clerk after execution of the bond by plaintiff in accordance with the statute and the order of the chancellor, and immediately served on all the members of the board; but the sheriff was unable to serve same upon appellant Pitcock until Monday morning, January 18, 1909. He was, however, duly notified of the issuance of the injunction by the sheriff, and by one of the attorneys for the plaintiff in a conversation over the telephone, immediately after the issuance of the injunction, and before he removed the convicts.

Immediately after the adoption of the resolution by the Board of Penitentiary Commissioners, and regardless of the notice to him of the issuance of the injunction, Pitcock set about complying with the resolution, and within the succeeding three days withdrew all convicts from the plaintiff's works and premises, and returned same to State convict farm and to the walls of the Penitentiary.

Upon the affidavit filed by the plaintiff setting forth the issuance and violation of said injunction, Pitcock was cited by the chancellor to appear and show cause why he should not be punished for contempt, and upon a hearing he was adjudged by the chancery court to be in contempt on account of having violated said injunction, and a fine of $500 was imposed upon him. The record has been brought here by writ of certiorari to review the action of the chancery court in adjudging Pitcock to be in contempt and imposing the fine upon him.

It is earnestly insisted on behalf of appellant that the evidence introduced at the hearing does not sustain the finding of the chancellor that appellant was informed of the issuance of the writ of injunction prior to the service on him on January 18, 1909, or that he had violated the injunction after being notified thereof. We are convinced, however, from a careful consideration of the testimony adduced at the hearing, that Pitcock, after receiving actual notice of the issuance of the injunction, evaded the service of the writ by the sheriff, and intentionally violated its terms by withdrawing the convicts from the premises and works of said plaintiff, pursuant to the resolution adopted by the Board of Penitentiary Commissioners. Actual notice of the issuance of the injunction, without formal service of the writ upon him, was sufficient to put him in contempt of the court by violating the terms of the writ, if the court possessed jurisdiction of the cause. Kirby's Dig. § 3984; 1 Joyce on Injunctions §§ 247-249, 251; High on Injunctions §§ 352, 353. We therefore treat as settled the fact that appellant Pitcock intentionally violated the injunction; and the only remaining question is whether or not the court had jurisdiction, for it is well settled that errors of the court in issuing an injunction cannot be taken advantage of by one who has violated the injunction.

If the court had the jurisdiction of the parties and subject-matter of the cause of action in which the injunction was issued, the fact that it was erroneously and improvidently issued does not excuse disobedience on the part of those who are bound by its terms. *Meeks* v. *State,* 80 Ark. 579.

In considering this question, the distinction must not be overlooked between the violation of a preliminary injunction

preserving the *status quo of* the subject-matter of the litigation during the pendency thereof, and the final decrees of courts requiring the parties to do or not to do the things enjoined upon them by such decrees. In the latter cases, if the decree was rendered without jurisdiction, it can be disobeyed with impunity, for no one owes obedience to a void decree, as it is without any force whatever. "A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it and all acts flowing out of it are void. The parties attempting to enforce it may be responsible as trespassers." *Rankin* v. *Schofield,* 81 Ark. 463. On the other hand, a court possesses the power of hearing and determining the question of its jurisdiction, and may, while so doing, require the parties to preserve the status of the subject-matter. *United States* v. *Arredondo,* 6 Pet. 709; *United States* v. *Shipp,* 203 U. S. 563. However, when the pleadings show on their face that the court is wholly without jurisdiction of the subject-matter set forth therein, any preliminary order made or final judgment rendered is void. *Williford* v. *State,* 43 Ark. 62.

It becomes necessary, therefore, to inquire as to the alleged cause of action set forth in the complaint—whether any cause of action is set forth at all, and, if so, whether or not it falls within the jurisdiction of the chancery court.

The complaint alleges in substance that the State of Arkansas, acting through its authorized officers and agents, entered into a written contract with the plaintiff's assignor for the hire of convicts, that the said contract was subsequently assigned to plaintiff and amended in writing, and also was subsequently amended by a verbal promise and undertaking of the Board of Penitentiary Commissioners, which was duly entered in writing on the minutes of the board, to the effect that the deficit in the number of convicts called for in the contract to be furnished to the plaintiff should be made good, so that the plaintiff should receive the aggregate amount of convict labor specified in the contract. In other words, the complaint sets forth an alleged contract entered into with the Penitentiary Board, evidenced partly by the original and amended writings, and partly by the

minutes of the board, to furnish the aggregate amount of convict labor provided for in the written contract. These allegations can only be construed to mean that the board agreed to continue to furnish convict labor to plaintiff until the aggregate amount specified in the contract should be supplied. The only difference between this case and that of *McConnell* v. *Ark. Brick & Mfg. Co., supra,* is that the latter was a suit to prevent an attempted rescission and breach of the written contract of February 3, 1899, as amended in writing on July 31, 1899, while the present suit is one to restrain an attempted breach of said amended contract as further amended subsequently by the alleged additional agreement of the Penitentiary Board, entered on the minutes thereof, to make good the deficit in the aggregate amount of convict labor agreed to be furnished. The contract and each of the alleged amendments thereto were based on the same character of consideration, viz: the mutual undertakings of the contracting parties. The present suit, as was the McConnell case, is plainly one to restrain an attempted breach by the Penitentiary Board of a contract alleged to have been entered into by that board for the State of Arkansas whereby convict labor should be furnished to the plaintiff; the question at issue in each of the cases being whether or not the contract was a valid and subsisting one, and whether such suit was one against the State.

The first and only question necessary for us to determine in this case is whether or not this is a suit against the State; for, if it is, then the chancery court was wholly without jurisdiction to proceed, and all orders and judgments attempted to be rendered therein were void. *In the matter of Ayres,* 123 U. S. 443. A sovereign State cannot be sued except by its own consent; and such consent is expressly withheld by the Constitution of this State. Art. 5, § 19.

The question whether a suit is one against a State is not necessarily determined by reference to the parties to the record. If the State is the real party in interest, though only its officers and agents are parties, then it is in effect a suit against the State, and falls within the rule of prohibition. *Poindexter* v. *Greenhow,* 114 U. S. 270; *Hagood* v. *Southern,* 117 U. S. 52; *In the matter of Ayres,* 123 U. S. 443; *Pennoyer* v. *McConnaughy,* 140 U. S. 1; *Fitts* v. *McGehee,* 172 U. S. 516; *Farmers*

National Bank of Hudson v. *Jones*, 105 Fed. 459; *Louisiana* v. *Jumel*, 107 U. S. 711.

In *Fitts* v. *McGhee, supra,* Mr. Justice Harlan, speaking for the court, said: "As a State can act only by its officers, an order restraining those officers from taking any steps, by means of judicial proceedings, in execution of the statute of February 9, 1895, is one which restrains the State itself, and the suit is consequently as much against the State as if the State were named as a party defendant on the record. If the individual defendants held possession of, or were about to take possession of, or to commit any trespass upon, any property belonging to or under the control of the plaintiffs, in violation of the latter's constitutional rights, they could not resist the judicial determination, in a suit against them, of the question of the right to such a possession by simply asserting that they held or were entiled to hold the property in their capacity as officers of the State."

In *Farmers Nat. Bank* v. *Jones, supra,* Judge Caldwell said: "As a State can perform its functions through officers and agents only, it was soon perceived that, if these officers and agents of the State were liable to be sued and coerced to comply with the judgments and decrees of a Federal court, the whole scope and purpose of the amendment would be nullified. * * * It is now settled that the jurisdiction in such cases is dependent upon the real, and not the nominal, parties to the suit, and it is now clear, both upon principle and authority, that a suit against the officers of a State to compel them to do acts which would impose a contractual pecuniary liability upon the State, or to issue any evidence of debt, in the name of the State, which would have that result, is in fact and legal effect a suit against the State, though the State itself is not named a party on the record."

In the Ayres case, *supra,* Mr. Justice Matthews, speaking for the Supreme Court of the United States, said: "A bill, the object of which is, by injunction, indirectly to compel the specific performance of the contract by forbidding all these acts and doings which constitute breaches of the contract, must also, necessarily, be a suit against the State. In such a case, though the State be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of

its contract, the suit is still, in substance, though not in form, a suit against the State."

And again, in the same case, it is said: "Where the contract is between the individual and the State, no action will lie against the State, and any action founded upon it against defendants who are officers of the State, the object of which is to enforce its specific performance by compelling those things to be done by the defendant which, when done, would constitute a performance by the State, or to forbid the doing of those things which, if done, would be merely breaches of the contract by the State, is in substance a suit against the State itself, and equally within the prohibition of the Constitution."

In actions against officers of the United States, the same principle has been announced. *Belknap* v. *Schild,* 161 U. S. 10; *Minnesota* v. *Hitchcock,* 185 U. S. 373; *International Postal Supply Co.* v. *Bruce,* 194 U. S. 601; *Naganab* v. *Hitchcock,* 202 U. S. 473.

In *Belknap* v. *Schild, supra,* which was a suit filed against Belknap, a commodore in the United State Navy and commandant of the United States Navy Yard at Mare Island, California, to restrain him from using caisson gates which, it is charged, were an infringement of letters patent granted by the United States to the plaintiff, the court held that it was a suit against the United States, and could not be maintained. In discussing the question, the court said: "No injunction can be issued against the officers of a State to restrain or control the use of property already in the possesion of the State, or money in its treasury when the suit is commenced; or to compel the State to perform its obligations; or where the State has otherwise such an interest in the object of the suit as to be a necessary party."

The doctrine of these cases is reaffirmed by the Supreme Court of the United States in the recent case of *Murray* v. *Wilson Distilling Co.,* 213 U. S. 151.

The only distinction found in these cases is that where the suit is against an officer to prevent him from doing an unlawful act to the injury of the complaining party, such as the taking or trespass upon the property belonging to the latter, the former cannot shield himself behind the fact that he is an officer of the State; and also where the officer refuses to perform

a purely ministerial act, the doing of which is imposed upon him by statute. In either of such cases a suit against such an officer is not a suit against the State.

In determining whether a suit is against the State, it is unimportant whether the contract sought to be enforced, or the breach of which is sought to be enjoined, is or is not a valid one. The fact that it is a valid contract does not justify the suit against the State, and that question has no place in an inquiry as to whether or not a suit is against the State. "An injunction restraining the breach of a contract is a negative specific enforcement of the contract. The jurisdiction of equity to grant such injunction is substantially coincident with its jurisdiction to compel a specific performance. Both are governed by the same doctrines and rules; and it may be stated as a general proposition that wherever the contract is one of the class which will be affirmatively specifically enforced, a court of equity will restrain its breach by injunction, if this is the only practical mode of enforcement which its terms permit." 4 Pomeroy, Eq. Jur. § 1341; *McDaniel* v. *Orner, ante* p. 171.

This court in the McConnell case, *supra,* held that that was not a suit against the State because the Penitentiary Board had executed a valid and then subsisting contract with the plaintiff, but was attempting without legal authority to break it by a refusal to perform it. That distinction is untenable. The Penitentiary Board is created by statute as the agent of the State to manage and provide for working the convicts of the State. That board has the power to make contracts for the State, and it is the sole agent of the State in the performance of such contracts. The board does not perform merely ministerial acts; what it does involves judgment and discretion, and all that it does for the State. The State can, under the present statute, make and perform contracts with reference to the management of convicts only through the agency of this board. Therefore, an injunction against the board restraining it from violating a contract necessarily results in requiring the board, and through it the State, to specifically perform its contract.

The alleged contract was one merely to furnish the labor of convicts. The board, acting for the State, retained custody and control of the convicts, and were to permit them to labor

for the plaintiff for a stipulated price. A withdrawal of the convicts from the premises of the plaintiff was not a taking or trespass upon the latter's property. It was only a refusal to perform the alleged contract which plaintiff seeks to restrain.

It is with great reluctance that we have concluded to review the McConnell case and overrule the doctrine therein announced, but a majority of the judges are of the opinion that the decision was wrong, and contrary to the great weight of authority. The overruling of a decision has the unfortunate tendency of rendering the laws of the State less certain. Decisions which become rules of property should never be overruled, whether they are right or wrong. But where, as in this instance, no rule of property is disturbed, and the dignity and sovereignty of the State is involved, we conceive it to be our duty to correct the mistake of the court as speedily as possible by overruling a former decision which we have become thoroughly satisfied is erroneous and contrary to the recognized rules established by the other courts of the country. No one can have a vested right to sue the State. The State can either extend or withhold the right. All who contract with the State must do so with full knowledge that they must rely solely upon the legislative branch for performance of the contract and for satisfaction of the State's just obligations. Even the privilege of suing the State, when once extended, does not afford the basis of a vested right to sue or to prosecute to termination a suit once commenced; and such privilege may be withdrawn without disturbing any vested right, even after suit has been commenced. *Beers* v. *State,* 20 Howard, 572.

The plaintiff cannot complain because the court overrules its former decision, even though that decision permitted the plaintiff to maintain its suit similar to the one now before us.

The judgment of the chancery court, adjudging the petitioner to be in contempt of that court, is therefore quashed, and said proceedings against the petitioner are dismissed.

HART, J., (concurring.) A majority of the judges think that the allegations of the complaint which was the basis of the injunction, for a disobedience of which Pitcock was fined, bring this case squarely within the principles of *McConnell* v. *Arkansas Brick & Manufacturing Company,* 70 Ark. 568; and that the

decision here, if that case is to stand, must be an affirmance. I do not think so. In the McConnell case there was a valid contract, made pursuant to our statutes regulating the hiring out of convicts, between the Board of Penitentiary Commissioners, as the agents and representatives of the State, and the Arkansas Brick and Manufacturing Company. The effect of the holding in the McConnell case was that the board could not abrogate that contract, such power being vested alone in the Legislature, and they were enjoined from so doing. The instant case to my mind is plainly distinguishable. The contract shows by its terms that it has expired. The allegations of the complaint amount to no more than an attempt by judicial construction to extend the terms of the contract exhibited with it. In short, the things asked to be done and performed by the Penitentiary Board are the very things which, when done and performed, would constitute a performance of the contract as its terms are construed by the successors to the Arkansas Brick & Manufacturing Company. In other words, the case resolves itself into a suit for a specific performance against the State. My attention has been called to no case, and I have been unable to find any, which gives the courts jurisdiction to entertain such a suit. Such a view is contrary to the principles of State sovereignty upon which our government is founded, and which must endure as long as the State itself. Because the expression of a majority of the judges as above indicated as to the effect of the McConnell case is in my judgment an unwarranted extension of the principles at issue in that case, and because I believe the McConnell case to be wrong in principle, I have voted to overrule it.

WOOD, J., (concurring.) I concur in the judgment, but dissent from the opinion. Why should the "McConnell case" be overruled? The doctrine of that case is sound "to the core." That case is not only unlike this, but it is not even of kin. In that case the contract was in existence, having yet seven years to run. In the present case the contract had expired. The allegations of the complaint do not disclose any new contract, but only set up the old, and certain promises by the board to carry out its provisions which were never fulfilled. And now, after the contract has expired, this effort is made to have the time for its performance extended by judicial construction, and to have

the various promises that were made to fulfill the old contract carried out. The allegations do not show any contractual relations between the State and the Brick Company.

In my opinion, time was of the essence of the old contract, and any promises made on the part of the board to comply with its provisions which remained unfulfilled when that contract expired died with it, and the officers in withdrawing the convicts after the contract had expired were but discharging their duty according to law, and, of course, were representing the State. The chancery court, therefore, so far as the enforcement of the provisions of that contract is concerned, is wholly without jurisdiction to "hear, determine and decree in reference to such matter, and any decree it might make would be void, and could not legally operate on any one, nor could anybody be punished for disobeying it." The court was without jurisdiction of the State, a necessary party. One of the essentials of jurisdiction is that the court have before it the proper parties. *Williford* v. *State,* 43 Ark. 62. See also *Rankin* v. *Schofield,* 81 Ark. 463. Therefore I have concurred in the judgment because the allegations of the complaint do not state a cause of action to give the chancery court jurisdiction. But, on the contrary, the complaint, on its face, shows that the court had no jurisdiction of the State, the real party in interest.

But, if it be true that the present case cannot be distinguished from the McConnell case, then the decree of the chancellor was clearly right and should be affirmed. As the only living member of this court who concurred fully in the views so well expressed in the McConnell case, I challenge the statement of the opinion in the present case that the decision in the McConnell case is erroneous and contrary to the recognized rules established by the other courts of the country.

Let us see. In the McConnell case the Board of Penitentiary Commissioners, under a statute expressly authorizing it (secs. 3855-6 of Kirby's Digest), on July 31, 1899, entered into a contract with the Brick Company whereby the board was to furnish the company after January 1, 1900, and until January 1, 1909, 300 able-bodied convicts. The parties had entered upon the performance of the contract. The Brick Company, as alleged in its complaint and as confessed by the demurrer, "had expended

for buildings, machinery, etc., for the purpose of equipping said plants so that it might comply with the terms of its contract, about $300,000." The board had furnished the convicts.

On the 13th day of August, 1901, after the contract had been in force about 20 months, the State officers, constituting the Board of Penitentiary Commissioners, passed a resolution annulling and setting aside the contract and ordering the superintendent of the Penitentiary "to withdraw from said Brick Company all convicts in their employ, and turn them back into the walls of the Penitentiary, subject to the further orders of the board." It was confessed by the demurrer that the Brick Company had fully carried out the contract on its part. The statute under which the board was authorized to make the contract did not give it power to rescind it, and there was no other statute giving it such power. So the action of the board in setting aside the contract and its order directing the superintendent "to withdraw all convicts in the employ of the Brick Company was purely arbitrary.

