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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

SIBECK *v.* MCTIERNAN.

Opinion delivered January 17, 1910.

1. REPLEVIN—ARTICLES ON PERSON.—Whether an order of delivery can be executed at the inception of a replevin suit to take an article of dress or personal adornment from the person of a defendant without his consent or not, such order is not necessary to the maintenance of the action, which may proceed as an action of detinue. (Page 6.)
2. SAME—NECESSITY OF DEMAND.—It is not necessary, before bringing replevin, to make demand for an article which defendant claims as her own and over which she exercises acts of ownership. (Page 6.)
3. SAME—DEFENSE.—One who wrongfully detained personal property and refused to surrender it on demand is liable to an action, although it may not be in his possession when suit is brought. (Page 7.)
4. SAME—ESTOPPEL.—Where a defendant in replevin gives bond to retain possession of the property, he is estopped to deny that he was in possession thereof at the time the action was brought. (Page 7.)
5. SAME—PERSONS LIABLE.—Where defendants jointly withheld plaintiff's property, they are jointly liable for the property and damages. (Page 7.)
6. LIMITATION OF ACTIONS—NECESSITY OF PLEA.—The defense of the statute of limitations is waived unless pleaded. (Page 7.)
7. INSTRUCTION—WHEN HARMLESS.—An erroneous instruction as to the measure of damages was harmless where it affirmatively appears that the jury followed the correct rule. (Page 7.)
8. REPLEVIN—ENTRY OF JUDGMENT AGAINST SURETY.—Under Kirby's Digest, § 6870, authorizing the entry of judgment for the value of the property against the sureties upon a delivery bond, such judgment against the sureties may be entered without notice after judgment against defendants, even at a subsequent term. (Page 8.)

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

Carmichael, Brooks & Powers, for appellant.

1. The court should have given a peremptory instruction for defendants. Articles of dress or personal adornment cannot

be taken on a writ of replevin from the person of a defendant without his consent. 16 Gray 213, s. c. 77 Am. Dec. 409. And, if plaintiff had no right to delivery of the property, there could be nothing to go to the jury. 37 Ark. 544; 43 *Id.* 535; 50 *Id.* 300; 54 *Id.* 121; 3 Hill 577.

2. The court should have instructed the jury that there could be no recovery unless demand had been made upon defendant, Mona Sibeck, prior to the institution of the suit. 16 Ark. 90.

3. Instruction number four, given at plaintiff's request, was erroneous in instructing the jury that "the defendants, or any of them," would be liable. Only the defendant having possession of the ring, at most, would be liable.

4. Under the statute of limitations, § 5064, subdiv. 3 and 6, Kirby's Dig., the plaintiff must allege, and the burden is upon him to prove, that the statute has not run. 27 Ark. 343. And in actions of replevin and detinue the period is three years. 22 Ark. 134; 22 *Id.* 226; 44 *Id.* 29. Defendants' requested instruction number 3 should therefore have been given. 50 Ark. 549.

5. A guardian *ad litem* should not have been appointed, as one was unnecessary.

6. The motion for judgment against the sureties on the replevin bond was not filed until more than thirty days after the trial, and this was too late under the statute. Kirby's Dig. § 6870. The surety was not afforded an opportunity to make defenses.

7. The verdict is not supported by the evidence.

Wiley & Clayton, for appellee.

1. Defendants' peremptory instruction was properly refused, because,

(a) It was abstract. 85 Ark. 390; 86 Ark. 91; 90 *Id.* 78; 90 *Id.* 287; 90 *Id.* 104; 87 *Id.* 471; 88 *Id.* 172; 88 *Id.* 454.

(b) It was not a correct statement of the law. 87 Ark. 528; 91 Ark. 43.

(c) The right to claim exemption from seizure under the writ was waived. 69 Ark. 256.

2. The specific objection to appellee's fourth instruction was not made at the time of the trial, and it will not now be considered. 80 Ark. 225; 87 *Id.* 396; 88 *Id.* 181; 90 Ark. 108.

The instruction was, however, correct, 74 Ark. 340.

3. No demand was necessary. Kirby's Dig. § 6006.

4. The statute of limitations was not pleaded, and was therefore waived. 77 Ark. 379. Moreover, the instruction requested upon this point was erroneous. 76 Ark. 405.

5. The verdict is amply supported by the evidence.

6. The appointment of a guardian *ad litem* was required by Kirby's Dig., § 6023.

7. The summary judgment against M. Levy, surety on the bond, was authorized under sections 4684 and 6870, Kirby's Digest, and was properly rendered. 78 Ark 237.

BATTLE, J. This action was brought by Nellie McTiernan against J. B. Sibeck and his wife, and Mona Sibeck, before a justice of the peace to recover possession of a certain diamond ring. She made the affidavit required by the statute as a condition precedent for suing out an order of delivery; and it was issued by the justice of the peace for the possession of the diamond ring, and at the same time a summons was issued for the defendants. To secure the execution of the order of delivery, plaintiff executed a bond with sureties, conditioned as required by law; and the order and summons were served upon the defendants; and the defendant, J. B. Sibeck, and M. Levy, as surety, executed a bond to the plaintiff, in the sum of three hundred dollars, to the effect that the defendant, J. B. Sibeck, would perform the judgment of the court in this action, which was approved by the constable to whom the order of delivery was directed; and the defendants were allowed to retain possession of the diamond ring. The defendant Mona Sibeck being a minor, a guardian *ad litem* was appointed for her, after she was served with process, and he, as such guardian, answered and denied that plaintiff was the owner of the property in controversy, and denied all the allegations contained in the statement of the cause of action filed by the plaintiff. The record fails to show the defenses of the other defendants.

In a trial before the justice of the peace the plaintiff recovered judgment against the defendants for the diamond ring or its value, one hundred and fifty dollars, in the event its return could not be had, and twenty-five dollars for its detention; and the defendants appealed to the Pulaski Circuit Court.

On the 26th day of March, 1909, the issues in this cause came on for trial before a jury in the circuit court. Evidence was adduced which tended to prove the following facts: Plaintiff and Andy Grancy were engaged to be married. She was the owner of the ring in controversy, and in October, 1904, loaned it to him, and allowed him to hold it until he died, which occurred on the 4th day of November, 1907. He was in possession of it at his death. After that it was delivered to the defendant, Mrs. Sibeck. About the 5th day of November, 1907, plaintiff demanded possession of the ring of Mrs. Sibeck, and she failed to deliver it. A short time after that plaintiff met J. B. Sibeck on the street, and ascertained that he had the ring, and demanded it, and he refused to deliver possession. On the 9th day of December, 1907, she brought this action. The ring is worth $150.

Evidence was also adduced which tended to prove as follows: Graney gave the ring in controversy to Mona Sibeck in his lifetime, and she exercised ownership over the same, and had it on her finger at the trial in the circuit court, claiming it as her own.

The court, over the objections of the defendants, at the instance of plaintiff, instructed the jury as follows:

"I. If you find from the evidence that the ring in controversy is the property of the plaintiff, and demand has been made on defendants, J. B. Sibeck and Miss Mona Sibeck, for possession of the same, you will find for the plaintiff, and assess her damages to the usable value of the ring from the date of the institution of this suit."