The Brick Company brought suit against the members of the board, and against the superintendent and the financial agent of the Penitentiary, to have the resolution attempting to set aside the contract declared null and void, and to restrain them from taking any action to prevent the due performance of the contract under the void order, and *"particularly from taking from the Arkansas Brick & Manufacturing Company any of the men then engaged in labor therein,* and to require the superintendent, McConnell, to proceed with the execution of the contracts and the furnishing of the labor as therein agreed upon."

The appellants (defendants in that case) contended that, in passing the resolution setting aside the contract and making the order directing the superintendent to withdraw the convicts, the board was acting for and representing the State, and that the State was therefore a necessary party. In response to that contention we said: "The power and authority to make a contract is one thing, but the power to abrogate it is quite another thing, and the latter power is, in this government, possessed by neither the State nor any of her citizens. The State can only speak through the legislative department, which is the mouthpiece of the sovereign; and the Legislature can lawfully pass no law

impairing the obligation of contracts. It is and has been the law from time immemorial that a public agent acting without the scope of his authority without authority of law can not shield himself behind the sovereign, the State, but where injury is thereby done to private citizens, the officer or agent is a trespasser and personally liable in damages."

We further said, quoting from the Supreme Court of the United States: "Such a defendant, sued as a wrongdoer, who seeks to substitute the State in his place, or to justify by authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, can not rest on the bare assertion of his defense, but is bound to establish it; and, as the State is a political corporate body, which can act only through agents and command only by laws, in order to complete his defense, he must produce a valid law of the State which constitutes his commission as its agent and warrant for his act." *Poindexter* v. *Greenhow,* 114 U. S. 270.

The judges who rendered the decision in the McConnell case were of the opinion that the Board of Penitentiary Commissioners exceeded their powers in attempting to set aside the contract, and that their acts in so doing were wrongful, and such as to render them liable as individuals for any damages directly resulting to others from such acts. *Nicks* v. *Rector,* 4 Ark. 284; *Rice* v. *Harrell,* 24 Ark. 402; *O'Conner* v. *Auditor,* 27 Ark. 242; *Simpson* v. *Robinson,* 37 Ark. 142; *Parham* v. *McMurray,* 32 Ark. 269; *State* v. *Newton,* 33 Ark. 276; *DeYampert* v. *Johnson,* 54 Ark. 165; *Railway Co.* v. *Hackett,* 58 Ark. 381. See also *Hawkins* v. *United States,* 96 U. S. 692; *Whiteside* v. *United States,* 93 U. S. 257.

The Legislature itself could not rescind or set aside the contract and deprive the Brick Company of the benefit thereof unless that power was expressly reserved in the act conferring upon the board the authority to make the contract. *Woodruff* v. *Berry,* 40 Ark. 256; *Berry* v. *Mitchell,* 42 Ark. 244.

The board certainly had no authority except what the Legislature had given them. The Legislature had not even attempted to vest them with power to destroy or to impair the obligations of the contract which they were authorized to make. The Supreme Court of the United States has quite recently decided that: "The

attempt of a State officer to enforce an unconstitutional statute is a proceeding without authority of, and does not affect, the State in its sovereignty or governmental capacity, and is an illegal act, and the officer is stripped of his official character, and is subjected in his person to the consequences of his individual conduct." Ex parte *Young,* 209 U. S. 123.

In the McConnell case we were of the opinion that the facts brought the case strictly within the general doctrine announced by Chief Justice Marshall in *Osborn* v. *United States Bank,* 9 Wheat. 738, to the effect that a State officer will be restrained from executing an unconstitutional statute of the State when to execute it would violate rights and privileges of the complainant which had been guaranteed by the Constitution and would work irreparable damage and injury to him. In *Pennoyer* v. *McConnaughy,* 140 U. S. 1, 9, complainants sought to restrain the defendants, officials of the State, from violating, under an unconstitutional act, the complainants' contract with the State, and thereby working irreparable damage to the property rights of the complainants. The court held that such a proceeding was not a suit against the State, and said that the general doctrine of the "great and leading case of *Osborn* v. *Bank of United States,*" as above stated, "has never been departed from."

If officers acting under an unconstitutional statute can be restrained from committing acts of wrong and injury to the vested rights of a complainant under a contract with the State, for a much stronger reason will officers be restrained from invading and destroying the rights of another under a contract with the State where such officers are acting without any color of authority whatever. This they were doing in the McConnell case. The withdrawal of the convicts which the Brick Company had in its possession, and which the board were attempting to do under their void resolution and order, would have meant an irreparable loss to the Brick Company, as the facts show, of many thousands of dollars. The Brick Company had a property right in the labor of the convicts.

It would make this opinion too long to review all the cases in this country supporting the doctrine announced in the McConnell case. It had long been an established doctrine in this State before that case was decided. In *Crawford* v. *Carson,* 35 Ark.

565, 578, we said: "The prohibition against suing the State or any officer representing her, in chancery, must be confined to such suits as seek to charge the State with some liability or duty, or to hold her or her officers as trustees of effects in their hands. Such and such only was the object of the statute. *It would open the way to intolerable tyranny to exempt officers of the State from injunctions to restrain them from illegal though colorable acts of authority.*"

The suit in the McConnell case was not, as the court now holds, a suit against the State to enforce the specific performance of her contract. Not at all; but it was a suit against the officers to restrain them from illegal and unauthorized acts to the injury of the rights of the Brick Company under the contracts, acts which were not only wrongful, but without even any color of authority. "The injunction," says the court in the McConnell case, "is not against the State, but against the defendants to restrain them from going beyond their powers. No order of the court can be against the State, nor against the defendants to compel them to perform those duties as officers and agents of the State." Mr. Rose, in his Code of Federal Procedure, says: "The distinction running through all the cases is between preventive and affirmative relief; between those cases in which State action is sought to be restrained by proceedings against State officers and those in which some affirmative though legal and proper act of the State is sought to be compelled. The 11th Amendment does not shield State officers in the performance of unlawful acts, though prescribed by State law; but it protects the State against compulsion in the performance of its sovereign functions, against the enforcement of a liability *ex contractu* or *ex delicto*, against *direct proceedings for the recovery of property* held by the State through its officers." "The cases," says he, "in which by mandamus or other writ State officers have been compelled to perform certain acts at the suit of individuals injured are no exception to this rule, since the foundation of the relief is the wrong of the officers in disobeying or maladministering the State law, and not the wrong committed by the State." 1 Rose, Code Fed. Procedure, pp. 50, 51 and numerous cases cited.

This is precisely the distinction we made in the McConnell case, and the failure of my brother judges to observe it in the

present case has caused the court to fall into the error of overruling the McConnell case and the case of *Crawford* v. *Carson* on the same point, although the latter is not expressly mentioned.

The Chief Justice in his opinion says: "The board does not perform merely ministerial acts; what it does involves judgment and discretion, and all that it does is for the State." I can never subcribe to that doctrine. The board was not representing the State at all when they passed the resolution annulling the contract and ordering the convicts taken away from the Brick Company.

"No principle is more firmly established than that when an officer exceeds his authority his acts are individual acts only, and do not bind the State. The State is liable only to the extent of the power actually given its officers, and not to the extent of their apparent authority." *Woodward* v. *Campbell,* 39 Ark. 583; *Woodruff* v. *Berry,* 40 Ark. 256; *Pulaski County* v. *State,* 42 Ark. 118; *St. Louis Ref. & W. G. Co.* v. *Langley,* 66 Ark. 52; Mechem, Publ. Off. §§ 511, 663; Throop, Pub. Officers, §§ 21, 551, 576.

The board had the discretion to make or not to make the contract. They had discretion in fixing the terms of the contract. But, after these terms were defined and agreed upon between the board and the Brick Company and the contract was entered into, the board no longer had any discretion in the matter of furnishing the number of convicts called for by the contract. The duty of the board to furnish the number of convicts named in the contract, and of the superintendent, who was the subordinate of the board, was purely ministerial in character.

Suppose the Legislature had provided that when the board makes a contract to let convict labor they shall furnish the labor of not less than three hundred able-bodied convicts. Would any one contend that after the board had made a contract for the number of convicts as prescribed by the statute, the duty of the board to furnish the number of convicts named would be a matter of judgment and discretion? Well, the Legislature, instead of prescribing the number of convicts to be let by the contract, has left the matter of designating the number open to the discretion of the board. But, after the board has exercised that discretion and designated the number in the contract they make, then the Legislature did not leave it to their discretion and judgment to withhold all or any part of the number called for in the contract.

After the board had designated three hundred as the number to be let by contract, under the statute authorizing them to make the contract, the legal effect was precisely the same as if the Legislature itself had designated that as the number that the board should furnish. And the simple act of furnishing the number of convicts called for by the contract was a ministerial duty imposed by law. So the litigation in the McConnell case was "with the officers, not the State." *Rolston* v. *Missouri Fund Com'rs,* 129 U. S. 390, 411.

Chief Justice Chase in *Mississippi* v. *Johnson,* 4 Wall. (U. S.) 475, has given a definition of a ministerial duty that has never since been improved. He says: "A ministerial duty, the performance of which may, in proper cases, be required by judicial process, is one in regard to which nothing is left to discretion. It is a simple definite duty, arising under conditions admitted or proved to exist and imposed by law." Our own court, through Mr. Justice SMITH, defines a ministerial act as follows: "One which an officer or tribunal performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act done." Ex parte *Batesville & Brinkley R. Co.,* 39 Ark. 82; *Grider* v. *Tally,* 77 Ala. 422; See Throop, Pub. Officers, § 535, and cases cited in note.

Since the contract fixed the precise terms as to the number of convicts to be furnished, and this duty under the statute was purely ministerial, it follows that from any and every viewpoint the doctrine of the McConnell case is right, and should not have been overruled.

The doctrine conforms to that class of cases which hold that "where a suit is brought against defendants, who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State, such suit, whether brought to recover money or property in the hands of such defendants unlawfully taken by them in behalf of the State, or for compensation in damages, or in a proper case where the remedy at law is adequate, for an injunction to prevent such wrong and the injury, or for a mandamus in a like case to enforce upon the defendant the performance of a plain legal

duty purely ministerial, is not, within the meaning of the Eleventh Amendment, an action against the State." Mr. Justice Lamar in *Pennoyer* v. *McConnaughy,* 140 U. S. 1, and citing *Osborn* v. *Bank, supra; Davis* v. *Gray,* 16 Wall. 203; *Tomlinson* v. *Branch,* 15 Wall. 460; *Litchfield* v. *Webster County,* 101 U. S. 773; *Allen* v. *Baltimore & Ohio Ry. Co.,* 114 U. S. 311; *Board of Liquidation* v. *McComb,* 92 U. S. 531, and *Poindexter* v. *Greenhow,* 114 U. S. *supra,* from which we have quoted. Other more recent cases are *Scott* v. *Donald,* 165 U. S. 112; *Smyth* v. *Ames,* 169 U. S. 466; In re *Tyler,* 149 U. S. 164, 190; *Tindal* v. *Wesley,* 167 U. S. 204, 220; *Prout* v. *Starr,* 188 U. S. 537, and Ex parte *Young, supra.* The facts in the McConnell case do not fit the doctrine of In re *Ayres,* 123 U. S. and that line of cases, but they do fit the line of cases followed by us as above indicated.

I am unable to see how the "dignity and sovereignty of the State are involved" in a suit to restrain her officers from exceeding their powers, and arbitrarily setting aside a contract, and destroying valuable rights thereunder. Nor do I think that the dignity and sovereignty of the State are involved in a suit to compel an officer to perform merely ministerial duties under a contract made under the authority of the statute. Such is the McConnell case, as the judges who rendered the decision, viewed the facts and the law. The doctrine there announced erects the same high standard for honesty and good faith in the conduct of public officers as that required by the law of private individuals in their dealings with each other. If I am correct in my views, this doctrine should remain the law in Arkansas forever.

BATTLE, J., (dissenting.) The contract involved in this case is the same as that held to be valid in *McConnell* v. *Arkansas Brick & Manufacturing Company,* 70 Ark. 568. But this is denied by saying that the contract adjudged to be valid in the McConnell case has expired. I do not think so. The Board of Commissioners of Arkansas State Penitentiary failed often to comply with that contract by furnishing the Arkansas Brick & Manufacturing Company with the labor of convicts as it had agreed to do, and upon each of such failures and during the life of the contract promised to furnish the company with such labor until it had furnished all it had contracted to do, and adopted resolutions to that effect, and caused them to be spread at length

upon its minutes. These promises were based upon valuable considerations, and did not constitute new contracts but a continuation of the old by an extension of the time of its performance. The labor to be furnished under the promises was to be in performance of the original contract, which could not expire until it was performed in the manner promised. If I am correct in this conclusion, the board is enjoined and restrained by the decree in the McConnell case from in any manner cancelling or annulling the contract as thus extended and "from refusing and failing to execute and carry out" its terms. The board in this case is the same as in that, the membership being different.

I dissented in the McConnell case on the ground that that suit was in effect, a suit against the State, which could not be sued. But the court held differently, and its judgment in that case has passed beyond its control, and become final, and I think should be enforced in this case. The parties have rightly acted upon the faith of it, and should not suffer on account of confidence in the judgment of the court.

CLAYPOOL v. JOHNSTON.

Opinion delivered October 11, 1909.

1. MASTER—POWER TO APPOINT.—A court of equity has the discretion to appoint a master for the purpose of assisting the court in the proceedings before it, as for example to take testimony or state an account. (Page 552.)
2. SAME—AUTHORITY.—A master derives his authority from the order appointing him, and should make no inquiry or finding beyond the matters that are expressly referred to him. (Page 552.)
3. SAME—EXTENT OF AUTHORITY.—Where a master was appointed for the purpose of taking testimony upon an issue, and to report such evidence, but the order did not direct him to determine the facts as to such issue or to report such determination, a report by him giving his determination upon such issue was unauthorized. (Page 552.)
4. SAME—FINDINGS—DUTY OF COURT TO REVIEW.—Where a court of equity of its own motion deems it proper to refer to a master any matter for the purpose of aiding or facilitating the court in the proceedings, the master's findings do not become effective until they are approved

by the court, though they are highly persuasive and will not be lightly disregarded. (Page 553.)

5. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—A chancellor's finding of facts will be sustained on appeal if it is not against the preponderance of the evidence. (Page 554.)

Appeal from Logan Chancery Court, Northern District; *J. Virgil Bourland,* Chancellor; affirmed.

Robert J. White, for appellant.

1. The court's finding that the trees were worth only 50 cents each is not in accord with proof. By the decided weight of the testimony they were worth at least $1.00 each. His finding is persuasive only. 41 Ark. 294; 75 Ark. 75.

2. It was the master's duty under the order of reference, and so understood by the parties, to take testimony and ascertain and report the value of the trees. The decree overruling the master's finding that their value was 75 cents each, was a mere difference of opinion of the chancellor from that of the master upon a disputed question where the evidence was conflicting. The master's report should stand unless error is affirmatively shown in his findings. 16 Cyc. 453, subdiv. F 1; 13 How. 581; 35 Fed. 488; 88 Fed. 140; 31 C. C. A. 427; 155 U. S. 631; 14 Am. & Eng. Enc. of Law, 1st Ed. 940; 8 Vt. 519. The findings of the master will neither be reviewed nor revised if there is evidence tending to sustain them unless fraud or corruption is shown. 38 Vt. 519; 120 Pa. St. 98; 50 Vt. 48; 1 S. W. 884; *Id.* 891; 5 Ind. 422.

Anthony Hall for appellee; *Jim Johnson* of counsel.

1. The testimony as to a value of 50 cents and under for each tree comes from witnesses of experience who were qualified to speak as to the worth of young trees. The higher valuations were given to "healthy bearing apple trees 6 years old."

2. The contention that the master's valuation of 75 cents each could not be reviewed, and was conclusive upon the chancellor, is inconsistent with the order of reference.

FRAUENTHAL, J. The plaintiff below, Frank L. Johnston, instituted this suit against the defendant, J. C. Claypool, seeking to recover upon a note given for the balance of the purchase money of certain land. The defendant admitted the purchase

of the land and the execution of the note, but alleged that the plaintiff had fraudulently induced him to purchase the land by falsely representing that at the time of the purchase there were 2,500 healthy bearing apple trees upon the land. He sought a recoupment by reason of the false representations or a rescission of the contract of sale. Upon a trial of the cause below the chancery court found "that the defendant is entitled to recoup in this action against the plaintiff the value of 1,300 bearing apple trees from 4 to 6 years old; that the testimony as to the value of said trees is insufficient for the court to find their value;" and it did order and decree "that the issues as to the deception as to the amount of trees are with the defendant, and that this cause be continued until the next term of this court, and that either party is permitted to take testimony upon the value of said trees before the clerk, who is made master for the purpose, and when such testimony shall be taken the master will make report to the next term of this court, to which this cause is continued."

At the following term of the court the master filed a report, in which he stated that he had taken the testimony of ten witnesses, which was reduced to writing and filed. He further reported that the witnesses had experience in fruit culture, and that a majority of the witnesses who testified at the instance of the defendant fixed the value of the trees at one dollar each, and that a majority of the witnesses who testified at the instance of the plaintiff fixed such value at twenty-five cents each; and, "relying wholly upon the testimony, I find the value of said 1,300 apple trees to be fifty cents each, making a total of $650." Thereafter a motion was made to quash the depositions of certain witnesses on the ground that notice of the taking therof had not been given, and to direct the master to take further testimony. This motion was sustained by the court. At the following term the master reported that he had taken the depositions of from 20 to 30 witnesses, which he filed. He also reported that he "would value 4 to 6 year old apple trees of all the different varieties and classes generally, diseased and otherwise, on the mountain in the vicinity of the Claypool place at 50 cents each;" that this was his former report. But that he found that the "testimony of the defendant's witnesses were

taken as to the value of healthy bearing six-year old apple trees," whereas the judgment of the court provided that the defendant was entitled to recoup "the value of 1,300 bearing apple trees from 4 to 6 years old;" and that, taking the judgment of the court as a basis and considering the testimony of all the witnesses, he now finds the value of the trees to be 75 cents each, or $975, for the 1,300 trees.

Exceptions were filed by the plaintiff to this latter report, and these exceptions were by the court sustained. The court thereupon found "the fair and equitable value of bearing apple trees 4 to 6 years old to be 50 cents each, and that defendant is entitled to recoup $650 for the value of the 1,300 trees; and the court rendered a decree in accordance with that finding. From this decree the defendant prosecutes this appeal.

The only question involved in this appeal is the value of the 1,300 trees and the action of the chancery court in finding that value. That court has the power within its sound discretion to appoint a master for the purpose of assisting it in the proceedings before it, as for example to take testimony or to state accounts, etc., and this power is also given it by statute. 14 Cyc. 435; Kirby's Digest, § 633.

The master derives his authority from the order thus appointing him, and he has no authority other than that conferred upon him by the court, and should make no inquiry or finding beyond the matters that are expressly referred to him. The master is the representative of the court in regard to the matter thus referred to him, and is wholly subject to the court's control, and should follow its orders. 17 Ency. of Pleading & Practice, 1020; 16 Cyc. 440; *Kimberly* v. *Arms,* 129 U. S. 512; 17 Ency. Pleadings & Practice, 1035; *Young* v. *Rose,* 80 Ark. 513.

In this case the clerk was appointed master for the purpose of taking testimony as to the value of said trees and to report that evidence. The order did not direct him to determine the facts as to the issue or to report his determination of the value of the trees. In so far, therefore, as he made a report as to his finding of the value of the trees, he took an action not conferred upon him by the order. The court could have so directed him if it had seen fit to do so; and, while the court did not strike such

finding from the report, but even considered it, nevertheless it did not make an order directing such finding.

The court has the power to appoint a master upon its own motion; or it can at the request of and by the consent of the parties refer matters to a master for his finding. If such appointment is made at the request of and by the consent of the parties with specific directions for a report of findings, then the report of such master as to his findings of fact has the same force and efficacy as the verdict of a jury. But that is only when the report is made by a consent referee or master. *Greenhaw* v. *Combs,* 74 Ark. 336; *Paepcke-Licht Lumber Co.* v. *Collins,* 85 Ark. 413.

As is said in the case of *Davis* v. *Schwartz,* 155 U. S. 631, "a distinction is drawn between the findings of a master under the usual order to take testimony and his findings when the case is referred to him by consent of parties, as in this case. While it was held that the court could not of its motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers, yet, where the parties select and agree upon a special tribunal for the settlement of their controversy, there it no reason why the decision of such tribunal with respect to the facts should be treated as of less weight than that of the court itself."

But where the master is appointed by the court upon its own motion, as is said in the case of *Kimberly* v. *Arms,* 129 U. S. 512: "The information which he may communicate by his findings in such cases upon the evidence presented to him is merely advisory to the court, which it may accept and act upon or disregard in whole or in part, according to its own judgment as to the weight of the evidence." When the court of its own motion deems it fit or necessary to refer to a master any matter for the purpose of aiding or facilitating the court in the proceedings incidental to the cause, it is the duty of the court to review the findings of such master. The findings of the master do not become effective until they are approved by the court. In regard to the report of a master, it is provided by section 6337 of Kirby's Digest that "the report shall stand good, except such parts as are excepted to, unless it shall appear

on the face of the report or from the evidence in the cause that it is erroneous." In such case it is not only the province but the duty of the court to examine the report and evidence and to pass its own judgment thereon. The findings of the master are highly persuasive, and should not be lightly disregarded. 17 Enc. Pleadings & Practice, 1054.

But where in the opinion of the court the evidence is not sufficient to warrant the findings made by the master thus appointed, the court will not sustain or approve them, but may take such action therewith as it may deem in its own sound discretion to be right, subject to a review upon appeal if that discretion is abused.

In this case we cannot say that the court has abused its discretion in refusing to confirm the second report of the master as to his findings of value, even if it should be held that the master had authority to make such findings.

The master made two reports. In his first report he made a finding that the value of each tree was fifty cents, and seems to have placed that value on "4 to 6 year old apple trees of all the different varieties or classes generally, diseased or otherwise." In his second report he says that he arrived at the above value in the light of testimony of witnesses on the part of the defendant as to the value of "healthy, bearing six-year old apple trees," whereas the order of the court only directed that testimony should be taken as to the value of "bearing apple trees from 4 to 6 years old." In his first report he took into consideration, as a requisite of the character of the tree, that it should be healthy, and in his second report he did not take this requisite into consideration; and yet by his second report he values the trees higher than by his first report. The court had before it two findings as to the value of the trees made by the master, and we cannot say that the chancellor under these circumstances was not justified in taking the value as found in the first report rather than in the second. Under these circumstances, therefore, we do not think that the court did lightly disregard the second report of the master. Nor can we say that the weight of the evidence is against the finding of the chancellor.

A number of witnesses testified as to the value of the trees, and there is quite a variance in the values placed thereon by

them. But after an examination of their testimony we cannot say that the finding of the chancellor is not sustained by the weight of the evidence. And the finding of facts by the chancellor will be sustained on appeal if it is not against the preponderance of the evidence. *Whitehead* v. *Henderson*, 67 Ark. 200; *Brown* v. *Wyandotte & S. E. Ry. Co.*, 68 Ark. 134; *Greer* v. *Fontaine*, 71 Ark. 605; *Sulek* v. *McWilliams*, 72 Ark. 67; *Hinkle* v. *Broadwater*, 73 Ark. 489; *Norman* v. *Pugh*, 75 Ark. 52.

The decree of the lower court is affirmed

WARE v. STATE.

Opinion delivered October 11, 1909.

1. EVIDENCE—CHARACTER OF ACCUSED.—In a criminal prosecution the State cannot prove the accused's bad character as a circumstance from which to infer his guilt. (Page 558.)
2. SAME—PROVING ONE CRIME BY ANOTHER.—One offense may not be proved by evidence of another offense, unless the two are so connected as to form a part of one transaction. (Page 559.)
3. WITNESS—IMPEACHMENT.—Where the defendant in a criminal case introduced evidence of his good character, it was inadmissible for the State to impeach such reputation by proof of specific acts of immorality. (Page 559.)
4. SAME—CROSS EXAMINATION OF ACCUSED.—A defendant in a criminal case testifying in his own behalf may be cross examined as to specific acts of immorality, but if the State desires to impeach his testimony by other evidence it must go to his general character. (Page 560.)
5. APPEAL—WHEN INCOMPETENT EVIDENCE PREJUDICIAL.—The admission of incompetent evidence against the accused is prejudicial where there was a conflict in the evidence as to his guilt. (Page 560.)

Appeal from Calhoun Circuit Court; *George W. Hays*, Judge; reversed.

C. L. Poole, Thornton & Thornton and *Davis & Pace*, for appellant.

The testimony of Bell Wood was incompetent, and its admission prejudicial. She admitted that she had never told any

one prior to the trial who the father of the bastard child was, and that the deceased did not know that appellant was accused of being its father. One who is accused of a crime cannot be convicted thereof by proof that he has committed another crime unless that other crime throws some light upon the motive of the defendant which actuated him in committing the crime with which he is charged, or, in case of an assault, on who was the probable aggressor. 39 Ark. 278; 37 Ark. 261; 71 Ark. 150; 82 Ark. 58; 68 Ark. 577. Bastardy, though a civil action for the benefit of the child and mother, is nevertheless *quasi* criminal. 29 Ark. 62; 45 Ark. 56. The only object in introducing this testimony was to discredit appellant and break down the effect of his testimony. It shed no light upon the motive for the crime for which appellant was being tried, nor as to the probable aggressor.

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellee.

Bell Wood's testimony was competent and proper to be considered in explanation of the conduct of the appellant toward the deceased, and was not so entirely disconnected with the case on trial as would render it incompetent as proving an independent crime. The verdict shows that the jury attached no weight to her testimony, and, in view of the testimony going to show that he was guilty of a higher grade of homicide than that of which he was convicted, its admission was not prejudicial. 77 Ark. 141; 70 Ark. 610; 76 Ark. 84; 72 Ark. 613; 73 Ark. 315.

FRAUENTHAL, J. The defendant, Mose Ware, was tried in the Calhoun Circuit Court upon an indictment charging him with the crime of murder in the first degree by killing one Craft Wood. He was convicted of voluntary manslaughter, and prosecutes this appeal to obtain a reversal of the judgment upon that conviction.

The evidence on the part of the State tended to prove that the defendant was a colored school teacher, and the deceased, Craft Wood, was a colored preacher, and they lived for a number of years about one mile from each other. Upon the morning of January 22, 1907, the deceased was riding upon a horse along the road by the home of the defendant, and there was shot and

killed. On the same day and very shortly after the killing the defendant voluntarily surrendered to parties in the neighborhood, who took him to the sheriff of the county. To the sheriff the State proved that he made the statement that the deceased had been having wrongful relations with his wife, and that he had written deceased a note to leave, which deceased had refused to do, and that he had shot the deceased. But the sheriff did not claim that the defendant told him all the particulars of the killing. There was no one present at the time of the killing, save the defendant and deceased. The prosecution proved by the wife of the deceased that a short time before the killing the defendant had written to deceased a note asking him to leave and charging him with wrongful relations with defendant's wife; and by several witnesses the prosecution proved that the defendant made the statement that the trouble was all about his wife. There were some other slight circumstances indicating that a breach of the friendly relations between these parties had occurred on this account; and the sole and only motive for the killing which the evidence on the part of the State indicated was the alleged illegal relations of deceased with the wife of defendant. The defendant testified in his own behalf that when the deceased passed along the road at his house a controversy arose between them about the wrongful relations between deceased and defendant's wife and about deceased leaving; that in the controversy the deceased started to draw a pistol from a pocket of his overcoat and had pulled it partially out of the pocket and was attempting to draw it for the purpose of killing him, when the defendant shot the deceased with his shotgun.

Briefly, but sufficiently, the above presents the testimony showing the manner and the cause of the killing as claimed by the prosecution on the one hand and as urged by the defendant on the other. It is not considered necessary to further detail the evidence, because from this it can readily be determined whether the court committed an error in permitting the introduction of the testimony which we will now refer to, and whether such error was so prejudicial as to deprive the defendant of a fair and impartial trial.

In its examination in chief, and before the defendant had introduced any testimony, the State introduced as a witness Bell

Wood, who testified that she was the daughter of the deceased; that a number of months after the killing the defendant gave her ten dollars for the purpose of sending her out of the State; that she was an unmarried woman and the mother of two illegitimate children, and that the defendant was the father of one of these bastard children; that the defendant had thus had illegal relations with her and debauched her. And in the same connection she stated that she had never told the deceased of any such wrongful relation with the defendant; that she had never told any one of it, and no one had ever spoken of it; that her father, the deceased, did not know it, and had never heard of it; and neither by her testimony or by any testimony was any circumstance shown by which it could be found that this alleged relation of the defendant with her was in any way the cause of or connected with this killing.

Let us then see if under the circumstances of this case there was any legal ground for the introduction of this testimony, or in what way it could throw light, if any, on the cause or manner of this killing. It is conceded that the deceased had never heard of this alleged relation, and had never in any way referred to it or in any way connected the defendant with his daughter; and that nothing had ever occurred that caused even a mention of the daughter between deceased and defendant. The sole and only motive for the killing which is advanced by the testimony of the State is the alleged illegal relation between deceased and the wife of defendant; and there is not a tittle of testimony which shows that the alleged relation of defendant with deceased's daughter was the cause or the motive of the killing. This testimony could not throw any light on the question as to who was probably the aggressor, for the reason that it is conceded that deceased knew nothing of the alleged relation, and that therefore no difficulty could have arisen between them from that cause. The sole effect, if not the purpose, of this testimony was to attack the character of the defendant. The question therefore presented is whether this testimony was admissible to prove the bad character of the defendant. The defendant occupies a two-fold relation in this case. He is the defendant; and he was a witness in his own behalf.

It is uniformly held that the prosecution cannot resort to the accused's bad character as a circumstance from which to

infer his guilt. This doctrine is founded upon the wise policy of avoiding the unfair prejudice and unjust condemnation which such evidence might induce in the minds of the jury. If such testimony should be admitted, the defendant might be overwhelmed by prejudice, instead of being tried upon the evidence affirmatively showing his guilt of the specific offense with which he is charged. 1 Greenleaf on Evidence (8th Ed.), § 14 b, § 14 q; Wigmore on Evidence, § 57.

And so, too, it is held that one offense cannot be proved by the evidence of the commission of another offense, unless the two are so connected as to form a part of one transaction. But, as wholly independent acts, the commission of one offense cannot be shown by evidence of the commission of another. And the introduction of such testimony is also inadmissible because it raises another and different issue which would call for the introduction of other testimony upon such issue, and thus would involve the true and specific issue presented to the jury for its determination, whether the defendant was guilty of the specific crime charged in the indictment. *Dove* v. *State*, 37 Ark. 261; *Endaily* v. *State*, 30 Ark. 278; *Ackers* v. *State*, 73 Ark. 262; *Allen* v. *State*, 68 Ark. 577.

But a defendant on trial for a crime of any grade is entitled to offer in his defense evidence as to his good character. Such evidence is permitted as to and should be limited to such character as would show that it would be unlikely that the defendant would commit the crime with which he is charged. 1 Wigmore on Evidence, § 56; 1 Greenleaf on Evidence, § 146; *Kee* v. *State*, 28 Ark. 155; *Edmonds* v. *State*, 34 Ark. 720; *Maclin* v. *State*, 44 Ark. 115. After the defendant has offered testimony of his good character in his own aid, the prosecution may by way of rebuttal offer evidence of his bad character. The object of permitting the prosecution to introduce such evidence is not for the purpose of showing the bad character of the defendant; but it is for the purpose of refuting his claim that he has a good character, and thus to prevent the defendant from imposing a false character upon the jury. But, as is said in the case of *State* v. *Laxton*, 76 N. Car. 216, "this right of reply however is only co-extensive with the privilege of the defendant, and is limited to evidence of general reputation." The prosecution is

not permitted, even on rebuttal, to show specific acts of misconduct. The testimony that is here permissible is similar to that testimony of general reputation which is allowed in order to impeach a witness. 1 Greenleaf on Evidence, p. 39; 1 Wigmore on Evidence, § 56; *Commonwealth* v. *Hardy*, 2 Mass. 317.

The testimony of Bell Wood was therefore not admissible in order to show the bad character of the defendant.

After the State had introduced this testimony and rested, the defendant introduced evidence of his good character. And, even though it should be considered that the testimony of Bell Wood was only introduced out of regular order in the progress of the trial, and simply on that account was not objectionable, nevertheless, it was still inadmissible because it was not limited to evidence of general reputation, but related solely to an alleged specific act of immorality.

And for the same reason this testimony was not admissible for the purpose of impeaching the defendant as a witness in the case. As a witness in the cause, he could have been cross-examined; and upon his cross-examination, like any other witness, he could have been asked as to specific acts for the purpose of discrediting his testimony as a witness. But as is said by the Court of Appeals of New York: "It is well settled that, for the purpose of impairing the credit of a witness by evidence introduced by the opposite party, such evidence must go to his general character." *Newcomb* v. *Griswold*, 24 N. Y. 298. As is said in case of *Hollingsworth* v. *State*, 53 Ark. 387, in such event "proof of specific acts of immorality is not competent." 1 Greenleaf on Evidence, § 461; Acts 1905, 143. It therefore follows that this testimony of Bell Wood was incompetent, and that it was an error to admit its introduction.

But, although it was an error to admit the introduction of this testimony, it does not necessarily follow that this error was prejudicial to the rights of the defendant; and it was not prejudicial if it did not deprive him of a fair and impartial trial under all the testimony adduced in the case. In a case where the uncontroverted testimony shows that the defendant is guilty of the degree of crime of which he is convicted, the error in permitting the introduction of incompetent testimony is not prejudicial to the rights of the defendant. This is based upon the ground

that, viewing such incompetent testimony in any light, the jury could not have rendered a verdict of acquittal. *Levy* v. *State,* 70 Ark. 610; *Taylor* v. *State,* 72 Ark. 613; *Darden* v. *State,* 73 Ark. 315; *Daniels* v. *State,* 76 Ark. 84; *Clingan* v. *State,* 77 Ark. 141.

But the contrary of this proposition is also true. If the facts are disputed, and if the proof is controverted, then that view of the testimony should be taken which is favorable to the defendant; and if, in such view of the case, the incompetent testimony would have a tendency to disparage this controverting evidence on the part of the defendant, then its admission would be prejudicial. *Whit* v. *State,* 74 Ark. 489.