"II. If you believe from the evidence that J. B. Sibeck was the agent of Mona Sibeck and had possession of the ring in controversy as such agent, you are instructed that demand on said J. B. Sibeck was a sufficient demand on Mona Sibeck."

"IV. Even though you should believe from the testimony that the ring exhibited to the jury was not the plaintiff's ring, still, if you believe from a preponderance of the testimony that the defendants, or any of them, had possession of the plaintiff's ring at the time this suit was brought, you will find for the plaintiff."

"V. If you find for the plaintiff, you will also find for the value of the ring in controversy, and also the damages suffered

by plaintiff by reason of the detention, which should be interest on the value of the ring at 6 per cent. from the date of the suit."

"VI. You are instructed that demand is only necessary before bringing suit where the defendant would not deny or contest plaintiff's right to recover; and if you find that the defendants exercised acts of ownership over the ring in controversy, claiming it as the property of said defendants, or either of them, then the court instructs you that no demand was necessary before the bringing of the suit."

And refused to instruct the jury at the request of the defendants, in part, as follows:

"II. You are instructed that if you find from the evidence that the ring in controversy was upon the person of either one of the defendants at the time the writ in this case was sued out, you will find for the defendants.

"III. You are instructed that if either of the defendants, or Andy Graney, held the ring in controversy as their own property for more than three years before the bringing of this suit, you should find for all the defendants."

"VII. If you find from the evidence that no demand for the possession of the ring was made on the defendant, Miss Mona Sibeck, before this suit was brought, you will find for the defendant, Miss Mona Sibeck."

"VIII. You are instructed that if the plaintiff gave the ring to Andy Graney and was out of the possession of it for more than three years, and that Graney transferred the ring for a valuable consideration to Mona Sibeck, you will find for the defendants, J. B. Sibeck and Mona Sibeck.

"X. If you find from the evidence that the plaintiff gave the ring to Andy Graney in the fall of 1904 as a gift and not as a loan, Graney had a perfect right to give the ring to Mona Sibeck; and if you find that he (Graney) did give the ring to Mona Sibeck you will find for the defendants, J. B. Sibeck and Mona Sibeck."

And the court instructed the jury, in part, at the instance of defendants, as follows:

"You are instructed that the plaintiff must win, if she win at all, upon the strength of her own title."

The jury returned a verdict in favor of the defendant, Mrs. Sibeck, and in favor of the plaintiff against the defendants, J. B.

Sibeck and Mona Sibeck for the possession of the ring or its value, $150, with interest at the rate of 6 per cent. from date of this action. Upon this verdict the court ordered and adjudged that plaintiff recover nothing of Mrs. Sibeck, and that she recover of and from the defendants, J. B. Sibeck and Mona Sibeck, the ring in controversy, or, in the event a return cannot be had, she recover of them its value, one hundred and fifty dollars, and that she recover of them twenty-four dollars and thirty-five cents the interest on the value of the ring from the day of the commencement of this action to the date of this judgment, for her damages.

On petition of the guardian *ad litem,* and over the objections of the defendants, the court allowed him for attorney's fee the sum of ten dollars, and ordered that it be taxed as costs in this action.

On the 8th day of May, 1909, the court, on motion of the plaintiff, over the objections of the defendants, rendered judgment in her favor, against M. Levy, as surety upon the bond given by the defendants to retain possession of the ring in controversy for the sum of $150 with interest at the rate of 6 per cent. per annum from the 9th day of December, 1907, until paid.

The defendants J. B. and Mona Sibeck, and the surety, Levy, have appealed.

Appellants contend that articles of dress or personal adornment cannot be taken on a writ of replevin from the person of defendant without his consent. We find no evidence of an effort to do so in this case, nor was it necessary to do so to maintain this action. All forms of actions were abolished by the "Code of Practice in Civil Cases." This action, under the Code, is an action to recover possession of personal property, and it may progress without any order of delivery. Such order is not necessary to its maintenance, and it may be prosecuted without it, as an ordinary action of detinue. *Hamilton* v. *Ford,* 46 Ark. 245; *Harkey* v. *Tillman,* 40 Ark. 555; *Eaton* v. *Langley,* 65 Ark. 448, 450, 451. So it is not necessary to take the ring from the person of the appellants to maintain the action, even if it be conceded that it could not have been taken in any other way.

No demand upon Mona Sibeck for the possession of the ring was necessary to maintain the action, for she claimed it

as her own, and exercised acts of ownership over it. *Prater* v. *Frazier,* 11 Ark. 249; *Henry* v. *Fine,* 23 Ark. 417; *Dunnohoe* v. *Williams,* 24 Ark. 364; *Triplett* v. *Rugby Distilling Co.,* 66 Ark. 219.

Appellants insist that judgment was recoverable only against the defendant having possession of the ring. This is not correct. Appellant J. B. Sibeck had possession of the ring when appellee demanded it, and he refused to deliver. He was liable for the property. In *Harkey* v. *Tillman,* 40 Ark. 555, it is said: "When one is wrongfully detaining property and refuses it on demand, he is liable to an action, although it may not remain in his possession when suit is brought." By giving the bond to retain possession of the ring, J. B. Sibeck was estopped from denying that he was in possession of the ring at the time the action was brought. *Strahorn-Hutton-Evans Commission Company* v. *Heffner,* 74 Ark. 340.

It is conceded that the appellant Mona Sibeck was controlling and exercising acts of ownership over the ring before and at the time this action was brought. They (J. B. and Mona Sibeck) were father and daughter, and joint wrongdoers in withholding the property from appellee and depriving her of its possession, and were jointly liable to be sued for the ring and damages. *Washington* v. *Love,* 34 Ark. 104.

The instruction upon the statute of limitation asked for by the defendants was properly refused. There is nothing in the pleadings or proceedings in the action that indicated that appellants relied upon that statute until they asked for the instruction. Unless they pleaded it, they cannot take advantage of it; they waived it. *McGehee* v. *Blackwell,* 28 Ark. 27; *Riley* v. *Norman,* 39 Ark. 158; *Livingston* v. *New England Mortgage & Sec. Co.,* 77 Ark. 379. It is true that the pleadings in this case were oral, but the statute requires that the substance of them should be written upon the docket, and that does not appear to have been done before the justice of the peace or in the circuit court. There is no evidence that they pleaded the statute of limitation. Kirby's Digest, § 4580.

The measure of damages in this case is 6 per centum per annum interest on the value of the property. The jury followed this rule, and allowed that much damages. As they followed this

rule, appellants were not prejudiced by instructions in this respect. But the court rendered judgment for $24.35 for damages, when they (damages) should have been $11.67, twelve dollars and sixty-eight cents too much, which is manifestly a clerical error.

The appellants object to the appointment of a guardian *ad litem* of Mona Sibeck as unnecessary. It is sufficient to say the statute required it. Kirby's Digest, § 6023.