In this case the defendant was a witness in his own behalf and the sole witness who testified as to the manner and circumstances of the killing. He testified to a state of facts which showed that he acted in his necessary self-defense; and if his testimony is true, he is not guilty of manslaughter. The physical facts proved by the evidence are not sufficient to show conclusively that the testimony of the defendant as to the circumstances of the killing is not true. The evidence proved that some of the shots entered the shoulder of the deceased; that one shot entered his head, somewhat on the side of his head and just back of the ear, and that some shot entered his back. But the deceased was at the time on his horse, and testimony as to the tracks of the horse indicated that the horse plunged and probably wheeled about, so that it is possible that the deceased may have been drawing a pistol in a manner and while in a position to shoot the defendant, and the defendant, acting on such appearances, fired his gun at deceased, and at the instant of doing so the position of deceased changed so that he received the shot in the parts of the body as shown by the evidence. The defendant had the legal right to have the jury pass on his testimony together with the other testimony in the case and these circumstances and to determine the facts. The undisputed testimony, therefore, does not show that the defendant did not act in his necessary self-defense; and therefore it does not appear from the uncontroverted testimony that he was guilty of the crime of which he was convicted. Now, this incompetent testimony was of a nature to discredit the defendant as a witness and to

cover him with a moral turpitude that may have led the jury to accept it as a link in fixing on the defendant a criminality in the commission of this act. The testimony was of such a nature that it was well calculated to arouse in the minds of the jury an unfair prejudice, and thereby not only to cause the jury to discredit his testimony as a witness, but also to condemn him as a man. It is true that the weight of the testimony is to the effect that the deceased had no pistol, and was unarmed, and that the defendant did not kill him in necessary self-defense. But under the law defendant had the right to testify as a witness, and he had the legal right to have that testimony presented to the jury unassailed by any unfair prejudice or by any incompetent testimony discrediting him. What credence the jury might have given to his testimony unaccompanied by this discredit, or to what extent they may have been influenced by testimony tending to show that the defendant had debauched the daughter of the man he was charged with having killed, we cannot say; but unquestionably this testimony had the tendency to affect and influence the jury to the detriment of the cause of the defendant. If it was illegal to admit this testimony, its admission was calculated to deprive the defendant of that absolutely fair trial under the law, to which he was entitled, and this error was prejudicial.

We find no other error in the case.

For the error in admitting the testimony of Bell Wood, the judgment of the Calhoun Circuit Court is reversed; and this cause is remanded for a new trial.

GREEN v. STATE.

Opinion delivered October 11, 1909.

1. RAPE—CONVICTION OF ASSAULT.—An assault with intent to commit rape is included in the charge of rape, and a conviction may be had of the former under an indictment for the latter. (Page 565.)
2. APPEAL—MODIFICATION OF SENTENCE.—Where the evidence in a prosecution for rape failed to establish penetration, but established the commission of an assault with intent to rape, a conviction of rape will

be set aside on appeal and, with the consent of the Attorney General, the cause will be remanded with directions to sentence the accused for assault with intent to rape. (Page 565.)

Appeal from Van Buren Circuit Court; *Brice B. Hudgins,* Judge; judgment modified.

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellee.

The question of fact as to whether or not the appellant accomplished his purpose is settled by the verdict of the jury. 50 Ark. 387; 21 Ark. 306; 24 Ark. 251. Consent of the victim is not material in this case. Where the female assaulted is under the age of consent, absence of consent will be presumed because of her incapacity to give it. 50 Ark. 387; 29 Ark. 120; 11 Ark. 389.

HART, J. Abe Green was indicted for the crime of rape. He was tried before a jury, found guilty and sentenced to death. He has duly prosecuted an appeal to this court.

The testimony is correctly abstracted by the Attorney General as follows:

Eura Webb, the prosecuting witness testified: "My name is Eura Webb. I am fourteen years of age. I know the defendant. I went over to Mr. Malone's after some hoes and goobers. I started back home and met Abe Green. He spoke to me, and asked me where Pa was. I told him at home plowing, and he got behind me and grabbed me around the neck and started with me out in the bushes. And that is the last I know. He was choking me. I don't know exactly how far we were from home or Malone's. The next time I remembered anything I was in my brother's field. There was a string around my neck. I don't know how I got it off. My neck and face were bloody when I got there. My brother, Ellis, took me to Mr. Malone's. This was in Van Buren County, three or four weeks ago. Afterwards I was sore on my back and neck, in the small of my back. I had a bruised place on the back of my leg (indicating.) I had a string around my neck, but don't know where I took it off, nor what I did with it. That was down in the woods. I was thoroughly conscious that the string was there, and that I was choking. The first I remember after that was in Ellis's

field. I didn't look at the string when I took it off; haven't any idea how I got it off; haven't seen it since. My private parts were not sore. There was a scratch on the back part of my leg above the knee. (Shows the court how large). I couldn't see it, but my mother told me it was there. She examined me the next day. My underskirt was torn down at the hem. (Shows the court; the rent was about eight or nine inches long). I don't know whether it was torn when I met the defendant or not. The first thing I remember after he took me into the bushes was that I was in Ellis's field. I knew there was a string around my neck because I was lying down and choking. I got it off while I was on the ground. When I took it off, I fell with my head in my lap."

Martha Webb testified: "Eura Webb is my daughter. I know Abe Green. My daughter was assaulted on Monday, the 10th day of May, about three weeks ago. I live near Formosa, in Van Buren County, Ark. Mr. Malone lives about a mile from us in the same county and State. The road between our house is in the same county and State. Eura left home about eight o'clock. The next I saw of her was about ten o'clock. They had started to Mr. Malone's house when I got there. She was bruised up. Her neck was red as blood. Her underskirt was torn into the hem, and she had a scratch on her leg, about so long (indicating six inches,) and two splotches on her clothes in front. They were on her bottom skirt; were stiff white splotches, right in front (indicating to the court they were about one and one-half inches square). The marks on her leg look like the print of finger nails (indicates that it was five or six inches long). Her neck was black, and there was the print of a string around it where it had buried itself in her neck. There was blood on her neck and her top dress and waist. I didn't examine her clothes until Tuesday morning about sunup. There was no blood on her underclothing, and her leg looked like it had been freshly scratched. My daughter was 14 years old the 19th of February, 1909. She was fully developed into womanhood, and had her first monthly sickness on the 13th day of April, 1909."

Other testimony was introduced to show that in the bushes where the prosecuting witness says the defendant was dragging

her there appeared the prints of the heel of woman's shoe as if made by a person laying down, and close to it appeared the toe prints of a man's shoe.

The defense introduced Dr. Russell, a practicing physician, as a witness, who testified that he did not think a girl of 14 could have intercourse for the first time without being sore. That the soreness is caused by the entering and dilation of the parts.

The only question raised the record is, was there sufficient evidence to support the verdict? We are convinced there was not.

Rape, as defined by our statute, is the carnal knowledge of a female forcibly against her will. Kirby's Digest, § 2005.

Proof of actual penetration into the body shall be sufficient to sustain an indictment for rape. *Ib.* § 2006.

The prosecuting witness says that the defendant grabbed her around the neck and started with her into the bushes. That she became unconscious, and does not remember anything more until she regained consciousness and found she was in her brother's field. The record does not disclose that any examination was made of her private parts to ascertain if they had been bruised or had become inflamed, as tending to show penetration of her body. The prosecuting witness herself testified that she felt no soreness there. Dr. Russell stated that he thought soreness would result from sexual intercourse with a girl 14 years old. There is no testimony whatever to indicate that penetration of her body had been made unless it can be inferred that such act was accomplished because a stiff white splotch was found on her underskirt and the toe print of a man's shoe and the heel prints of a woman's shoe in the soft earth where the defendant had dragged her. We do not think this is sufficient to show that there was penetration of her body.

In connection with the prosecuting witness' testimony, it is ample to show an assault with intent to rape of a most aggravated character.

An assault with intent to commit rape is included in the charge of rape, and a conviction may be had of the former under an indictment for the latter. *Pratt* v. *State,* 51 Ark. 167.

Therefore, the uncontradicted evidence showing that the defendant was guilty of an assault with intent to rape, under

the rule established in the case of *Jones* v. *State,* 88 Ark. 579; *Hamby* v. *State,* 72 Ark. 623 and *Vance* v. *State,* 70 Ark. 272, and other cases decided by this court, an order will be made setting aside the judgment for rape, and affirming the judgment for assault with intent to commit rape, with the punishment fixed at 21 years in the State penitentiary, unless the Attorney General shall, within 15 days, elect to take a new trial. In which event the judgment will be reversed, and the cause remanded for a new trial.

JUDKINS v. MYERS.

Opinion delivered October 11, 1909.

BILL OF EXCEPTIONS—TIME FOR FILING.—Where, on January 29, 1908, the trial court gave appellant 6 months in which to file a bill of exceptions, a bill filed on July 30 following was too late.

Appeal from Lawrence Circuit Court, Western District; *Eugene Lankford,* Judge; affirmed.

J. B. Judkins, for appellants.

Campbell & Suits, for appellees.

The judgment should be affirmed because appellants have failed to present a sufficient abstract of the testimony and of the instructions given and refused. 90 Ark. 161, 214, 230, 393, 398; 89 Ark. 41; 88 Ark. 449; 87 Ark. 368. It should be affirmed because the bill of exceptions was not filed within the time allowed by the trial court.

BATTLE, J. On the 29th day of January, 1908, the trial court overruled the appellants' motion for a new trial, and gave them six months within which to file a bill of exceptions. On the 30th day of July, 1908, at 58 minutes past 11 o'clock P. M., they filed a bill of exceptions. It was then too late, and their bill of exceptions formed no part of the record, and there is nothing presented to us for consideration, the questions in the case being such as could be presented only by a bill of exceptions.

Judgment affirmed.

CLAMPETT v. STATE.

Opinion delivered October 11, 1909.

CONTINUANCE—ABSENCE OF WITNESS.—Where one accused of a felony handed the clerk the name of a witness with the address "Smackover," a town in another county, and the clerk handed the subpoena for such witness to a deputy sheriff, who mailed it to "Officer at Smackover," and nothing further was ever heard of the writ, it was not an abuse of the court's discretion to refuse a continuance on account of the absence of such witness.

Appeal from Cross Circuit Court; *Frank Smith,* Judge; affirmed.

Smith & Smith, for appellant.

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellee.

McCULLOCH, C. J. Appellant, Lee Clampett, stands convicted of the crime of obtaining property under false pretenses, the charge being that he obtained from the agent of the railway company at Cherry Valley, in Cross County, Arkansas, upon the false and fraudulent representation that he was then the holder of a bill of lading therefor, a lot of personal property which had been consigned to the Merry Machine Works. The evidence establishes the fact that appellant had ordered from the last-named concern at Memphis, Tenn., the property in question (a lot of machinery and appliances for a sawmill), which was shipped from Memphis to Cherry Valley, Arkansas, to the order of the shipper, and the latter sent the bill of lading, attached to a draft on appellant for the purchase price of the property, to a bank at Cherry Valley, to be delivered to appellant on payment of the draft. Appellant paid the freight charges and received the property from the agent of the railway company, and hauled it to the mill without paying the draft and without procuring the bill of lading and surrendering it to the agent of the railway company. He has never paid for the goods at all.

The railway agent testified that appellant represented that he held the bill of lading, and that the consignment of freight was delivered to him on the faith of such representation. Appellant denied that he made any such representation; his contention being that he was not aware of the property having

been consigned to the shipper's order. This was the issue involved in the trial of the case. The evidence was conflicting, but the jury has settled the issue by the verdict.

Appellant relies for a reversal of the case on the alleged error of the court in overruling his motion for continuance of the case to the next term, in order to procure the attendance of an absent witness, Tom Stevens by name. He set forth in his motion what he alleged to be the testimony of the absent witness, and the court, in overruling the motion, required of the prosecuting attorney an admission before the jury that the witness would give the testimony thus set forth. This was read to the jury as the testimony of the absent witness.

The court, in passing on the motion for continuance, heard testimony as to the diligence of the appellant and his attorney in attempting to procure the attendance of the absent witness. It appears from said testimony that the only thing done by appellant or his attorney was to hand to the clerk, four or five days before the trial, a list of his witnesses containing the name of this witness, with the word "Smackover" written opposite, indicating his residence to be at that place. Smackover is a railroad station in Union County, and the clerk issued a subpoena directed to the sheriff of that county, and delivered the same to a deputy sheriff of Cross County; the last-named officer mailed the subpoena in an envelope directed to "Officer at Smackover." The writ was never returned, and nothing was ever heard of it. The deputy sheriff stated that he was informed by Tom Stevens's father, who resided at Cherry Valley, that the witness resided at Smackover.

This court has repeatedly held that the matter of postponement of trials is left to a considerable extent to the discretion of trial judges. This must necessarily be so, as the trial judge who hears such motion is in a much better position than the appellate court to determine whether or not the motion is made in good faith and whether an honest, diligent effort has been made to prepare for trial. It is only when it appears that there has been an abuse of discretion by the trial judge that the appellate court will disturb such ruling.

Now, in the present instance we cannot say that the trial court abused its discretion in refusing to postpone the trial of

the case. Proper care had not been exercised by the appellant or his attorney in sending the subpoena to an officer who would serve it promptly. The Cross County deputy sheriff was blamable for not sending it to the proper officer of Union County; but appellant was not free from blame, as it does not appear that he took pains to give directions for forwarding the writ. He should not have relied on the officer entirely without specific directions to send it properly in order to get it served in time. However honest, intelligent and well-meaning public officers may be, they are often without the experience which suggests to them the best course to pursue in obtaining the speedy service of process; and a proper degree of diligence on the part of those interested in the service requires that they give directions, under circumstances similar to those shown to exist in this instance. Courts must hold litigants to a strict degree of care and diligence in preparing for trial. Otherwise the orderly dispatch of business of the court would be hindered.

This subpoena should have been sent to the sheriff of Union County, to whom it was directed, with information as to where the witness could be found in his county. If this had been done, doubtless the writ would have been served, and the witness present when the case was called. The only disputed point in the testimony of the absent witness is that appellant, some time after he obtained the property from the agent of the railway company (Miss McLin), offered to return it to her. He was of course entitled to prove this as tending to show good faith and a lack of criminal intent on his part. It was proved by undisputed evidence, however, that after Miss McLin ceased to be the agent of the company at Cherry Valley, and was succeeded by Stevens, appellant offered to return the property to the latter as such agent on condition that the freight charges which he had paid be refunded to him.

Upon the whole we are of the opinion that appellant was accorded a fair trial, and was convicted upon sufficient evidence. So the judgment is affirmed.

PICKETT v. STATE.

Opinion delivered October 4, 1909.

1. HOMICIDE—DUTY TO INSTRUCT AS TO MANSLAUGHTER.—Where, in a prosecution for murder, there was testimony justifying a finding that the defendants killed deceased under the belief that it was necessary to save their own lives, but that they were negligent in forming such belief, it was error not to instruct the jury as to voluntary manslaughter. (Page 574.)
2. SAME—JUSTIFICATION.—Where the defendant in a murder case seeks to justify the killing as in self-defense, it was error to instruct the jury that the guilt or innocence of the defendants depended upon the existence of reasonable grounds of belief that they were in danger, regardless of how the danger appeared to them at the time. (Page 575.)
3. INSTRUCTION—CREDIBILITY OF WITNESS.—It was not error to instruct the jury that if they believed a witness had sworn falsely in part and truth in part they should reject that part which they believed to be false and accept that part which they believed to be true. (Page 576.)

Appeal from Union Circuit Court; *George W. Hays,* Judge; reversed.

Thornton & Thornton, for appellants.

1. This case falls within the exception to the rule against disturbing the verdict of a jury. Even where there is a conflict in the evidence, this court will direct a new trial, where the verdict is so clearly and palpably against the weight of it as to shock the sense of justice. 34 Ark. 639. The verdict against Wilson Pickett inflicting the highest punishment is conclusive evidence that the jury were swayed by prejudice or passion. The evidence does not connect him with the crime. As to Henry Pickett, it is clear that he was being attacked in his own home, his castle, which Bunk Abbott and the deceased were entering in a violent and tumultuous manner, and which, under the circumstances, he had the right to defend, even to the taking of human life. While there is some conflict as to whether or not Bunk Abbott fired first, there is no question that Charles Abbott, for whose death these appellants are on trial, was the aggressor from the beginning of his connection with the difficulty.

2. Appellants were entitled to an instruction on the question of manslaughter, and the court's failure to so instruct when requested was error. 74 Ark. 265; 69 Ark. 139.

3. The oral instruction given by the court charging the jury that, if they believe any witness had sworn falsely in the case, it was their duty to disregard the testimony of such witness, etc., was erroneous. It does not even require that the matter falsely sworn to be material. 68 Ark. 336.

4. The fourth instruction given at plaintiff's request is perhaps correct when applied to ordinary cases of self-defense, but a different rule applies where one is in his own home, defending himself against attack.

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellee.

1. Under the evidence the defendants were guilty of murder either in the first or second degree, or guilty of no offense at all. The trial court should not instruct as to the law of a particular grade of homicide when there is no evidence to connect the defendant with it. 88 Ark. 448; 36 Ark. 285; 52 Ark. 345.

2. If the fourth instruction had been the only one given on the right of self-defense, it might have misled the jury. It is rather loosely drawn, but in view of the facts developed in evidence defendants were not prejudiced thereby. Taking all of the instructions together, they gave the law of the case, and appellant's defense was fully presented, and the jury's verdict will not be set aside if one of the instructions was misleading. 21 Ark. 357; 59 Ark. 322; 37 Ark. 238; 58 Ark. 353; 77 Ark. 141; *Id.* 100; 59 Ark. 558.

3. The court's oral charge correctly stated the law, and left it to the jury to reject that part of a witness' testimony which they believed to be false and to accept that part which they believed to be true.

4. The evidence is sufficient to sustain the verdict as to both appellants, and it should stand. 47 Ark. 196; 50 Ark. 511; 76 Ark. 326.

HART, J. The appellants, Henry Pickett and Wilson Pickett, were indicted in the Calhoun Circuit Court for murder in the first degree, committed by killing Charles Abbott, and on change of venue to Union County they were tried and convicted of murder in the second degree. Their sentence was fixed at a period of 21 years in the State Penitentiary. An appeal has been duly prosecuted to this court.

The evidence on the part of the State is correctly abstracted by the Attorney General as follows: On the 8th day of December, 1908, Henry Pickett went to the store of Bunk Abbott, and told him that he had a bale of cotton at the gin for him. Bunk Abbott told Henry Pickett that it was all right; that he would go down there and get the cotton. And Abbott asked Pickett what did he do with the seed, and when Pickett replied that the seed were at the house Abbott told him that he owed him the cotton and seed, and then it would not pay his account. Bunk Abbott told his brother, the deceased, Charlie Abbott, to go down and tag the cotton. Henry Pickett, Charley Abbott and Wilson Pickett, a brother of Henry Pickett, left the store together. Bunk Abbott knew the reputation of the two negroes, and when he saw Wilson Pickett leave with them, he went down to where they were to load the cotton. After the cotton was loaded, the two Pickett negroes went to the house. In a very short time a conversation took place between Henry Pickett, who was sitting at the time on the porch at his house, and Bunk Abbott, who was at or near the gate.

According to the testimony of Bunk Abbott and Hard Green, a negro boy who was there at the time, Bunk Abbott told Henry Pickett to go down and unload the cotton. Henry said he was not going. Bunk told him they would have to have a settlement. He told Bunk to go off, that he did not want to talk with a drunk man. Bunk asked him if he thought he was drunk, and he told him that he had his account, and put his hands in his pocket to get the account. Henry replied, "To hell with you," and immediately stepped into the house, and came back, and commenced shooting. Bunk and Charlie Abbott then approached the house, and also began firing. Hard Green saw Wilson Pickett in the house during the shooting, and Ira Newton, who was about 100 yards away, testified that he saw "the darkey" at the corner of the room at the "L" of the house run into the house immediately after he had heard some shots. A little bit later Newton saw both negroes come from around the house. One was carrying a single-barreled shotgun, and the other a rifle. As they passed Newton, they were asked if any one got hurt. Henry said that he was shot in the leg, and Wilson said "they come and got our cotton."

The negroes fled the country, and were finally captured at Monroe, La.

Bunk Abbott was shot in the arm and in the chin. The shot struck the back of his arm near the wrist bone, and came out on the inside of his arm, near the elbow. Charlie Abbott was shot in the left arm, and a load of squirrel shot penetrated his breast over the heart. There were forty-four squirrel shot holes in his breast covering a space of about six inches.

The circumstances in regard to the killing, as testified to by the defendant Henry Pickett, is as follows: "I am one of the defendants. We had been to town that day, and did not have any dinner, and I was hungry, and I went in the kitchen, and asked my wife how near supper was ready, and she replied that it would be ready in a few moments, and I went back and sat down on the porch, and Mr. Abbott says: "Henry, come out here and get in this wagon, and go back to town with me.' I said: 'Mr. Abbott, you have plenty of help without me.' He says: "Damn that! This is your cotton, and I want you to go back to town and unload it. I started to tell him something, and he said again: 'Come out here.' I started to go out there, and then concluded I had better stay where I was, and said to him that I had better stay where I was, as he did not look right. He says: "You damned son of a bitch, come out of there!" And I told him I was not coming, and he said: 'If you don't come out of there, I am coming in there.' He said: 'You may think I have no right to come in there, but I will show you.' I said: 'I have got nothing to say about that.' He then pulled his gun out and started in. He got about half way between the gate and the doorsteps where I was sitting. I was still sitting there, and he had the gun in his hand. I did not think he was going to shoot me, and I just stayed there. I stayed there until he stepped up to me, and when he gets up to me he says: 'By God, you get up and come out of here.' I sat there just a second, and then I gets up and whirls right quick in the house. He then shoots at me three or four times, may be five, and then he started in the house. Mr. Bunk was running in this way shooting, and Mr. Charlie was shooting this way (indicating). My children and my wife were scared nearly to death. My children was running around after me hallooing and screaming. And they were just shooting every way.

My wife had been cleaning up and scrubbing that day. I ran to the corner where I generally kept my gun, and I did not find it, and I ran to the bed and found my gun where they had put it while they were cleaning up. I grabbed my gun, and began shooting at them. I did not have but one shell, and I shot it, and then I ran back and got my rifle, and began shooting at them. I shot both the shotgun and rifle. My brother did not shoot at all. He had nothing to do with the difficulty. I did not have any pistol that day; never owned one in my life. After the shooting I ran out of the back door and into the field where we saw Mr. Porter. We then went off into Louisiana. My family consists of a wife and three children. The oldest is 14 years, the middle one two years, and the youngest 10 months old. They were all in the house running around, scared to death. The reason I did not go back to town with the wagon was that my wife's mother was about to die."

The testimony of Wilson Pickett is substantially the same as that of Henry Pickett.

Counsel for appellant correctly contends that the court erred in refusing to instruct the jury on voluntary manslaughter. The facts in the present case bring it squarely within the principle announced in the case of *Allison* v. *State,* 74 Ark. 444. Mr. Justice RIDDICK, speaking for the court said:

"In each case, then, the question of whether it is proper to submit to the jury the question of the defendant's guilt of any particular grade of offense included in the indictment must be answered by considering whether there is evidence which would justify a conviction for that offense. In this case there was evidence that tended to show that the defendant shot Baldwin because Baldwin cursed him and then attempted to draw a pistol upon him in a threatening manner. The presiding judge may have concluded that if the jury believed this evidence they should acquit, and that therefore this evidence did not justify an instruction in reference to manslaughter. But the jury may have accepted a part of this evidence as true and rejected other portions of it as untrue. They may have concluded that the defendant shot under the belief that he was about to be assaulted, but that he acted too hastily and without due care, and was therefore not justified in taking life under the circumstances. It is not

always necessary to show that the killing was done in the heat of passion to reduce the crime to manslaughter; for, where the killing was done because the slayer believes that he is in great danger, but the facts do not warrant such belief, it may be murder or manslaughter, according to the circumstances, even though there be no passion. Or, when the slayer, though acting in self-defense, was not himself free from blame, the crime may be only manslaughter. *Wallace* v. *United States,* 162 U. S. 466. The mere fact that a man believes that he is in great and immediate danger of life or great bodily harm does not of itself justify him in taking life. There must be some grounds for such belief, or the law will not excuse him for taking the life of another. But if the slayer acts from an honest belief that it was necessary to protect himself, and not from malice or revenge, even though he formed such conclusions hastily and without due care, and when the facts did not justify it, still under such a case, although such a belief on his part will not fully justify him, it may go in mitigation of the crime and reduce the homicide to manslaughter. *Stevenson* v. *United States,* 162 U. S. 313.

So in the present case the jury, exercising its right to accept such portions of the testimony as it believed to be true and to reject that believed to be false, might have found that there was not only provocation by words, but that there was an overt act on the part of deceased and his brother. In short, the jury might have found that the defendants shot first, but that they did so under the belief, formed too hastily and negligently, that Bunk Abbott was reaching for his pistol when in reality he was only coming in for the purpose of having a settlement with the defendants. As there was at least some substantial evidence upon which the jury might have found the defendants guilty of voluntary manslaughter, the defendants had a right to an instruction on that question.

Inasmuch as there must be a reversal on account of the failure to instruct on manslaughter, we shall take occasion to caution the court in regard to the form of instruction No. 4. To say the least of it, the instruction was ambiguous. It might be construed to make the guilt or innocence of the defendants dependent upon the existence of reasonable grounds of belief that they were in danger, regardless of how the danger appeared

to them. *Burton* v. *State,* 85 Ark. 48; *Hoard* v. *State,* 80 Ark. 87; *Magness* v. *State,* 67 Ark. 599; *Smith* v. *State,* 59 Ark. 132.

Counsel for appellants also insist that the oral instruction given in regard to the credibility of witnesses was erroneous because it warranted the jury in disregarding testimony which it believed to be true if it came from a witness whom the jury believed had sworn falsely to some other material fact. While the instruction might have been couched in clearer language, we do not think it susceptible of that construction. It, in effect, told the jury that, if they believed a witness had sworn falsely in part and truthfully in part, they should reject that portion which they believed to be false and accept that part they believed to be true. It is, therefore, not in conflict with the rule announced in the case of *Bloom* v. *State,* 68 Ark. 336, and of *Frazier* v. *State,* 56 Ark. 242.

Counsel for appellants next contend that there is no evidence connecting Wilson Picket with the killing. We cannot agree with their contention in this respect. There was evidence tending to show that both defendants were in the house during the time of the shooting, and that two guns were used. Both the defendants left immediately after the shooting, each carrying a gun.

For the error in refusing to instruct the jury on manslaughter, the judgment is reversed, and the cause remanded for a new trial.

HOLT v. STATE.

Opinion delivered October 18, 1909.

1. JURORS—ERROR IN REFUSING TO EXCUSE JUROR—PREJUDICE.—Error of the court in a criminal case in overruling a challenge to a juror for cause is waived if the defendant did not exhaust his peremptory challenges. (Page 579.)
2. TRIAL—ARGUMENT OF COUNSEL.—It was not error to permit the attorney for the State in a murder case to denounce the defendant in argument as "an assassin and cold-blooded murderer" where such an opinion was a reasonable deduction from the evidence. (Page 579.)
3. APPEAL AND ERROR—WHEN ADMISSION OF EVIDENCE HARMLESS.—The error of admitting improper evidence may be cured by instructing the jury not to consider it in making up their verdict. (Page 579.)

4. SAME—WHEN ADMISSION OF EVIDENCE HARMLESS.—The defendant in a murder case was told by the officer having him in charge that there was a pretty hard case against him, to which defendant replied: "Charley Buck shot a man and got off with five years." Defendant claimed that the killing was done in self defense. *Held* that if the confession was inadmissible, not being voluntary, it was not prejudicial, especially where defendant had made a voluntary confession of the killing to another witness. (Page 580.)

5. JURORS—DESIGNATION OF PERSON TO SUMMON.—Under Kirby's Digest, § 2350, providing that "the court may, for sufficient cause, designate some other officer or person to summon jurors," the trial court has discretion to determine what is a sufficient cause. (Page 581.)

Appeal from Washington Circuit Court; *J. S. Maples,* Judge; affirmed.

Appellant, *pro se.*

1. It was error to permit either Todhunter or Boaz to testify as to the confession made, as they were not voluntary but extorted. 66 Ark. 53; 50 *Id.* 305; 22 *Id.* 336; 11 *Id.* 408; 69 *Id.* 599-602; 3 Enc. Ev., pp. 301-2-3. Confession must be voluntary and without restraint, coercion or influence of any kind. The question of admissibility often turns upon the question whether they were made to one having official authority, or sustaining some confidential relation as spiritual adviser, or having control over or power to punish. 25 Ala. 9; 69 *Id.* 159; 2 Col. 186; 113 Ga. 1039; 80 Ky. 468; 11 Tex. App. 364; 14 N. Y. 384; 35 Tex. Cr. App. 360; 13 S. W. 865; 1 Bish. Cr. Pr. 1227; 3 A. & E. Enc. L. 457-8-9; 1 Greenl. Ev. 220.

2. It was error to dismiss the sheriff and deputy and allow a bystander to summon a jury.

3. The court erred in its charge to the jury.

Hal L. Norwood, Attorney General, *C. A. Cunningham,* Assistant, for appellee.

1. There is nothing in the testimony of Boaz and Todhunter that would render the confession of defendant inadmissible. 28 Ark. 121; *Ib.* 521; 35 Ark. 35; 50 *Id.* 501. But if they were they were not harmful nor prejudicial. 73 Ark. 407; 76 *Id.* 276; 77 *Id.* 453.

2. Error in admitting improper testimony is cured when the court withdraws it from the jury. 60 Ark. 45. The presumption

is that the verdict is based on competent evidence only. 43 Ark. 99. Juries should be credited with at least ordinary intelligence. 66 Ark. 16.

3. Defendant had not exhausted his peremptory challenges, and he cannot complain of the juror Bob Curtis. 72 Ark. 613; 19 *Id.* 156; 30 *Id.* 328; 50 Ark. 494; 69 *Id.* 322; 71 *Id.* 86.

4. The denunciation of defendant in argument, under the proof, was very proper and appropriate. 72 Ark. 613; 74 *Id.* 489. If error, it was harmless. 72 Ark. 613; 73 Ark. 148.

WOOD, J. Appellant appeals from a judgment of the Washington Circuit Court convicting him of the crime of murder in the second degree. He was indicted for murder in the first degree. The indictment was in apt language, and correctly charged the offense. The evidence for the State tended to show that appellant on the 6th day of September, 1908, shot and killed one J. W. Murry from ambush. It was shown that Murry a few weeks prior to the killing had accused appellant of stealing watermelons, had cursed appellant, calling him vile names, and had threatened to kill appellant; that this abuse filled appellant with rancor, which on the day of the killing caused him to say that he was going to "get his gun and make him take it back or kill him." There were circumstances tending to show that appellant while lying in wait killed Murry as he passed along the highway. Such was the theory of the State.

On the other hand, there was evidence tending to prove that appellant met Murry in the public road, and requested him to retract the abusive language he had formerly used toward appellant; that he refused to do so, but made a motion as if to draw a weapon, whereupon appellant shot and killed him instantly. The jury passed upon the conflicting theories to be deduced from the evidence, and it suffices to say that a verdict for murder, even in the first degree, would not have been disturbed by this court. There was some evidence to justify the court in submitting to the jury the question as to whether appellant was seen at the time he fired the fatal shot, and this the court did in proper instructions. There was no evidence to warrant the court in submitting the question as to whether appellant was acting under an insane delusion in taking the life of Murry. There is no proof of delusional insanity in the record, and the trial court

properly rejected prayers for appellant seeking to have such issue presented.

Bob Curtis, a talesman, stated on his *voire dire* that he had a "fixed opinion" as to the defendant's guilt formed from reading newspaper articles and talking with persons who purported to give the facts in the case. The court over the objection of appellant held that Curtis was a qualified juror. The appellant excepted to the ruling, and peremptorily challenged the juror.

Conceding that the answers of the juror *prima facie* rendered him incompetent, and that, in the absence of further examination into his competency, the court should have excused him for cause, still there is no showing in the record that appellant had exhausted his peremptory challenges. It does not appear, therefore, that appellant was prejudiced by the ruling of the court. It does not appear that by the ruling of the court appellant was compelled to accept some juror that was unsatisfactory to him. The appellant, not having exhausted his peremptory challenges, waived any error the court may have committed in not excusing the juror for cause. *York* v. *State, post* p. 582; *Glenn* v. *State,* 71 Ark. 86; *Caldwell* v. *State,* 69 Ark. 322.

Counsel for the State denounced the defendant in argument as an "assassin and cold-blooded murderer." The language, at most, could only have been accepted by the jury as the opinion of the zealous prosecutor from his viewpoint of the evidence. The jury had heard all the evidence, and they were sworn to form their opinion from the evidence and the law applicable thereto. It is not probable that a sensible jury would mistake the denunciation of zealous counsel for proof in the case, and be misled thereby to appellant's prejudice. Such arguments are in bad form, but it is not error to permit them, especially under facts and circumstances such as are detailed in this record. *Kansas City S. Ry. Co.* v. *Murphy,* 74 Ark. 256. From the standpoint of the State, such opinions as the prosecutor expressed were reasonable and legitimate deductions, to be drawn from the evidence.

The court permitted witness Carson, the deputy sheriff and jailer, to give his opinion as to the sanity of appellant while he was in jail, where no foundation had been laid for such opinion. But the court cured any error in this by instructing the

jury not to consider such opinion in making up their verdict. *Carr* v. *State*, 43 Ark. 99; *Johnson* v. *State*, 60 Ark. 45.

It may be conceded that the confession of appellant, made to the deputy sheriff Todhunter and constable Boaz after they had taken him into custody, was, under the circumstances detailed by them, not a voluntary confession, and that therefore the court erred in permitting evidence of such confession to go to the jury. But we see nothing in the confession, as shown by the testimony of these witnesses, that was prejudicial to appellant. The deputy sheriff, after taking appellant into custody, told him that "it looked like there was a pretty hard case against him." To this appellant replied, "Charley Buck shot a man and got off with five years, and got off with about five months." Appellant urges that this "testimony tended to create in the minds of the jury a belief that this appellant thought lightly of human life, and believed that he could kill a man and get off with a few months as Buck had done." But the testimony could not reasonably have so impressed the jury. For it was but the expression of a hope on the part of appellant that, although his case might seem to the deputy sheriff to be a a "pretty hard one," yet, in view of the light punishment Buck had received for killing a man, appellant might also hope to be similarly dealt with. It must be borne in mind, that appellant was claiming that he acted in self-defense. In view of this claim, it was but reasonable for him to express the belief, in answer to the deputy's question, that he, appellant, might not fare any worse than Buck had done for killing a man. We do not see that this part of his confession could have prejudiced him. Taking the confession as a whole, it did no more than to connect appellant directly with the killing.

The testimony of witness June Lawson shows that appellant confessed to the killing before he was arrested, and before he made the confession to the officers. It is not contended that the confession to June Lawson was involuntary. Appellant also, on the witness stand, confessed to the killing.

That is all that the confession to the officers tends to show. So we are convinced that, although this confession might not have been free and voluntary, evidence of it, in the light of the testimony of June Lawson and of appellant himself, could not have been prejudicial.