Appellants contend that the court should not have rendered judgment against the surety on the bond to retain possession of the property in controversy at the time it did. The statute provides, in such cases, that "the court or jury in the case may not only render judgment against the defendants for the recovery of the property, or its value, together with all damages sustained by the detention thereof, but also, upon motion of the plaintiff, may render judgment against the sureties upon his said delivery bond for the value of the property, and also damages as aforesaid, as the same may be found and determined by the court or jury trying such cause." *Id.* § 6870. By executing the bond, the sureties became parties to the action, and the statute provides for no process or notice to them before judgment. Upon bonds upon which the statutes authorize summary judgments upon motion against sureties after judgment against the principal, this court has repeatedly held that such judgments may be entered without notice against the sureties after a failure to do so at the time judgment was rendered against the principal, even at a subsequent term of the court. *Freeman* v. *Mears,* 35 Ark. 278; *Rogers* v. *Brooks,* 31 Ark. 194; *Fletcher* v. *Menken,* 37 Ark. 206; *Shaul* v. *Duprey,* 48 Ark. 331. So we conclude that the judgment in this case was properly entered against the surety.

The evidence was sufficient to support the verdict of the jury.

Judgment is affirmed in all things except as to error in the calculation of interest, which is corrected.

THOMAS-HUYCKE-MARTIN COMPANY v. GRAY.

Opinion delivered February 7, 1910.

1. CONTRACT—MUTUALITY.—A contract whereby defendant at a price fixed undertook to buy the output of a sawmill is not lacking in mutuality as not binding the plaintiffs to sell, since the contract implies a corresponding obligation on the part of the plaintiffs to sell at the stipulated price. (Page 11.)
2. SALES OF CHATTELS—RESCISSION.—Where a contract for the sale of lumber stipulated that the lumber should be stacked in a certain manner, the vendee, after accepting a lot of lumber, could not refuse to receive any more lumber because the lumber already received had not been properly stacked. (Page 13.)

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

H. N. Smith and *T. F. & R. D. Garver,* for appellant.

1. The contract is void for want of mutuality. Under it appellants agree to pay a certain price for lumber of a certain grade, but nowhere are appellees under any obligation to saw or furnish any particular quantity. They were left free to shut down at any time, or, if opportunity was presented to them after moving the mill to the second location, to sell at an increased price. Nothing in the contract would prevent. 1 Ark. 391, 415; 59 Kan. 601; 60 Kan. 424; 58 Mich. 574; 93 Mich. 491; 157 Ill. 339; 36 La. Ann. 35; 13 O. St. 84; 43 Minn. 11.

2. The manner in which appellees entered upon performance of their contract, the way the lumber was stacked, was sufficient ground to rescind the contract, and appellant should have been permitted to introduce proof to show it.

3. The court erred in instructing the jury that if defendant had failed to show a subsequent verbal contract they should find for the plaintiff.

4. The charge as to the measure of damages was erroneous. If this was a valid contract, it was executory, and appellees could not enhance their damages by incurring additional expense in manufacturing lumber from the timber after they learned that appellant would no longer accept it; and a party to such a contract has a right to prevent a full performance by making the other party whole as against the loss which, unenhanced by his own acts after receiving information of a refusal

further to perform, he would suffer thereby. 37 Vt. 239; 115 Mass. 159, 162.

J. H. Carmichael and *A. G. Leming,* for appellees.

1. No defense was interposed or attempted except the claim of a verbal contract. The court therefore quite correctly charged the jury that if the defendant had failed to show a verbal contract made subsequent to the written contract, they should find for the plaintiffs.

2. The evidence fully sustains the verdict. Under the contract the price agreed upon for lumber to run No. 2 and better was the price at the mill yard, and appellant was to check the lumber once each month and pay for it on the yard, all lumber not grading No. 2 to be charged back to the appellees. Except for appellants' refusal to accept, the facts in evidence show a tender that would amount to a delivery. 35 Ark. 304; 54 Ark. 305.

McCULLOCH, C. J. Plaintiffs, Gray & Sons, were owners of a portable saw mill, and were engaged in manufacturing and selling lumber. The Thomas-Huycke-Martin Company was dealing in lumber, and those parties, plaintiffs and defendant, entered into a written contract for the sale of the output of the mill, the contract (omitting caption) being as follows:

"The Thomas-Huycke-Martin Company, parties of the first part, agree to take from Gray & Sons the mill cut from the mill belonging to the parties of the second part located on Jones's Creek, Scott County, Arkansas. The Thomas-Huycke-Martin Company, parties of the first part, agree to pay the parties of the second part eight dollars and twenty-five cents ($8.25) per thousand feet mill run for all merchantable lumber to run No. 2 and better, with the usual rule of measuring 2 inches only to be counted with one-eighth off and to cut lumber from 10 to 20 feet and to cut one and two inch, and are to cut as requested by the parties of the first part. It is further agreed and understood by both parties that the price of $8.25 is the price for lumber at the mill yard for all merchantable lumber cut and stacked properly, and are to stack each length and width separate, and to stack the lumber 200 feet away from the mill, so the parties of the first part can obtain insurance. The Thomas-Huycke-Martin Company will check the lumber once each month and pay for it

on the yard; all lumber that will not grade No. 2 to be charged back to the parties of the second part. It is further agreed and understood that all the lumber now on the yard is to come in under the contract of November 5, 1906, and as soon as the amount is hauled in then the new contract takes effect.

"Present set to be 100 feet from mill and next set 200 feet from mill.

"Gray & Sons,
"Thomas-Huycke-Martin Co."

The word "set" as used in the latter part of the contract meant, according to the evidence, the location of the mill or place where it was being operated. When the contract was entered into, plaintiffs were engaged in sawing lumber at a certain location, and this is what was meant by the words "present set;" and the next location referred to is what was meant by the words "next set." Defendant accepted and paid for all the lumber sawed at the first or present location, referred to in the contract, though complaint was made of the manner in which the lumber was stacked, and plaintiffs allowed a small discount for culls which were in the stacks. Defendant refused to accept any more lumber from plaintiffs, and they instituted this action to recover damages alleged to have been sustained by reason of defendant's refusal to accept the lumber sawed at the second location referred to in the contract. It is alleged in the complaint that plaintiffs sawed 400,000 feet of lumber, and that the damages caused by defendant's refusal to accept it amounted to $3.50 per thousand.

Defendant in the answer admitted the execution of the contract, but denied that it had violated the terms thereof, and alleged that plaintiffs broke the contract by failing to saw and stack the lumber in accordance with the specifications of the contract. The trial before a jury resulted in a verdict in plaintiffs' favor for the sum of $585.11, and defendant appealed.

Some of the defendant's exceptions were not preserved in the motion for new trial, and some that were so preserved are not insisted on here. We will consider only those insisted on here which were properly preserved in the motion for new trial.