Appellant insists that the court erred in dismissing the duly elected sheriff and his sworn deputy, Carson, and in designating Combs, a bystander, to summons the jury to try the case; and insists that the motion asking for the discharge of the sheriff and Carson did not contain sufficient allegations for said motion to be considered by the court, and the evidence adduced was not sufficient to justify the court in denying the sheriff and his deputy, Carson, the right to summons the jury to try the appellant, and in giving to Combs, a bystander, the right to summons said jury. Section 2350 of Kirby's Digest provides: "The court may, for sufficient cause, designate some other officer or person than the sheriff to summon jurors, the officer or person designated being first duly sworn in open court to discharge the duty faithfully and impartially." The prosecuting attorney moved the court to designate some one other than the sheriff to select talesmen to serve as jurors after the regular panel had been exhausted, setting up, among other things: "That J. C. Reed, sheriff of Washington County, is so biased and prejudiced in favor of the defendant in the above-entitled cause that said sheriff will not summon a jury free from bias and prejudice." It was also alleged that "J. C. Reed, sheriff, was related in some degree by affinity or consanguinity to the defendant." The court, after hearing evidence on the motion, granted it, and designated J. G. Combs, sheriff.

It will serve no useful purpose to review the evidence adduced on the hearing of the motion. The trial judge must necessarily have large discretion in determining what is "sufficient cause," in order to carry out the salutary purposes of this statute. The Legislature did not designate what would constitute a "sufficient cause," but wisely left that to the discretion of the trial courts. We find no abuse of the discretion in the present case of which appellant can complain. The jury was duly selected, and it is nowhere shown that any juror selected by the special sheriff was prejudiced against appellant.

We have examined the objections to the rulings of the court in the giving and refusing of prayers for instructions. It could serve no useful purpose to discuss these at length. The charge as a whole is clear, consistent, and exceptionally free from error. It covers accurately every phase of the evidence, and announces

familiar principles that have been often repeated in many decisions of this court.

The appellant has had a fair trial. The judgment is therefore affirmed.

YORK v. STATE.

Opinion delivered October 18, 1909.

1. JURORS—ERROR IN SUSTAINING CHALLENGE—WAIVER.—If it was error to excuse jurors in a capital case because they did not believe in capital punishment, such error was not prejudicial if the defendant failed to exhaust his peremptory challenges. (Page 585.)
2. CRIMINAL LAW—JUDGES EXCHANGING CIRCUITS DURING TRIAL.—It was not reversible error for the regular circuit judge to exchange circuits with another circuit judge during the trial of a criminal case. (Page 586.)

Appeal from Dallas Circuit Court; *Henry W. Wells* and *Antonio B. Grace,* Judges; affirmed.

Goodwin & McHaney and *Herring & Williams,* for appellant.

1. Mere disbelief in capital punishment is not a ground of disqualification of a juror. Kirby's Dig., § 2363, sub-div. 7; 17 Am. & Eng. Enc. of L., 2d Ed. 1134, sub-div. "d;" 16 Ark. 579. The statute, *supra,* places disqualification to serve as a juror in a capital case on the sole ground of entertaining such conscientious opinions as will preclude the juror from finding the defendant guilty. There was neither legal nor discretionary ground for the court's excusing the five jurors from the regular panel upon a mere expression of disbelief in capital punishment. 17 Am. & Eng. Enc. of L. 1156 and 1157, note 2; 24 Cyc. 251, subdiv. 3 and cases cited. A special venire can be summoned only under the conditions named in the statute. Kirby's Dig., § 4526. Talesmen can be summoned only when the regular panel is exhausted or otherwise engaged, and, except in such event, the regular panel of jurors must be used in the trial of all cases during their term of service. *Id.* § 4528. Defendant was entitled

to have the jury drawn from the whole panel in the manner provided by statute. *Id.* § § 2347, 2348. A failure to comply substantially with the procedure provided by law in the selection of jurors is error. 24 Cyc. 367, sub-div. "A;" 50 S. W. 241; 20 Ky. L. 184; 80 Va. 555.

2. The exchange of circuits in the midst of the trial, whereby the regular judge absented himself and a judge from another circuit presided until the trial was completed, was error. It was neither within the spirit nor the letter of our Constitution and laws. 23 Cyc. 565; 14 Colo. 419; 24 Pac. 258; 143 Cal. 462; 77 Pac. 153; 192 Ill. 493; 55 L. R. A. 240; 75 Miss. 527; 71 Ark. 113; art. 7, § 21 Const. (Ark.) 1874; *Id.* § 22; Kirby's Dig., § 1321. In prosecutions for felonies the continual presence of the judge during the entire course of the trial is essential. 192 Ill. 493; 21 Enc. Pl. & Pr. 978, 979 and notes; 88 Ark. 69; 71 Ark. 115. And his judicial authority cannot be delegated to another. 75 Miss. 527; 10 Am. St. Rep. 154; 118 Ind. 350.

3. Instructions given on the part of the State wholly ignore appellant's right to stand his ground in his own house, but put upon him the duty to retreat in the face of danger; and the fact that the court gave instructions at appellant's request to the effect that he could stand his own ground in his own premises without retreating did not cure the defect in the State's instructions. The two sets of instructions contradicted each other, and were misleading. 85 Ark. 52; 13 Ark. 360; 54 Ark. 588; 55 Ark. 397. The ninth instruction evidently meant that the defendant must retreat, even though assaulted in his own house, if consistent with his safety and thereby he could avoid the danger and avert the necessity of the killing. That is not the law. 69 Ark. 650; 33 Am. St. 83, 87; 87 Am. St. Rep. 910; 2 Bishop, Crim. Law, 653; 8 Mich. 177; 27 O. St. 188.

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellee.

1. A defendant has no vested right to be tried by any particular juror. He is entitled to a fair and impartial trial by a jury of his peers, and that is the only guaranty. If there was error in excusing the five jurors, it was not prejudicial. Moreover, it is not shown that appellant exhausted his challenges. 19 Ark. 22; 45 Ark. 165; 50 Ark. 492; 69 Ark. 449; 71 Ark. 86;

72 Ark. 145. The court's decisions upon challenges to the panel and for cause shall not be subject to review. Kirby's Dig., § 2430; 28 Ark. 547. Are not his rulings as to the qualifications of jurors within the spirit of this statute? Again it is held that erroneous acceptance or rejection of a juror is no ground for new trial. 29 Ark. 17; 30 Ark. 343; 32 Ark. 763; 35 Ark. 639; 69 Ark. 322.

2. Judge Wells presided through the taking of testimony, instructed the jury, and the exchange of circuits was not effected until after part of the argument was heard. No prejudice could have resulted by the exchange, and, indeed, none is claimed. This is not a case of a judge absenting himself during a trial and leaving the parties without control. There was a competent judge present and presiding throughout the whole of the trial. No prejudice being shown, appellant cannot complain. 81 Ark. 301; 92 Ga. 65; 110 Ga. 370; 73 Ark. 148; 54 Ark. 6; 51 Ark. 132.

3. The instructions are to be considered as a whole. When that is done, it appears that the whole law of this case was given to the jury. 64 Ark. 250; 66 Ark. 601; 74 Ark. 431; *Id.* 377.

BATTLE, J. James York was indicted at the August, 1908, term of the Bradley Circuit Court for murder in the first degree committed by killing Homer McLain, and was tried in the Dallas Circuit Court, after a transfer of the cause to that court, on the 23d day of June, 1909, and convicted of voluntary manslaughter, and his punishment was fixed at three years' imprisonment in the State penitentiary.

In impaneling the jury to try the defendant the trial court caused the panel of twenty-four jurors, selected by jury commissioners, to serve at the June, 1909, term, of the Dallas Circuit Court, to be sworn, over the objection of the defendant, to answer questions touching their qualifications to serve as jurors in the trial of the defendant, and asked the whole panel "if they believed in capital punishment," and five answered that they did not, and were excused from serving. The court then ordered the sheriff to summon five bystanders to take the places of the five jurors excused, which was done, and the five talesmen, over the objection of the defendant, took the places of the five jurors who had been excused, and the names of the panel, as thus composed, were written upon separate slips of paper, and placed in

a box, and the names of the jurors selected to serve as a jury in the case, were drawn from the box in the manner provided by the statute.

Did the court commit a reversible error in excusing the five jurors and causing five others to be summoned and substituted in their places?

In *Meyer* v. *State,* 19 Ark. 156, a juror was challenged by the defendant for cause. The challenge was overruled. The defendant excepted to the ruling of the court, and stood upon his challenge, and he was sworn as a juror in the case. The court said: "After his competency was determined by the court, the prisoner did not get clear of him by peremptory challenge, but, permitting him to be sworn as a juror, rested upon his exception to the decision of the court, which he had a right to do;" and held that the trial court erred in overruling the challenge and for such error, in part, reversed the judgment of the circuit court, and allowed the defendant a new trial. Since that time this court has uniformly held that if, after a court has erroneously overruled a challenge of a juror for cause, the defendant elected to challenge him peremptorily, he could not avail himself of the error, unless he had exhausted his peremptory challenges, thereby holding that he could protect himself against such error, and would not be allowed to suffer by so doing if he exhausted his peremptory challenges before the completion of the jury. *Benton* v. *State,* 30 Ark. 328; *Wright* v. *State,* 35 Ark. 639; *Polk* v. *State,* 45 Ark. 165; *Caldwell* v. *State,* 69 Ark. 322.

In *Mabry* v. *State,* 50 Ark. 492, the regular panel of jurors was exhausted, and the jury in the case remained incomplete, and bystanders were summoned to complete it, and, over the objection of the defendant on account of the manner in which they were summoned, were sworn as members of the jury. The court said: "When such objection is made, and the record fails, as in this case, to show that the defendant exhausted his peremptory challenges, it is unavailing in the appellate court, because the failure to challenge is an implied admission that the jurors are unobjectionable. * * * * The right of peremptory challenges is conferred as a means to reject, not to select, jurors. The object of the law is to obtain a jury impartial to the prisoner and the State alike. Neither has a right to the services of any par-

ticular juror. *Hurley* v. *State,* 29 Ark. 22. If all the talesmen had been challenged by him, and he had then been forced to accept a juror without the privilege of exercising his right of peremptory challenge, he might have cause to complain. But he has voluntarily taken his chance of acquittal at the hands of jurors whom he might have rejected, and he must abide the issue."

The record in the case at bar does not show that appellant exhausted his peremptory challenges, and according to the principles upon which the Mabry case rests he has no right to complain.

During the progress of the trial in this case and after all the evidence had been adduced and the instructions had been given by the court, and the opening arguments of both parties had been made by counsel, the Hon. H. W. Wells, Circuit Judge of the Tenth Judicial Circuit of the State of Arkansas, and the judge of the Dallas Circuit Court, then presiding in the trial, and the Hon. A. B. Grace, Circuit Judge of the Eleventh Judicial Circuit of the State of Arkansas, by an agreement spread upon the record, exchanged circuits, the former vacating the bench and the latter immediately occupying it and presiding during the remainder of the trial, and until the arguments were completed. The motion for new trial was overruled, and the prisoner was sentenced, and judgment rendered, and an appeal was prayed and granted.

Did the judges commit a reversible error in exchanging circuits at the time they did?

Section 22 of article 7 of the Constitution of this State provides: "The judges of the circuits may temporarily exchange circuits or hold courts for each other, under such regulations as may be prescribed by law." And section 1321 of Kirby's Digest says: "The judges of the circuit courts may by agreement temporarily exchange circuits or hold courts for each other for such length of time as may seem practicable and to the best interest of their respective circuits and courts." And section 1322 provides: "The judges exchanging as aforesaid shall have the same powers and authority while holding courts for each other as the judge for the circuit in which term or terms shall be held."

This case is unlike *Stokes* v. *State,* 71 Ark. 112, where the judgment of the circuit court was reversed because the trial

judge lost control of the proceedings of the court by his temporary absence. In this case the proceedings of the court were at all times under the direct supervision of a judge fully authorized to control them. We are unable to see that appellant could have been prejudiced by the exchange of the judges unless it be in the decision of questions of evidence. But this could not affect the legality of the exchange, as the witnesses whose testimony may be in question in such cases may be recalled and required to testify what they had stated in the trial, and go through the same course of examination. *Bullock* v. *Neal*, 42 Ark. 278. In the case cited this court held that "when the judge at a trial becomes sick and unable to proceed after the evidence is all in and the instructions have been given to the jury, the trial should proceed under a special judge, before the same jury, and without rehearing the testimony." That case is decisive in this, the judge in the case cited being a special judge and in this case a regular judge vested by the Constitution and the statute with the same powers and authority as the judge of the Dallas Circuit Court had.

In the trial of appellant the court instructed the jury, over the objection of the appellant, in behalf of the State, in part, as follows:

"8. 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.

"9. In order to justify the taking of life in self-defense, the party must employ all means within his power, consistent with his safety, to avoid the danger and avert the necessity."

And at the request of the defendant instructed the jury, in part, as follows:

"7. The court instructs the jury that if you find from the evidence in this case that the defendant, Jim York, was in his place of business or residence, or was in a place of business where he was in control, in the town of Vick, in Bradley County, Arkansas, when the killing occurred, as alleged in the indictment,

if you find that the killing so alleged did occur, then the court instructs you that the defendant, Jim York, had a right to be in his place of business or residence, and if you find from the evidence that the deceased, Homer McClain, by himself or in company with others, came into the defendant's place of business or residence with the intent of assaulting the defendant or offering him personal violence, or, being in his place of business or residence, formed the intent of assaulting him or offering him personal violence, and by overt acts or words made it appear to defendant that he was in danger of losing his life or of receiving great bodily injury, or that he was about to be assaulted at the hands of deceased, Homer McClain, or at the hands of deceased in company with others, then the court instructs you that the deceased, Homer McClain, and those acting with him, if any, were trespassers, and the defendant had the right to defend himself and act upon the danger as it appeared to him, whether the danger was real or not; and if you believe from the evidence, or if you have a reasonable doubt from the evidence as to whether the deceased, Homer McClain, came to the defendant's place of business or residence with the intent, or, being in the defendant's place of business or residence, formed the intent of assaulting the defendant or offering him personal violence, and by any overt act or words gave defendant reasonable grounds to believe, from his point of view, that he was in danger of being assaulted or receiving personal violence at the hands of deceased, or at the hands of deceased in company with others, and that defendant, while honestly defending himself against such assault or proffered personal violence, and without fault upon his part, killed the deceased by stabbing him, the killing would be justifiable, and under those circumstances you must acquit the defendant."

Appellant contends that the instructions given in behalf of the State conflict with that given at his request, and should not have been given. Were they prejudicial? All of them were based upon evidence. Those given in behalf of the State were general, and that given at the instance of the defendant was specific, applying the law to the facts as defendant contended they were, and directing the jury to acquit in the event they found the facts to be as stated in the instructions given at the request of the defendant. On the other hand, those given in behalf of

the State stated general rules of law without any directions as to the verdict. Construed as a whole, as they should have been, we are unable to see how those given in behalf of the State could have prejudiced the defendant.

The evidence was sufficient to sustain the verdict.

Judgment affirmed.

SEXTON v. STATE.

Opinion delivered October 18, 1909.

1. APPEAL AND ERROR—WHEN ERROR HARMLESS.—Appellant can not complain because the jury found him guilty of assault with intent to commit rape, though the evidence was to the effect that he was guilty of rape if anything. (Page 590.)
2. RAPE—EVIDENCE—COMPLAINT BY PROSECUTRIX.—In a prosecution for rape it is competent for the State to prove the fact that the prosecuting witness made complaint of her injury, but not the details as to what she said, unless the defense undertakes to impeach her testimony on this point, in which case the particular facts stated by her may be proved in corroboration of her testimony. (Page 591.)
3. SAME—EVIDENCE—THREAT TO RUIN PROSECUTRIX.—In a prosecution for rape it was not error to permit the State to prove that four or five months before the crime is alleged to have been committed the defendant had threatened to ruin the prosecuting witness if he could get hold of her. (Page 593.)
4. SAME—CROSS EXAMINATION OF WITNESS.—In a prosecution for rape where a witness for the defendant testified on direct examination that the prosecuting witness spent at his house the night after the crime was alleged to have been committed, and that she made no statement to him as to the outrage alleged to have been committed on her, it was not error to permit the State on cross examination to show that the prosecuting witness during that night communicated information of the outrage to the wife of witness. (Page 594.)

Appeal from Independence Circuit Court; *Charles Coffin*, Judge; affirmed.

Oldfield & Cole, for appellant.

1. In certain instances it is permissible to show that the prosecutrix in a rape case made complaint of the outrage soon

after it happened, but the details of that complaint or the naming of her assailant is not admissible. 63 Ark. 470; 66 Ark. 264; 11 Am. Cas., 95 and note.

2. The alleged declaration of appellant to the witness Wilson some three to five months prior to the time this crime is charged to have been committed was improperly admitted. There is nothing in the statement, if made, which is improbable, to show that the prosecutrix was the girl referred to. Before threats are admissible in evidence, they must be shown to have been connected with the offense charged and directed to or spoken of the injured party. 59 Ark. 303; 46 S. W. 39; 86 Fed. 106; 29 C. C. A. 600. See also 82 N. C. 268.

3. It was error to permit a cross examination of the witness Milligan on matters not responsive to his examination in chief. What he advised about the matter in the absence of the defendant, and what the father of prosecutrix said, was manifestly improper and prejudicial. It was not relevant; it was not cross examination.

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellee.

1. There is nothing objectionable in Birmingham's testimony. He was not allowed to detail what the prosecutrix said. Its only purpose and effect was to show that she made complaint, and that process issued for the appellant. 63 Ark. 474. Nowhere does his testimony show any description of or reference to appellant on the part of the prosecutrix. 29 Am. & Eng. Cas. 95 and note; 66 Ark. 268.

2. His remark to Tom Wilson concerning prosecutrix was admissible to show appellant's intent. Wilson says she was the only girl there of any *size,* that the rest were all *small* children.

3. Milligan's cross examination was legitimate. He had testified in chief that prosecutrix had asked her father if he (Sexton) had given him any money, which would go to show that her father had attempted to settle the matter for money. It was proper on cross examination to show what he did and said when informed of the outrage upon his daughter.

McCULLOCH, C. J. Defendant, Charles Sexton, was indicted for the crime of rape, alleged to have been committed by having carnal knowledge of one Maud Bethel forcibly and against her

will; and on trial therefor he was convicted of assault with intent to commit rape, his punishment being fixed by the jury at confinement in the penitentiary for three years. Maud Bethel testified that the defendant, on the day named in the indictment, came to her home and forcibly and against her will had sexual intercourse with her. The defendant denied this, and testified on the contrary that he had never had sexual intercourse with Maud Bethel, either with or without her consent. The jury settled the issue by their verdict, which the evidence was sufficient to sustain. The tendency of the evidence was to show that the defendant was successful in his attempt and committed the crime of rape, if he made any assault at all on the girl; but the jury released him from the penalty of the higher crime and found him guilty only of the lower crime of assault with intent to commit rape; and he cannot complain of this leniency. *Benton* v. *State,* 78 Ark. 284; *Price* v. *State,* 82 Ark. 25.

The defendant objected to the introduction of certain testimony by the State, and saved his exceptions to the ruling of the court in admitting it. The first exception insisted on here is that to a portion of the testimony of a witness named Birmingham. This witness was in the neighborhood where the offense is alleged to have been committed, and testified that, after having heard that the offense had been committed, he went over to see the girl, and, after having heard her complaint, went with her father to procure a warrant for defendant's arrest. The portion of his testimony quoted by counsel for defendant as objectionable is as follows:

"Q. Where was it she made the complaint? A. At Riley Milligan's. Q. Who was present? A. Riley Milligan and Riley's wife. Q. In getting a complaint from her at that time, were Riley Milligan and his wife present at the time? A. That she gave me the complaint? Q. Yes. A. Yes, they were both present. Q. If questions were asked her concerning this affair, who asked them? A. Riley Milligan. (Objected to by defendant, overruled, exceptions saved.) Q. Where were you at the time, and where were these other parties at the time she made the complaint? A. I was at Riley Milligan's in the house, or on the little porch between the houses, rather, and they were there, too. Q. What was done in reference to this matter? (Objected to by defendant.) Q. In other words, was the process issued or

asked for for the apprehension of this defendant? (Objected to by defendant, overruled and exceptions saved.) A. Yes, sir. Q. Where did you go after that? A. I went back to the meeting ground and learned that the boy had his gun and was gone. (Objection sustained.) Q. What did you go to the meeting ground for? A. I went over there for church and to see if he (defendant) was there, and he was gone. I had understood that he was going over there to meeting."

Further statements along the same line were made by the witness, but the above serves to show the part objected to by the defendant. The basis of defendant's objection to this testimony is that, in effect, it was allowing the witness to state that the girl in making her complaint to him gave the name or description of her assailant, and that on the strength of it the witness at once caused a warrant of arrest to be issued for the defendant's apprehension. Such is not, we think, the effect of his statements. He merely stated that she made complaint in his presence, and that immediately thereafter he went with her father to procure a warrant. His testimony does not show that he obtained from her information as to her assailant's identity, for he expressly stated that before he went to see the girl he had already heard about the commission of the crime, and had been over to defendant's house to see him. This court, in a similar case, said:

"The rule on the subject is that the officer making the arrest, as in this case, should testify on the stand no further as to his reason for seeking and arresting the criminal than that there was an outcry or information furnished him in other ways of the commission of the crime, and that thereupon he proceeded to search for and apprehend the criminal. Whatever information he may obtain as to the description and identity of the alleged criminal is for his use in making the arrest, but not for his use as a witness; for it is but hearsay after all." *Davis* v. *State,* 63 Ark. 470.

In *Williams* v. *State,* 66 Ark. 264, Judge RIDDICK, speaking for the court, stated the law on the subject to be as follows: "It is competent, on a charge of rape, for the State to show that the prosecuting witness made complaint of her injury, but the particular facts stated by her are not admissible on direct examination. They may be brought out by defendant on cross examination; and if the defendant denies that the prosecuting

witness made complaint, and undertakes to impeach the testimony on that point, then the particular facts stated by her may be proved by the prosecution, in order to confirm her testimony that she made complaint." To the same effect, see *Skaggs* v. *State*, 88 Ark. 62.

We are of the opinion that the testimony admitted in this case does not offend against the rules of law stated in the cases cited above, and that no error was committed in this respect.

The next assignment of error is as to the admission of the testimony of the witness Tom Wilson concerning an alleged remark made about the girl, Maud Bethel, four or five months before the crime is said to have been committed. The testimony objected to is as follows:

"I had defendant under arrest, and we passed where the girl and three smaller children were in the field playing. As we passed, we spoke to the girl, and he said, 'There is a girl I would like to get hold of—I'll be damned if I don't ruin her.' I asked him if he thought he could ruin her, and he said, 'If I didn't, I would come damn near it."

This testimony is first objected to on the ground that it is not shown definitely that the remarks applied to the prosecutrix; but we are of the opinion that it is shown by the testimony of this witness that, under the circumstances, the remarks must have applied to this girl. He evidently was referring to a girl of sufficient age for sexual intercourse, and the others in the party were small children, to whom the remarks could have had no application.

We think also that the testimony was competent as tending to corroborate the testimony of the prosecutrix; for the remark of the defendant was a declaration as to the sinister purpose which he harbored at that time, and the girl's testimony tends to show that he afterwards put his atrocious design into execution. She stated that the defendant came to her house on an occasion about two weeks before he ravished her, and said he wanted to "scuffle with her," but that she declined, and he went away without attempting to do anything; and that at the time he ravished her he came again to the house, and when he came in said, "I've got you now," and threw her down on the bed and ravished her. He denied that he had ever had intercourse with

her, or had ever tried to do so, or had ever made any improper proposals to her.

The only other assignment of error is as to the matter brought out by the prosecuting attorney on cross examination of Riley Milligan. Maud Bethel testified that on the evening of the day the defendant ravished her she went to Milligan's house, where her father was at work, and there spent the night; that she told Milligan and his wife that night of the outrage perpetrated on her, and told her father the next day. Milligan was called to the witness stand by the defendant and testified in chief that Maud and her father spent the night in question at his house, but that she made no statement to him that night concerning the assault on her; that the next morning he heard her ask her father if Mr. Sexton, defendant's father, had paid him any money. The defendant had attempted to prove by other witnesses that Maud and her father were trying to extort money from the Sextons to prevent prosecution; and the prosecuting attorney was permitted to show by Milligan on cross examination that he received information through his wife that night of the alleged assault on the girl by defendant, and that he told the girl's father of it that night and advised him to have the defendant arrested; that the girl's father, when told of the outrage, threatened to get his gun and kill the defendant. We think this was legitimate cross examination. The witness had stated in his examination in chief that the witness and her father had spent the night in his (Milligan's) home without anything being said about the assault; and that the next morning they were heard talking about getting money from defendant's father. The cross examination developed the fact that the witness received that night full information concerning the outrage, and communicated it to the girl's father, whose indignation was aroused to a high pitch, and that the witness advised the prosecution of the defendant.

We are unable to discover anything in the testimony which was prejudicial to the defendant except the contradiction of his witness Milligan, and that was legitimate.

Judgment affirmed.

THOMAS v. BURKE.

Opinion delivered October 18, 1909.

1. CIRCUIT COURT—RIGHT TO APPEAL FROM COUNTY COURT.—Where all of the signers to a petition to put in force the three-mile prohibitory law (Kirby's Digest, § 5129) took an appeal from an adverse judgment of the county court, but the affidavit for appeal was made by a party who was not eligible as a petitioner, such ineligibility did not affect the right of the other petitioners to be heard in the circuit court on appeal. (Page 596.)

2. LIQUORS—OPERATION OF THREE-MILE LAW BEYOND STATE.—When the point which marks the center of a circle having a radius of three miles within which a prohibitory statute has been put in force is less than three miles from the State boundary, so much of the circle as lies beyond the State boundary should not be considered in determining whether the petition to put in force the prohibition law contains the requisite majority of signers. (Page 597.)

3. SAME—THREE-MILE LAW—DESIGNATION OF CENTER.—Where a petition to put in force the three-mile law described the center of the proposed circle as "the public school building situated on block 34," etc., and the evidence shows that there are two school buildings in the block 30 feet apart, one of which is known as the main building and the other as an "annex" thereto, it will be taken that the petition referred to the main building. (Page 597.)

Appeal from Miller Circuit Court; *James S. Steel*, Judge: reversed.

W. V. Tompkins, for appellant.

1. Thomas was a party, having signed the petition when a resident of the district, and had a right to appeal and make the necessary affidavit.

2. Only one point was named and one building; the main building, which constituted one center. 40 Ark. 290; 43 Ark. 150; 45 Ark. 458; 56 Ark. 107. *Lindley* v. *State*, 90 Ark. 284, settles this question. See also 33 L. R. A. 322; 48 Ark. 310; 35 Ark. 428; 36 Ark. 181.

3. 90 Ark. 284 also settles the question that the three-mile law only contemplated the counting of inhabitants *within this State*, when the radius would extend beyond the limits of the State.

J. D. Conway and *John N. Cook*, for appellees.

1. Thomas was not an adult inhabitant of the district, within the meaning of the act. He could not appeal nor make the affidavit. 70 Ark. 545. The appeal should be dismissed. 71 Ark. 84; 85 *Id.* 304; 52 *Id.* 99; 77 *Id.* 586; 66 *Id.* 126.

2. Two school buildings were designated in the petition. There cannot be two central points in a circle. There was no designation of the initial point. 36 Ark. 178; 90 Ark. 284; 40 Ark. 290; 68 Ark. 92.

McCULLOCH, C. J. This is an appeal from the judgment of the circuit court of Miller County refusing to make an order prohibiting the sale or giving away of intoxicating liquors within three miles of a school house in the city of Texarkana. The county court had refused to make the order prayed for, and an appeal was taken to the circuit court. The case was heard in the circuit court on oral evidence. The petition was in due form prescribed by law, and described the house which was to mark the center of the prohibited area as "the Public School Building situated on block 34, in the city of Texarkana, Miller County, Arkansas."

The first point to which attention should be directed was that raised by appellees (persons who were permitted by the court to appear and make themselves parties for the purpose of remonstrating against granting the prayer of the petition) whether or not the appeal from the judgment of the county court was properly granted. The record shows that the petitioners, which of course means all of them, prayed an appeal to the circuit court, and that the affidavit for appeal was made by B. B. Thomas, one of the petitioners and appellants.

The appellees filed a motion in the circuit court to dismiss the appeal on the ground that Thomas had never been an inhabitant of the territory in question; that he was only temporarily there at the time the petition was signed and presented to the county court, and that he had removed to a distant part of the State before the case came up for hearing in the circuit court. The court overruled the motion to dismiss the appeal, and we think that was a correct ruling.

It is unnecessary for us to decide, in passing on this ruling of the court refusing to dismiss the appeal, whether or not Mr. Thomas was in fact an inhabitant of the three-mile area within

the meaning of the statute. He did, in fact, sign the petition, and was entitled to be heard, with the other petitioners, when the county court considered the matter; and when the court by its judgment denied the prayer of the petition, he was one of the persons aggrieved by the judgment within the meaning of the statute, and he, as well as the other petitioners, was entitled to prosecute an appeal to the higher court. In other words, the right to take an appeal depended, not on the right of the petitioners to the relief prayed for, but on the right to be heard in the appellate court when relief was denied in the inferior court; and when Mr. Thomas signed the petition which was filed in the county court, he became a party to that record, and was guaranteed the right of appeal by the Constitution and laws of the State, as much as any other petitioner, even though it should finally be decided that he was not eligible as a petitioner. Of course, if Thomas had been the only person who took an appeal, and it appeared on the hearing that he was not eligible as a petitioner, and therefore had no interest in the further prosecution of the case, the question would arise as to whether or not the court should consider the case and grant the relief solely on his request. But no such question arises on the record, as it shows that all of the petitioners appealed, and the affidavit was made by Thomas as one of the parties aggrieved.

There are only two other questions in the case necessary for us to decide. One is this: The school house named in the petition is less than three miles distant from the State line, and the circuit court held that "all of the adult inhabitants residing within the radius of three miles of such center must be counted in ascertaining the total number of adult inhabitants within said district, irrespective of the State line." This court has decided to the contrary, and the ruling of the circuit court is incorrect. *Lindley* v. *State,* 90 Ark. 284.

The remaining question is as to the correctness of the court's declaration of law and finding of fact concerning the designation of the school house which was to mark the center of the proposed prohibition territory. The petition, as already shown, named "the Public School Building situated on block 34, in the city of Texarkana, Miller County, Arkansas," as the center of the proposed territory. There was no conflict in the evidence on this

branch of the case, and it is undisputed that there are two buildings on block 34, both used for public school purposes. The two buildings are situated about thirty feet apart (or about 100 to 150 feet from center to center), and are under the supervision of the same superintendent and the same corps of teachers. In other words, there are two buildings, about thirty feet apart, used in conducting one school by one superintendent and corps of teachers. One of the buildings is shown to be the main building, situated near the center of the block, and the other, which is a smaller one, is referred to as the "annex."

Upon this showing, the court found that there were two public school buildings on block 34, and that the petition failed to designate the particular one which was to form the center of the proposed area. This was one of the grounds on which the court denied the prayer of the petition.

The statute prescribes that "whenever the adult inhabitants residing within three miles of any school house, academy, college, university or other institution of learning, or of any church house in this State, shall desire to prohibit the sale or giving away of any vinous, spirituous or intoxicating liquors of any kind," etc., and a majority thereof shall petition the county court of the county "wherein such institution of learning or church house is situated," said court shall make an order, etc. Kirby's Digest, § 5129. This phase of the statute has never been passed on by the court except in the following cases, which do not reach to the particular question now under consideration: *Williams* v. *Citizens,* 40 Ark. 290; *State* v. *Bailey,* 43 Ark. 150; *Gazola* v. *State,* 45 Ark. 458; *Lindley* v. *State, supra.*

In *Williams* v. *Citizens, supra,* the petition named as the center of the proposed area two churches situated about two hundred yards apart. This court held that that rendered the proceedings void. Judge Eakin, speaking for the court, said:

"Two points, as centers of circular areas, cannot be designated in the same petition, signed without distinction, by a majority of the adult inhabitants living within three miles of both points, or of either one or the other point. In the first case the area would be less than one with a radius of three miles, and in the second case it would be greater. The statute confers no authority to make such an order as would result in either case.

Every adult inhabitant residing within three miles of any particular school house, church, etc., should be counted in determining the majority, that is in theory, and as nearly practically as possible, and no one living more than three miles from that particular house should be. This cannot be effected by designating two or more distinct buildings more or less widely separated, without any indication of one as the center for all. Where they are close together, it would probably make little difference, but embarrassments would grow as the distance widened, and the court cannot fix the limits within which the practice would be permissible."

The next two cases cited above arose upon indictments for selling liquor within three miles of two churches, and the court, citing the Williams case, held that the orders were void.

In *Lindley* v. *State, supra,* the petition described the center of the proposed area as "the new stone public school house situated on block 23, in the town of Mammoth Spring," and it was afterwards shown that the house was situated on block 22 instead of block 23 as stated in the petition. The court held that the defect did not render the proceedings void, and that it "was sufficient to describe it in the language of the statute with such reasonable certainty as to identify it as the point marked from which the radius was to extend in designating the territory to be embraced in the order."

Now, it is manifest that the framers of the statute had in view two things in shaping the form of the proceedings: one, that a definite object should mark the center of the prohibition area to be created; and the other that the radius of this area should extend three miles from this center. This necessarily means that the center shall be definitely and accurately pointed out, so that there should be no uncertainty as to the limits of the area. But absolute accuracy in the description is not required. Reasonable certainty is sufficient. This is demonstrated in *Lindley* v. *State, supra,* in which it was held that an error in describing the school house in the wrong block was immaterial, as the building was otherwise sufficiently described.

Applying the descriptive language of the petition in this case to the facts shown to exist with reference to the buildings on block 34, there can be no doubt that it means the principal or

main building, and not the so-called "annex." The descriptive words in their ordinary acceptation cannot mean anything else. Parol evidence is admissible of course to show the surroundings, so as to identify the particular building intended to be described —to fit the description to the building. *Paragould* v. *Lawson*, 88 Ark. 478. The petition, therefore, named only one building as the center of the proposed area, and we are of the opinion that the learned judge erred in his conclusion that two buildings were named.

Appellants ask that we make a finding here of the fact as to whether or not the petition contained a majority of the adult inhabitants residing within three miles of the school building mentioned in the petition, and render a final judgment without remanding the case for further trial. We do not deem it proper to do this on the conflicting testimony in the record. The circuit judge made no finding of fact as to whether the petition contained a majority of the adult inhabitants residing in this State within the three-mile limit, and we think the case should be remanded for new trial in accordance with the law herein stated. It is so ordered.

BATTLE and HART, JJ., dissenting.

LANSING WHEELBARROW COMPANY v. MONTGOMERY.

Opinion delivered October 18, 1909.

1. WITNESSES—FEES—PROOF OF ATTENDANCE.—A witness who fails to prove up his account for attendance as witness, as required by Kirby's Digest, § 3524, is not entitled to have his account for attendance and mileage taxed as part of the costs against the losing party. (Page 601.)