It is first insisted that the complaint does not state facts sufficient to constitute a cause of action, for the reason that the

contract set forth therein lacked mutuality and was not binding. It is said that the contract attempted to bind the defendant to purchase the lumber, but did not bind plaintiffs to sell and deliver it. The written contract is ambiguous as to the subject-matter upon which it is intended to operate, but we think that the addition of the words "present set to be 100 feet from the mill, and next set 200 feet from the mill," together with the attending explanatory facts and circumstances, makes it plain that the contract referred to the lumber sawed at the (then) present location and the next location of the mill. The obligation of the defendant, expressed in the contract, to purchase the lumber implied a corresponding obligation on the part of the plaintiff to sell and deliver it at the prices named and on the stipulated terms, and the language of the contract shows an agreement on their part to sell and deliver the lumber to defendant. *Minneapolis Mill Co.* v. *Goodnow,* 40 Minn. 497; *Lewis* v. *Atlas Mut. Life Ins. Co.* 61 Mo. 534; *Jones* v. *Binford,* 74 Me. 439; *Miller* v. *Board Com. Weld. Co.,* 67 Pac. (Col.) 347; *Bangor Furnace Co.* v. *Magill,* 108 Ill. 656.

The contract does not present a case where the obligations are all on one side and none on the other side. Such a case is that of *St. Louis, I. M. & S. Ry. Co.* v. *Matthews,* 64 Ark. 398, and *Davie* v. *Lumberman's Min. Co.,* 93 Mich. 491, and others which might be cited. The case of *Minneapolis Mill Co.* v. *Goodnow, supra,* is very much in point. There the agreement provided that "the Minneapolis Mill Company agrees to saw for said John Goodnow, in its Jones Mill, so called, during the summer of 1887, six million feet or more of pine logs; said sawing to be done in good and workmanlike manner, and as shall be directed from time to time by said John Goodnow or his agent. Said John Goodnow agrees to pay said Minneapolis Mill Company for sawing, scaling, loading and delivering at his piling place," etc. The court, in construing this provision, said: "There is in this agreement no express promise on the part of Goodnow to furnish for plaintiff to saw the 6,000,000 feet of logs which the plaintiff is to saw for him and as he shall direct. But that is necessarily implied. How could it saw the logs as he should direct unless he should furnish them? There can be little doubt that, as the parties understood this agreement when they

executed it, Goodnow was thereby engaging to furnish the 6,000,000 feet of logs for plaintiff to saw, and plaintiff was engaging to saw them in the manner and at the prices specified. A third party would so understand it."

The Maine case cited above is also clearly in point. There, a number of farmers, including defendant, signed an agreement to plant sweet corn suitable for packing, and to deliver the product to plaintiff, and plaintiff agreed to pay certain stipulated prices for all corn which it received. It was argued that there was no mutuality because the plaintiff had not agreed to receive this corn, but only to pay certain prices for that which it did receive. The court, in construing the contract, said: "The only fair construction which can be given to this contract, and the one which expresses the meaning of the parties better than the any other, is that the defendant undertakes to plant and cultivate a specified quantity of the land to sweet corn and deliver what is so raised at the plaintiff's factory when fit for packing, when notified if reasonable notice is given, or, if no reasonable notice is given, he may still deliver it during the time specified, and for all the corn so raised and delivered the plaintiffs must pay the stipulated price. Thus it is a simple contract for the production, sale and purchase of personal property. This construction relieves it from objection on the ground of any alleged illegality, as well as from want of consideration."

In *Lewis* v. *Atlas Mut. Life Ins. Co., supra,* it is said: "It very frequently happens that contracts on their face and by their express terms appear to be obligatory on one party only; but in such cases, if it be manifest that it was the intention of the parties, and the consideration upon which one party assumed an express obligation, that there should be a corresponding and correlative obligation on the other party, such corresponding and correlative obligation will be implied. As, if the act to be done by the party binding himself can only be done upon a corresponding act being done or allowed by the other party, an obligation by the latter to do or allow to be done the act or things necessary for the completion of the contract will necessarily be implied."

The next assignment is that the court erred in refusing to allow the defendant to show that the lumber sawed at the first lo-

cation of the mill and accepted and paid for by defendant was not sawed and stacked in accordance with the specifications of the contract. It was not erroneous to exclude that testimony. It is undisputed that, notwithstanding defendant's objection to the manner in which the first lot of lumber was sawed or stacked, it waived those objections and accepted the lumber and paid for it. That part of the contract was therefore fully performed, and defendant's objections to the manner in which it was performed by plaintiff, after such objections were waived by acceptance of the lumber, could not be made grounds for refusal to perform the remainder of the contract. There was no proof offered that defendant, in accepting the lumber, stipulated that the balance of the contract would be abrogated, nor that the lumber sawed at the next location of the mill failed to come up to the requirements of the contract. If the first installment of lumber was not up to contract, defendant had a right either to reject it and treat the contract as broken, or to accept the lumber and treat the contract as being still in force. He could not, with full knowledge of the facts, do both. 3 Page on Contracts, § 1494.

The court gave the following instruction over defendant's objection: "If defendant has failed to show a verbal contract made subsequent to the written contract, then your verdict should be for plaintiffs." This was an indirect way of stating the issue in the case, but, as the defense from liability under the contract rested primarily on proof that there was a subsequent verbal contract, the instruction reached to the issue in the case. Defendant contended that the words, "present set to be 100 feet from the mill, next set to be 200 feet from the mill," were not incorporated in the contract, but that, subsequent to the time it was entered into, the parties thereto verbally agreed that, if the lumber sawed at the first location was satisfactory to defendant, defendant would take the lumber to be sawed at the next location, and that the words referred to above were noted on the contract merely as a memorandum, and not as a part of the contract. Plaintiffs contended that the words were added to the contract as a part thereof, before it was signed, and that there was no verbal agreement between the parties subsequent to the execution of the contract. That was the principal issue

of fact in the case; and if the jury found that there was no subsequent verbal contract, then the written contract prevailed, and, according to the undisputed testimony on the other issues, the plaintiffs were entitled to recover.

Excessiveness of the verdict is not set up as grounds for new trial, but it is contended that the evidence as to the market value of the lumber is not sufficient to sustain the verdict. While the evidence on this point is not entirely satisfactory, we think there is enough to sustain the verdict.

Judgment affirmed.

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

Opinion delivered February 7, 1910.

1. CARRIERS—LIABILITY FOR CONCURRING NEGLIGENCE.—Where the negligence of trainmen in passing a railway station without signal concurred with the negligence of an express company's truckman in causing the death of a person lawfully on a railway station platform, the negligence of the railway company was an efficient cause of the injury. (Page 18.)
2. SAME—CONCURRING NEGLIGENCE.—Where a passenger, while waiting for his train at a station, was jostled by an express company's truck, and thereby thrown in front of a train then passing the station without signal, and was killed, it was not error to refuse to instruct that if deceased was pushed near the railroad track by a truck owned and operated by the express company, and on account of such push was run over and killed by the train, the jury should find for the defendant railway company, as the negligence of the trainmen concurred in causing the death. (Page 19.)
3. SAME—DUTY TO PERSONS ON PLATFORM.—A carrier owes to passengers and others lawfully using its premises the duty to protect them from the dangerous habits of the servants of an express company in negligently moving trucks about the platform without warning. (Page 19.)
4. SAME—DEATH OF PASSENGER—CONTRIBUTORY NEGLIGENCE.—Where an infant passenger was waiting for his train, and in trying to escape from an express truck was thrown in front of a train which was approaching without signal, and was killed, an instruction that if deceased could have stepped out of the way of the truck, without

moving towards the track, the jury should find for defendant was erroneous in leaving out of account the fact that deceased did not know of the train's approach, and that he was an infant. (Page 20.)

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

Kinsworthy & Rhoton and *Jas. H. Stevenson,* for appellant.

1. The court erred in treating appellant's negligence in the operation of its train as the proximate cause of the injury. 56 Ark. 387; 21 S. C. 466; 1 Thompson, Neg. § § 44-45.

2. Appellant's eighth and twelfth instructions should have been given, submitting to the jury the proposition that if deceased was knocked or frightened into the way of the oncoming train by a truck operated by an employee of an express company, appellant would not be responsible therefor. 3 Thompson, Neg. § 2767; 114 Ind. 476; 24 L. R. A. 215; 50 Am. Rep. 141.

3. The court erred in refusing appellant's ninth instruction, submitting the question of contributory negligence on the part of deceased.

McRae & Tompkins and *D. L. McRae,* for appellee.

1. The negligence of appellant in the operation of the train was a concurring cause of the injury, and the court so treated it. 61 Ark. 381; 73 *Id.* 116; 89 *Id.* 581; 29 Cyc. 496.

2. Appellant's eighth and twelfth instructions were properly refused, for it is liable for injuries resulting from the continuance of a course of conduct on the part of the express agents which was dangerous to persons rightfully upon the premises. 123 Mich. 634; 33 Cyc. 807.

3. Appellant's ninth instruction was properly refused. 55 Ark. 248; 76 *Id.* 227; 29 Cyc. 521.

MCCULLOCH, C. J. This is an action instituted by the administrator of the estate of Joe Shaw, deceased, to recover damages resulting from an injury of said decedent by one of appellant's passenger trains at Hope, Arkansas. Deceased was a boy 17 years of age, and was on his way from Emmett, a station on appellant's road, to Washington, Arkansas, which is on the line of the Arkansas & Louisiana Railway Company. He came from Emmett to Hope over appellant's line, and at the time he was run over by the train he was waiting for his train to start on the Arkansas & Louisiana Railroad. The two roads jointly used the

same station and platform at Hope. Deceased was accompanied by his brother, who was his elder by only two years. While waiting for the train, he, with other passengers, was on the platform. While he was standing on the platform a few feet from the railroad track and looking up the track, he either was struck from behind by a moving baggage or express hand truck, and knocked or jostled toward the track, or stepped toward the track to get out of the way of the truck. This occurred just as a passenger train from the south passed along at a high rate of speed, and he was caught by the pilot beam of the engine, knocked under the train and mortally injured. Some of the witnesses say that he was struck from behind by the truck and knocked or jostled toward the track. Another witness says that he was struck by the truck, which "kind o' staggered him, and he just made one step before the train hit him." Others say he stepped over toward the track to get out of the way of the truck and lost his balance, and another witness says that deceased was never in the way of the truck, but took a position on the platform close enough to the track for the pilot beam of the engine to strike him. It appeared that he was unconscious of the approach of the truck on the platform or of the train, and was looking in the other direction. Another train was switching in the yard nearby, and there was enough noise and confusion to drown the noise of an approaching train. The testimony warranted a finding that no signals, by bell or whistle, were sounded by the approaching engine.

The court, over appellant's objections, submitted the case to the jury on the following instructions requested by appellee:

"2. You are further told that where a railroad company is running its trains through populous communities, towns and cities, where the presence of persons upon the track is to be expected, it is its duty to give notice in some way, either by sounding the whistle, ringing the bell, or in some other way, of the approach of the train, and, if necessary, to reduce the speed of the train. So in this case, if you believe from the evidence that the deceased was without fault, and that he was killed by reason of the failure of the defendant to discharge its duty in this regard, your verdict should be for the plaintiff.

"3. If you believe from the evidence that the death of the deceased was caused by the negligence of the defendant com-

pany, a recovery will not be defeated on the ground of contributory negligence, unless it appears from the evidence that the deceased himself failed in the exercise of ordinary prudence, and that such failure so contributed to the injury that it would not have occurred if he had been without fault."

The court also gave four other instructions at appellant's request as to the duty of deceased under the circumstances; and also gave the following at appellant's request: "The jury are instructed that the defendant had the right to run its train through the town of Hope without stopping, and that the employees of defendant in charge of said train had a right to presume that passengers and parties on the platform would keep out of the way of moving trains, and the jury are instructed that the defendant is not liable for running its trains through the said town of Hope at the speed shown by the evidence."

It is contended that if the evidence shows that deceased was struck by a hand truck, operated by a servant of the express company, the alleged negligence of the trainmen in failing to give signals was not the proximate cause of the injury, and that instruction number two was erroneous in submitting the case to the jury on that charge of negligence. The evidence warranted the finding of a state of facts constituting concurring negligence on the part of the trainmen in failing to give signals, which rendered appellant liable for damages. When the truck came along and struck deceased, or caused him to step aside, he was standing very near the track looking in the opposite direction, and apparently unconscious of his danger. He was not injured by being struck by the truck; but his proximity to the railroad track caused him, when struck by the truck, or when he stepped out of the way of the truck, to get near enough to the track for the passing train to catch him. His position in close proximity to the track was an incident to the injury, and this was caused by the negligence of the trainmen in failing to give signals of the approach of the train, as the jury might have found that he would not have been in that position if he had received proper notice of the approach of the train.

There were two street crossings nearby, and the statutes require that signals be given under such circumstances. If a warning had been given, deceased would not have been close

enough to the track to be struck by the train or to be knocked or jostled over near the track as the train passed along. Thus the negligence of the trainmen concurred with the negligence of the truckman in producing the injury. In other words, the negligence of the trainmen caused deceased to be in a position where he was injured, and where he would not have been but for the act of negligence, which thus became one of the efficient causes of the injury. *City Elec. Ry. Co.* v. *Conery,* 61 Ark. 381; *Chicago Mill & Lbr. Co.* v. *Cooper,* 90 Ark. 326; *St. Louis, I. M. & S. Ry. Co.* v. *Corman,* 92 Ark. 102.

The court refused to give the following instructions requested by appellant:

"8. If the jury believe from the evidence that the truck in question belonged to the Pacific Express Company, and was handled by employees of that company, then the defendant railway company is not liable, and you will so find."

"12. If the jury believe from the evidence that deceased was pushed or knocked on to or near the railroad track and in front of a moving train by a truck owned and operated at the time by the Pacific Express Company, and on account of such push or knock was run over and killed by the train, you will find for defendant."

These instructions were asked on the theory that the act of the agent of the express company in running the truck against deceased was that of an independent agency, for which appellant was not responsible. The instructions were, however, erroneous, even if it be conceded that appellant was in no wise responsible for the alleged negligent act of the truckman, for they place the responsibility for the injury entirely upon the act of the truckman; and, as the jury had a right to conclude that the negligence of the trainmen was a concurring cause of the injury, it was incorrect to say that the verdict should be for appellant if it was found that the truckman who ran the truck against deceased was a servant of the express company. If the negligence of the trainmen concurred as a proximate cause of the injury, it matters not what other agency was the other concurring cause.