2. SAME—CUSTOM IN VIOLATION OF STATUTE.—The statute requiring witnesses to make out their account for attendance in a case and to swear to it (Kirby's Digest, § 3524) cannot be abrogated by a custom of permitting witnesses to report to the clerk verbally the number of days' attendance, without making out their accounts and swearing to them. (Page 601.)

Appeal from Cross Circuit Court; *Frank Smith*, Judge; reversed.

T. E. Hare, for appellant.

There is only one way by which the fees of a witness may be taxed as cost in a case, and this is by making out his account stating that he was summoned to attend as a witness in the cause, the number of days he attended, and, if summoned to attend from without the limits of his county, the number of miles traveled—and this account must be sworn to. Kirby's Dig., § 3524. This witness' attendance must be so claimed and proved at each session he attends. *Id.* § 3525; 64 Ark. 148. If he is a volunteer witness, he is entitled to a fee only for the day he is sworn and testifies. 56 Ark. 249.

J. T. Patterson, for appellee.

The witnesses at each term claimed their attendance, showing the number of days attended, of which the clerk made a minute. They doubtless believed that they were doing all that was required of them. The statute is not so mandatory as to preclude the trial court from determining the question upon equitable principles.

McCULLOCH, C. J. The sole question involved in this appeal is whether or not a witness in a civil case pending in the circuit court is entitled to have his fees for attendance and mileage taxed against the losing party without having, in the time and manner provided by statute, proved his account therefor. The statute is as follows:

"Every account for attendance as a witness shall be sworn to, and shall state that he was summoned to attend as a witness in the cause upon which the charge is made and the number of days he attended and, if summoned without the limits of the county, the number of miles he traveled in consequence of the summons." Section 3524, Kirby's Digest.

This court, in *Fulks* v. *State,* 64 Ark. 148, held that a witness in a criminal case could not have his fees taxed unless he proved same in the manner and within the time prescribed by the statute. The statute applies equally to civil and criminal cases.

It was shown in evidence in the present case that it had always been the prevailing custom in Cross County, where the case was pending, for witnesses to report to the clerk verbally the number of days' attendance, without making out an account

and swearing to it, as provided by the statute. This alleged custom does not alter the rights of the parties, nor prevent the operation of the statute. Parties, witnesses and officers are all presumed to know of the existence of this statute, and it cannot be abrogated by custom.

Reversed and remanded with directions for further proceedings on the motion to retax costs not inconsistent with this opinion.

WESTERN UNION TELEGRAPH COMPANY v. HARRIS.

Opinion delivered October 18, 1909.

1. TELEGRAPH COMPANIES—RIGHT TO ADOPT RULES.—Telegraph companies have the right to prescribe reasonable rules and regulations for the operation of the business, including the right to prescribe reasonable hours during which messages may be sent and delivered at certain offices. (Page 604.)
2. SAME—DELAY—NEGLIGENCE.—Where a telegraph company's transmitting agent knows, or under the circumstances should know, that on account of the receiving office being closed there will be delay in delivering an urgent message which is intended for immediate delivery, it is incumbent on him to so inform the sender; and if he fails to do so the company is liable for damages resulting from such neglect. (Page 604.)
3. SAME—NOTICE OF OFFICE HOURS.—The agent of a telegraph company to whom a message is offered for transmission is bound to take notice of the office hours of the company at the office to which the message is to be sent. (Page 605.)

Appeal from Perry Circuit Court; *E. W. Winfield,* Judge; affirmed.

George H. Fearons and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

1. There can be no recovery in this case unless 73 Ark. 205 is overruled. 77 Ark. 533. The rule is well established that a telegraph company has the right to establish reasonable office hours for its offices, and that delay in the transmission of a message, caused by the fact that a terminal or intermediate office is

closed, is not an unreasonable delay, nor does it render the company liable for damages. Croswell on Electricity, § § 421, 422; 103 Ind. 505; 54 S. W. 963; 107 Ky. 600; 47 Atl. 881; 22 R. I. 344; 62 S. W. 136; 31 *Id.* 211; 66 *Id.* 17; 53 S. E. 985; 51 *Id.* 117; 66 S. W. 592; 32 S. E. 1026; 24 Fed. 119; 8 Bissell, C. C. 131.

2. There is no proof that the receiving clerk knew that the office at Perry was closed. It is impossible for a receiving clerk to know the office hours of all other stations. Croswell on Electricity, § § 421-2, and cases *supra.*

Sellers & Sellers, for appellee.

1. No rule to close at Perry is shown. But if there was the sender of the message should have been notified. 13 Am. St. 843; 116 S. W. 91; 66 Fed. 907; Gray on Communication by Telegraph, § 18. It is the duty of the agent to know the office hours of the different stations. 2 Thompson, Neg., p. 991, § 2452; 129 Fed. 321; 19 S. W. 149; 16 *Id.* 29; 159 Fed. 643; 21 Pac. 990; 43 S. E. 841; 55 Fed. 738; 30 Am. St. 579; 78 *Id.* 668.

2. Negligent ignorance is equivalent to actual knowledge. 1 Thompson, Neg., § 8.

3. The burden was shifted to appellant, as its agents alone had knowledge of the office hours at Perry. 16 Cyc. 936; 2 Enc. Ev., 809-10.

McCULLOCH, C. J. This is an action instituted by G. B. Harris against the Western Union Telegraph Company to recover damages for alleged negligent failure to transmit and deliver a telegraphic message. The plaintiff recovered judgment below, and the defendant appealed. There is practically no dispute as to the facts of the case, which are as follows:

In July, 1907, Harris resided at the village or town of Perry, in Perry County, Arkansas, and his wife went to Little Rock on a visit to one of her relatives, named Mrs. Pounders. While in Little Rock, she became critically ill, and at 8:30 P. M. Mrs. Pounders filed with the telegraph company for immediate transmission and delivery a message directed to the plaintiff Harris at Perry in the following words: "Your wife is very sick. Come down at once." If the plaintiff had received the message at any time prior to 10:35 o'clock that night, he could, and the

proof shows that he would, have taken a train at that hour which would have brought him to Little Rock and to the bedside of his sick wife in about two hours. The message was not, however, delivered to him by that time, on account of the fact that Perry, the receiving office, was not a night office, the office hours at that place being from 7:30 A. M. to 7:00 P. M. On this account he did not and could not leave Perry until the next morning. His wife became unconscious sometime before he reached her, but the proof shows that if he had received the message in time to take the 10:35 P. M. train at Perry he would have reached her bedside several hours before she became unconscious. She died on the same day without having regained consciousness after the plaintiff reached her bedside.

When the message was filed with the operator at Little Rock for transmission, the latter gave no information to the sender that the office at Perry was not a night office, and that the message would not, or might not, be delivered before the next morning. It was proved that there is a long distance telephone line between Little Rock and Perry, and that the plaintiff had a telephone in his house where he slept that night, and could have been reached by telephone.

The failure to deliver the telegraphic message to the plaintiff on the same night it was sent was manifestly due to the fact that Perry was not a night office, and that no operator was regularly maintained there during the hours of the night. This of itself would afford no grounds for recovery, for it is well established that telegraph companies have the right to prescribe reasonable rules and regulations for the operation of the business, including the right to prescribe reasonable hours during which messages may be sent and delivered at certain offices. *Western Union Tel. Co.* v. *Love-Banks Co.*, 73 Ark. 205; *Western Union Tel. Co.* v. *Ford*, 77 Ark. 531; *Western Union Tel. Co.* v. *Gillis*, 89 Ark. 483.

But it is insisted by plaintiff that his right of recovery is established by proof of the fact that the defendant's agent at Little Rock was guilty of negligence in failing to inform the sender that the message would not be delivered that night, so that another means of communication with the plaintiff could have been adopted, viz., the telephone. We are of the opinion

that this contention is well founded. The defendant's agent, when he received the message, knew or should have known that the message would not be promptly delivered on account of the fact that the receiving office was closed during the hours of the night. The message was filed for immediate transmission and delivery, and its urgency and importance appeared on its face. The sender had the right to assume that, as the message was received by the company for immediate transmission, if there existed any reasons why it could not be promptly delivered, information thereof would be then given, so that other means could be adopted. The agent of the company had no right to assume that the sender of so urgent a message knew of the necessary delay incident to awaiting the opening of the receiving office the next day, and he therefore was not justified in withholding or failing to give information that there would necessarily be considerable delay in sending the message. The rule is, we think, well established by the authorities that "if a telegraph company is unable, through a disarrangement of its lines or other cause, to do what it makes a business of doing, it must inform those who wish to employ it of the fact, and thus acquaint them with the advantage of employing other means." Gray on Communication by Telegraph, § 18; *Pacific Postal Tel. & Cable Co.* v. *Fleischner*, 66 Fed. 899; *Swan* v. *Western Union Tel. Co.*, 129 Fed. 318; *W. U. Tel. Co.* v. *Bruner* (Tex.), 19 S. W. 149.

The same principle is stated in another place as follows: "Where, from any cause, it is impossible to transmit the message, or where considerable delay will be necessary, and the operator is aware of the fact when the message is offered him, it is his duty to inform the sender, particularly when the message shows on its face the necessity or importance of its being speedily transmitted." 27 Am. & Eng. Enc. Law, 2 Ed. 1026.

This principle, we think, demands that where the company's transmitting agent knows or, under the circumstances, should know that on account of the closure of the receiving office there will be delay in delivering an urgent message which is intended for immediate delivery, it is incumbent on him to so inform the sender; and if he fails to do so, the company is liable for damages resulting from such neglect.

The further question then arises, whether or not the transmitting agent is bound to take notice of the office hours at the

receiving office. The evidence in this case is silent on the question as to whether or not the Little Rock agent knew that the Perry office was, in accordance with the rules, not open at night. This question is not free from doubt, and there is little authority on the subject. Judge Thompson, in his work on Negligence (vol. 2, § 2402), states his conclusion to be that the agent of the company ought to be held bound to know the rules of other offices with respect to office hours. We think this is the sound and just view of the matter, and that any other rule would work an injustice to those who deal with telegraph companies. It appears to us to be conveniently within the power of the company to furnish its agents with information as to the rules of various offices with respect to the hours within which messages may be received and delivered. In addition to this, it is within the power of one of the agents, when he receives a message for immediate transmission, to ascertain by inquiry over the lines whether the receiving office is at the time open for the receipt of messages so that he can give the necessary information to the sender.

We are of the opinion, therefore, that the facts of the case justify a recovery of damages by the plaintiff, so the judgment is affirmed.

APPENDIX

IN MEMORIAM

OSCAR DELIEN SCOTT

On September 27, 1909, at a meeting of the Supreme Court of Arkansas, the Attorney General presented the following:

"RESOLUTIONS OF THE MILLER COUNTY BAR.

"On this day come John N. Cook, L. A. Byrne, J. D. Cook, T. E. Webber and W. H. Arnold, and present to the court the following resolutions passed by the Bar of Miller County, relative to the death of Judge Oscar D. Scott:

"On the 15th day of March, 1909, a meeting of the Bar of Miller County, Arkansas, was held at the courthouse in the city of Texarkana, Arkansas. Judge Joel D. Conway was elected chairman, and Paul J. Cella secretary. The chairman announced the death of Judge O. D. Scott, and stated that the purpose was to take suitable action expressing the esteem and veneration in which he was held by the profession and people. On motion a committee of five was appointed to draft suitable resolutions, and reported as follows:

"We, your committee, appointed to draft resolutions of respect to the memory of Judge O. D. Scott, beg leave to report as follows:

"Oscar Delien Scott departed this life at his home in Texarkana, Arkansas, on the 23d day of February, 1909, in the sixty-sixth year of his age. He was born in Townshed, Vermont, August 30, 1843, and was classically educated at Middlebury College, Middlebury, in his native State. In 1863 he enlisted as a corporal in Company 'F,' 17th Vermont Volunteers, and lost a leg at the battle of Cold Harbor, June 7, 1864, being honorably discharged from the army May 18, 1865.

"After the war he studied law, and was admitted to the bar at St. Albans, Vermont, in 1869. In 1870 he came South, and began the practice of his profession at Magnolia, in Columbia County, Arkansas, where he remained until 1873, when he moved to Lewisville, in Lafayette County. He moved to Texarkana in 1875, and lived and practiced his profession here until a short time before his death. In 1875 he was married

to Cornelia F. Hewlett, and is survived by her and a daughter and two sons.

"The above is a skeleton history of one of the great men of our State. In early manhood, coming to this State from the far North, at a time when the feeling between the sections was bitter, his fair dealing and unquestioned honesty won for him the respect and confidence of all with whom he came in contact, and his recognized legal attainments early attracted to him a large clientage, which he retained until sickness compelled him to retire from practice. In his business dealings he was scrupulously honest and fair, and in his practice courteous to both court and opposing counsel, ever standing for the highest ethics of the profession. To the young lawyer, and those less fortunate than himself, he was ever ready to lend assistance and give them advice and words of encouragement. He was the dean of the Texarkana Bar, and will ever be held in affectionate remembrance by them.

"He became associated with various firms, as follows: Burton & Scott, at Lewisville, Cook & Scott, Scott & Jones, Scott, Lake & Head and Scott & Head, at Texarkana. Through his long and prominent career as a lawyer, the firms with which he was connected took a conspicuous part in much of the weighty litigation in south Arkansas, as the records of the courts and the Supreme Court will show.

"At a time when carpetbagism ran riot in this State, to the credit of Judge Scott, be it said, that, while a Republican in politics, and a member of the Grand Army, both of which always had his loyal affection, he gave no support to those who plundered and oppressed the people of this State under the guise of Republicanism. He was twice nominated by his party for judicial honors—once for Chief Justice and once for Associate Justice of our Supreme Court, and, while making no effort for election, he polled much larger than his party vote.

"In his private life, he was modest and unassuming, but charitable in word and deed, ever ready to help a worthy cause by his means and presence. His intimacies were not general, but he was whole-souled, companionable and congenial, and numbered his friends by those who knew him. Truly, can it be said of him that he was a gentleman of the old school.

"While not a member of any church, his faith in the fundamental truths of religion was strong. No man respected true religion more than he, nor had a greater disrespect for shams and hypocricy.

"Summing up the life of Judge Scott in one sentence, he was an eminent lawyer and an honest man.

"Therefore, be it resolved, that in the death of Judge O. D. Scott the State has lost an honored citizen, the bar an able and revered member, his friends a generous and congenial companion, and his family a kind husband and loving father.

"Be it further resolved that a copy of these resolutions shall be presented to the chancery and circuit courts of this county, and to the Su-

preme Court of this State, and to the Circuit Court of the United States for the Texarkana Division of the Western District of Arkansas, and that a copy be sent to the family of the deceased.

"JOHN N. COOK,
"L. A. BYRNE,
"J. D. COOK,
"W. H. ARNOLD,
"T. E. WEBBER,
"Committee."

The Chief Justice responded, and ordered that the resolutions be spread upon the records of the court.

II.

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Nashville Lumber Co. *v.* State; appeal from Howard Circuit Court; James S. Steel, Judge; affirmed, June 21, 1909; *per* Battle, J.

Hurst *v.* Lund; appeal from Pulaski Circuit Court; Edward W. Winfield, Judge; reversed, July 12, 1909; *per* McCulloch, C. J.

Morris *v.* Fontaine; appeal from Crittenden Chancery Court; Edward D. Robertson, Chancellor; affirmed, July 12, 1909; *per* McCulloch, C. J.

III.

CASES DISPOSED OF ON MOTION.

St. Louis, Iron Mountain & Southern Railway Company *v.* Mrs V. L. Woolsey; Nevada Circuit Court; Jacob M. Carter, Judge; affirmed as a delay case, with 10 per cent. penalty, June 7, 1909; *per curiam.*

Kansas City Southern Railway Company *v.* William F. Brown; Benton Circuit Court; J. S. Maples, Judge; settled, and appeal dismissed on appellant's motion June 7, 1909; *per curiam.*

J. V. & Frank Brame v. State National Bank; Lafayette Chancery Court; E. O. Mahoney, Chancellor; affirmed as a delay case, June 21, 1909; *per curiam.*

Industrial Mutual Indemnity Company *v.* Mary Redmond; Pulaski Circuit Court, Second Division; John W. Blackwood, Special Judge; affirmed as a delay case, with 10 per cent. penalty, June 21, 1909; *per curiam.*

Kittie Rowland *v.* State; Ouachita Circuit Court; George W. Hays, Judge; appeal dismissed on appellant's motion, September 27, 1909; *per curiam.*

State *v.* J. O. Smith; LaFayette Circuit Court; Jacob M. Carter, Judge; appeal dismissed on motion of the Attorney General, September 27, 1909; *per curiam.*

Nora I. White *v.* St. Louis, Iron Mountain & Southern Railway Company; Cross Circuit Court; Frank Smith, Judge; dismissed at appellee's cost under compromise agreement, September 27, 1909; *per curiam.*

St. Louis, Iron Mountain & Southern Railway Company *v.* F. J. Carpenter; Clark Chancery Court; James D. Shaver, Chancellor; judgment by consent in accordance with stipulation filed, October 4, 1909; *per curiam.*

David Carter *v.* G. A. Hughes; Benton Chancery Court; T. Haden Humphreys, Chancellor; affirmed under rule seven, October 11, 1909; *per curiam.*

W. O. Wingfield *v.* State; certiorari to Clark Circuit Court; Jacob M. Carter, Judge; order of circuit judge denying bail affirmed, October, 18, 1909; *per curiam.*

State *v.* W. A. Neeley et al; Pulaski Circuit Court, Second Division; James H. Stevenson, Judge; settled and appeal dismissed on motion of the Attorney General, October 18, 1909; *per curiam.*

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