But the instructions were incorrect in other respects. Even if it be conceded that the railway company was not primarily

responsible for the servants of the express company, still it owed passengers and others using by lawful right its premises the duty of protection from dangerous habits of such servants in negligently moving trucks about the platform without warning to any one. *Huddleston* v. *St. Louis, I. M. & S. Ry. Co.*, 90 Ark. 378. There was evidence to the effect that the truckman of the express company was permitted to pursue a course of conduct in operating trucks about the platform which was dangerous to those on the platform, and it would have been erroneous, in any view of the case, to tell the jury broadly, as is done in these instructions, that the railway company was not responsible for the negligent act of the truckman.

Error is assigned in the refusal of the court to give the following instruction:

"9. If the jury believe from the evidence that at or just before the time deceased, Joe Shaw, was struck by defendant's engine, he could have gone around or stepped out of the way of the truck in question by moving towards the depot instead of moving towards the railroad track, then it was his duty to have done so—moved towards the depot—and his failure to do so and moving towards the railroad track and in front of the approaching train was negligence on his part, and you will find for the defendant."

This instruction was clearly erroneous, even if it was correct in other respects, in leaving out of account the fact that deceased did not know of the approach of the train, and that no warning of its approach had been given. It also leaves out of account the age of deceased, and holds him to the highest degree of discretion and judgment under trying circumstances. The instruction was properly refused.

There are other assignments of error which we do not deem of sufficient importance to discuss. The judgment is affirmed.

BATTLE, J., not participating.

ON REHEARING.

Opinion delivered February 28, 1910.

MCCULLOCH, C. J. We find on re-examination of the evidence in the record that we were not justified in saying that

"there was evidence to the effect that the truckman of the express company was permitted to pursue a course of conduct in operating the trucks about the platform which was dangerous to those on the platform." This does not, however, change the result, for the requested instruction was properly refused for other reasons stated in the opinion. We do not wish to be understood as holding that the railroad company is not responsible for the negligent act of the servant of the express company. It is unnecessary to pass on that question. We held in *Huddleston* v. *St. Louis, I. M. & S. Ry. Co,* 90 Ark. 378, that a railway company is not primarily liable for the negligence of a mail agent; but whether or not the same rule should be applied as to liability for negligence of a servant of the express company using the premises of the railroad company under contract and by permission, we do not undertake to decide in this case.

Rehearing denied.

DODGE *v.* THOMASON.

Opinion delivered February 14, 1910.

1. INSURANCE—WAIVER OF PROOF OF LOSS.—Where an insurance company denies liability on some ground other than the failure to furnish proof of loss, the latter defense is waived. (Page 25.)
2. SAME—IRON-SAFE CLAUSE—WHEN COMPLIED WITH.—The requirement of the iron-safe clause in a policy of fire insurance that the books mentioned therein be kept in an iron safe or in some other secure place not exposed to a fire which would destroy the insured building is complied with where insured, a merchant, carried the books home with him if such home was not exposed to the fire which destroyed his store. (Page 25.)
3. SAME—ESTOPPEL.—A policy required insured to keep his books in an iron safe or other secure place. Insurer, prior to the fire, took his cash sales book to his home, and after the fire forgot that he had removed it, but represented that it had been destroyed in the fire. The insurer refused payment on account of a breach of the iron-safe clause. Insured, for this reason, failed to furnish proofs of loss. Subsequently the cash sales book was discovered and offered in evidence. *Held* that insured was not estopped by his representations that the book was destroyed from thereafter relying thereon, even though such representation induced the insurer to waive proofs of loss. (Page 26.)

Appeal from Mississippi Circuit Court, Osceola District; *Frank Smith,* Judge; affirmed.

Dan. W. Jones and *Robert Martin,* for appellant.

1. The court erred in its declarations of law. While it is true that "a denial of liability waives proof of loss" (83 Ark. 128), a waiver obtained by misrepresentations or concealment of material facts required by the "iron safe clause" of a policy does not bind the insurer. One ought not to be allowed to take advantage of his own misrepresentations, even if he is *honest* in making them. It is an undue advantage, and opens the doors to dishonesty. Plaintiff's acts worked an estoppel. 11 A. & E. Enc. Law, 422-3; 67 Ark. 588; 3 *Id.* 494; 65 *Id.* 54.

2. The conditions of the "iron safe clause" are useful and valid, and must be complied with. 65 Ark. 249; 83 *Id.* 126.

W. J. Driver, for appellee.

1. If the cash sales record book is admissible in evidence, plaintiff has made out his case, everything else required by the policy having been produced and the company having by denial of its liability waived proof of loss. 83 Ark. 126.

2. The finding of the court, like the verdict of a jury, is final as to the facts, and there is no question of law involved not clearly settled by this court. 79 Ark. 160; *Ib.* 266; 85 *Id.* 33; 87 *Id.* 171.

3. A denial of liability is a waiver of proof of loss. 19 Cyc. 867, 872. A waiver cannot be withdrawn. *Ib.*

FRAUENTHAL, J. This is the second appeal of this cause to this court. The opinion of this court rendered upon the former appeal will be found in 83 Ark. 126 (*Yates* v. *Thomason*). The plaintiff below instituted this action against the People's Fire Insurance Company upon a fire insurance policy. In its answer the defendant claimed that the plaintiff should not recover because he had violated a number of the express provisions and conditions of the policy which avoided the contract of insurance. Amongst other grounds of forfeiture of the policy, it was alleged that the plaintiff had taken out other and additional insurance on the stock of goods covered by the policy and in violation of an express provision thereof in that regard; that he had failed to furnish proof of loss in compliance with a provision of the

policy; and that he failed to keep a set of books as provided by what is known as the "iron-safe clause" of the policy. Upon the former trial a verdict was rendered in favor of the plaintiff. Upon the former appeal this court held that under the evidence adduced at the first trial of the case a denial of liability was proved, which waived the provision of the policy in regard to making the proof of loss, and that the defense upon that ground was not well taken. But, in regard to the defense that the plaintiff violated the provision of the policy contained in the iron-safe clause, this court held that under the evidence adduced upon that trial the plaintiff failed to keep in his iron safe a certain cash book which showed the account of sales, and that "there is no book or other written evidence which shows the amount of the sales;" that "the books were not before the jury, and there was no testimony tending to show that the books preserved contained a summary of the sales, and no written evidence of any data of such sales was preserved." For the failure to preserve and present at said trial said book showing said sales the judgment was reversed, and the cause remanded for a new trial.

Upon the cause being remanded to the circuit court, Frank H. Dodge was substituted for Frank B. Yates as receiver of the People's Fire Insurance Company. At the second trial the case was by agreement submitted to the court sitting as a jury upon the pleadings and the testimony as contained in the bill of exceptions of the former trial and certain additional testimony and the following further agreement:

"And it is further agreed that the plaintiff cannot recover unless the book designated in the stipulation between the attorneys for the parties as the cash sales book is admissible and competent evidence under the present state of the record in this cause. But it is further agreed that upon the other questions the court may adopt the verdict of the jury in the former cause and find the facts as there found, if it be held by the court that said book is admissible in evidence under the present state of the record in this cause; and the defendant saves its exceptions to any ruling of the court which permits the introduction of said book in evidence."

The additional testimony introduced at this second trial tended to prove that before the fire which destroyed the stock

of goods plaintiff removed the book kept by him showing the cash sales of the goods covered by the policy from the iron safe in his storehouse and carried same to his home and put it in his house desk, which was a secure place, and put it in a large book containing farm accounts, and it was overlooked, but subsequently discovered by his housekeeper just after the first trial of the case in the circuit court; that at the time he testified in the first trial and up to the date of its discovery the plaintiff was under the honest but mistaken belief that he left the book in a desk in his store, and that it was destroyed. The cash book was presented in evidence; and this book, in conjunction with the books and inventories introduced in evidence upon the first trial, showed a complete record of the business in reference to the property insured including all purchases, sales and shipments, both for cash and credit.

The defendant asked the court to make the following declaration of law, which was refused: "When the insured made statement to the insurance company's adjuster that disclosed a noncompliance with the terms of the insurance policy in such manner that a valid defense could be interposed by the insurance company in refusing to pay the claim based on such policy, and the insurance company denied liability after such disclosure was made, the denial of liability under such circumstances does not relieve the insured from the duty of making and filing with the insurance company a proof of loss within the time specified in the policy if such statements are afterwards proved to be erroneous. And if the insured fails to make and file with the insurance company such proof of loss within the time specified in the policy of insurance, the insured cannot recover."

At the request of the plaintiff the court made the following declaration of law:

"If the plaintiff Bertt kept the book which showed his cash sales in a secure place, and after the destruction of the stock of goods insured plaintiff mislaid said cash sales book, and was unable to produce the same within sixty days after the destruction of said stock, and at the former trial of this cause plaintiff was unable to produce said book of cash sales, but he thereafter found said book of cash sales, said book is competent evidence, and plaintiff is not estopped by rea-

son of the failure to produce said book as mentioned, and the verdict should be for plaintiff."

The court thereupon rendered a verdict in favor of the plaintiff, and from the judgment entered thereon the defendant brings this appeal.

It is contended by the defendant that the court erred in permitting the introduction of the book containing the cash sales, because the plaintiff had represented, no matter how innocently, before the first trial, and had at that trial stated that this book had been burned in the store at the time of the fire, and that the plaintiff should be concluded by the representation, even though, as a matter of fact, he was honestly mistaken in making such statement, and in truth said book was at his home. He urges that, by reason of the misrepresentation, the defendant denied liability, and thereby waived the necessity of making proof of loss, and on this account plaintiff is estopped from denying the destruction of the book, or that plaintiff should be held to have been required to have made said proof of loss within the time specified in the policy. We do not think that this contention is well founded. When the case was remanded to the circuit court for a new trial, it presented for determination every issue made by the answer. One of these issues was the alleged failure of the plaintiff to make proof of loss. It was agreed upon this second trial that upon that issue a finding should be made in accordance with the finding of the jury upon the former trial. The finding of the jury upon that issue upon the former trial was in favor of plaintiff. This court upon the former appeal held that there was sufficient evidence to sustain the finding of the jury upon that issue, and that the proof of loss was waived by a denial of liability. It has been uniformly held by this court that a denial of liability, not predicated upon the failure to furnish the proof of loss, is a waiver of a defense upon that ground. *German Insurance Co.* v. *Gibson,* 53 Ark. 494; *Phoenix Ins. Co.* v. *Minner,* 64 Ark. 590; *Greenwich Ins. Co.* v. *State,* 74 Ark. 72; *Planters' Mutual Ins. Ass'n* v. *Hamilton,* 77 Ark. 27; *Phoenix Assurance Co.* v. *Boyette,* 77 Ark. 41; *Security Mutual Ins. Co.* v. *Woodson,* 79 Ark. 266.

In its answer the defendant denied liability on a number of different grounds. At the time of the alleged denial of lia-

bility made by its adjuster it claimed, amongst other reasons, that it was not liable because the plaintiff had taken out additional insurance on the stock of goods in violation of a provision of the policy in that regard. The jury may have found that the defendant denied liability on grounds other than the failure to keep the books in the iron safe or other secure place. The case was tried upon the agreement that the finding of the jury upon this issue at the former trial should be final; and the only question then submitted to the court by this agreement was whether the cash book was admissible under the additional testimony. This additional testimony tended to prove that the books mentioned in the iron safe clause were kept in compliance with that provision of the policy; and it was, therefore, not error to admit in evidence the cash book and the additional testimony. The cash book was kept at a place and in a manner that sufficiently complied with the requirements of the policy. *Home Ins. Co.* v. *Driver,* 7 Ark. 171; *People's Fire Ins. Ass'n* v. *Gorham,* 79 Ark. 160; *Security Mutual Ins. Co.* v. *Woodson,* 79 Ark. 266; *Capital Fire Ins. Co.* v. *Kaufman,* 91 Ark. 310.

The clause in the policy known as the "iron-safe" clause, and the provision known as the "proof of loss" clause were separate and distinct, and a violation of either clause constituted a good defense to a recovery upon the policy. The fact that the cash book was destroyed by reason of not being kept in the iron safe would be a violation of the iron-safe clause, and not of the proof of loss provision. The testimony relative to the cash book tended to prove that the "iron-safe clause" of the policy had been complied with. The defendant denied liability because the "iron safe clause" had been violated, and not because the proof of loss had not been complied with. Before the time had elapsed for making the proof of loss, it in legal effect told the plaintiff it was not necessary to make the proof of loss; and now after that time has expired it insists that the proof of loss should have been made. It did not, after learning that this cash book had really been preserved, ask for the proof of loss, nor did it then permit the proof of loss to be made. It is not willing to do this, which is equity, but asks for the enforcement of an estoppel which is founded on equity. It concedes that technically it has waived the proof of loss by denial of liability, but it insists

that such waiver be set aside on the ground of estoppel; and yet it also insists upon the enforcement of the technical forfeiture of the policy. The doctrine of estoppel is allowed to be interposed only to prevent injustice and to guard against fraud. It will be allowed to shut out truth only when necessary to advance justice, but it will never be permitted where it will itself work injustice. If by innocent misapprehension defendant waived the proof of loss, and seeks to have that waiver avoided, it should have first asked for the proof of loss to be made, and thus have waived the time in which it should have been made under the policy. Failing to do that, it cannot insist upon the technical forfeiture of its contract and also ask that the legal waiver of that forfeiture shall be set aside.

We do not think under the circumstances of this case that the court committed any error in its findings of fact or in its rulings on the declarations of law.

The judgment is affirmed.

ARKANSAS STAVE COMPANY *v.* STATE.
(Three Cases.)

Opinion delivered February 14, 1910.

1. CONSTITUTIONAL LAW—OBLIGATION OF CONTRACT—CORPORATE CHARTER.—The charter or articles of incorporation of a corporation is a contract between the State and the corporation, and is protected from legislation of the State impairing its obligation. (Page 30.)
2. SAME—DUE PROCESS—PROTECTION OF CORPORATION.—A corporation is a "person" within the due process clause of the Fourteenth Amendment to the Constitution of the United States. (Page 31.)
3. CORPORATIONS—POWERS.—A corporation organized under the laws of the State is but the creature of the Legislature, and possesses only those rights, powers or property which the charter of its creation confers upon it, either expressly or as incidental to its existence. (Page 31.)
4. SAME—LAWS AS PART OF CHARTER.—Where a corporation is organized under the general laws of the State, such laws become a part of its charter. (Page 31.)
5. CONSTITUTIONAL LAW—LEGISLATIVE CONTROL OVER CORPORATIONS.—Under Const. 1874, art. 12, § § 2, 6, providing that no corporations shall, with

certain exceptions, be created by special act, and that corporations may be formed under general laws, which may from time to time be repealed, and that their charter may be altered, revoked or annulled, in such manner that no injustice shall be done to the corporators, *held* that the Legislature is authorized to regulate the powers of corporations to enter into contracts when that regulation would not be subversive of any vested rights or the object of the charter. (Page 35.)

6. SAME—POWER OF LEGISLATURE OVER CORPORATIONS NOT UNLIMITED.—The power of the Legislature to alter and amend the charter of a corporation is not unlimited; the alterations must be reasonable, made in good faith, and consistent with the scope and object of the act of incorporation. (Page 35.)

7. CORPORATIONS—REASONABLENESS OF REGULATION.—The act of February 1, 1909, requiring corporations doing business in this State to pay their employees semi-monthly, is not an unreasonable exercise of the power to amend the charters of corporations. (Page 35.)

8. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAW.—The act of February 1, 1909, providing that corporations shall pay their employees semi-monthly, does not deny the equal protection of the law, since all corporations of the class affected are treated alike under like circumstances. (Page 35.)

9. SAME—LIMITING POWER TO CONTRACT.—The act of February 1, 1909, requiring corporations to pay the employees semi-monthly, is not invalid as restricting the right of such employees to contract with such corporations. (Page 36.)

10. MASTER AND SERVANT—CONSTRUCTION OF STATUTE—PENAL STATUTE.—The act of February 1, 1909, making it a misdemeanor for a corporation doing business in the State to fail to pay its employees semi-monthly, being penal in its nature, must be strictly construed, and no act that does not clearly violate its provisions can be declared an offense. (Page 37.)

11. SAME—CONSTRUCTION OF STATUTE.—Under the act of February 1, 1909, providing that all corporations doing business in this State shall pay their employees semi-monthly, and declaring a violation of that provision a misdemeanor, *held* that a violation of the law is not committed unless a corporation fails or refuses to pay the wages of its employees semi-monthly after a request or demand therefor has been made or unless by its acts and conduct it shows that it will fail or refuse to pay such wages upon request or demand. (Page 37.)

12. SAME—STATUTORY REGULATION—CONSTRUCTION.—A contract entered into between a corporation and an employee for payment of wages at a longer period than semi-monthly would be void, under the act of

February 1, 1909, and could not deprive the employee of his right to request or demand the payment of his wages semi-monthly. (Page 37.)

13. SAME—STATUTORY REGULATION.—The mere fact that a corporation doing business in this State agreed with an employee not to pay his wages semi-monthly will not be a violation of the act of February 1, 1909, requiring corporations to pay wages of employees semi-monthly. (Page 37.)

Appeals from Craighead Circuit Court, Jonesboro District; *Basil Baker*, Special Judge; two cases reversed; the other affirmed.

Hawthorne & Hawthorne, for appellant.

1. A corporation is a "person" within the meaning of the Fourteenth Amendment. 164 U. S. 578; 118 *Id.* 394; 125 *Id.* 181; 20 L. R. A. (N. S.) 126.

2. The act is unconstitutional. Kirby's Digest, § 850; 6 L. R. A. 576; 154 Mo. 375; 176 U. S. 385; 152 *Id.* 133; 62 L. R. A. 136; 3 W. Va. 179; 115 Mo. 307; 19 S. W. 910; 113 Pa. 431; 58 Ark. 407.

Hal L. Norwood, Attorney General, and *Wm. H. Rector*, Assistant, for appellee.

1. The act is constitutional. 18 R. I. 16.

2. Appellant is not a "citizen of the United States." 172 U. S. 239; *Ib.* 561; 8 Wall. 168.

3. Conceding that corporations are persons under the Fourteenth Amendment, the act is no violation of the inhibition. 58 Ark. 407; 64 *Id.* 83; 173 U. S. 404; 165 *Id.* 150, 159; 69 Ark. 521; 28 L. R. A. 344; 96 Fed. 735; 190 U. S. 169; 28 L. R. A. 344; 276; 168 U. S. 680; 183 *Id.* 22; 204 *Id.* 22.

FRAUENTHAL, J. The appellant, the Arkansas Stave Company, is a corporation organized under the laws of the State of Arkansas, and is doing business in Craighead County.

The grand jury of that county returned three indictments against appellant, charging it with violating the provisions of the act of the General Assembly of the State of Arkansas entitled "An act requiring corporations doing business in Arkansas to have two regular pay days each month," which was approved February 1, 1909 (Acts 1909, p. 21). The act is as follows:

"Sec. 1. All corporations doing business in this State who shall employ any salesmen, mechanics, laborers or other servants for the transaction of their business shall pay the wages of such employees semi-monthly.

"Sec. 2. Any corporation that shall through its president, or otherwise, violate section one of this act shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not less than fifty dollars nor more than five hundred dollars for each offense.

"Sec. 3. 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 July 1, 1909."

The first indictment charged that the defendant is a domestic corporation, doing business in Craighead County, Arkansas, and that it entered into a contract with William Nichols, one of its employees and laborers, that it would not pay him his wages semi-monthly, but would pay him monthly.

The evidence on the trial of the second indictment proved that the defendant refused and failed to pay its said employee and laborer, who was working for it, semi-monthly as required by the statute, although requested so to do.

The evidence on the trial of the third indictment showed that said employee and laborer requested said defendant not to pay him semi-monthly, and thereupon defendant did not pay him semi-monthly, but paid him monthly as requested by the employee to do.

The cases were tried separately on each indictment; and there was a conviction in each case, from which an appeal has been taken to this court; and on the docket of this court these cases are numbered respectively 1434, 1435 and 1436.

The defendant contends that the above act of the General Assembly is unconstitutional and void because it contravenes section one of the Fourteenth Amendment of the Constitution of the United States, in that it deprives the defendant of liberty and property without due process of law, and denies to it the equal protection of the law. Under the decisions of the Federal Supreme Court, the articles of incorporation or charter of the defendant is a contract between the State and the defendant, and like all other contracts it is protected by the Federal Con-

stitution from legislation of the State impairing its obligation; and the defendant is a person within the meaning of the due process and equal protection clause of the Fourteenth Amendment, which is as follows:

"Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The right freely to acquire property and the liberty to make contracts in respect thereto and in regard to one's business is fundamental, and it has been often held that this right and liberty is under the protecting power of this clause of the Fourteenth Amendment. But, even in the case of individuals, it has been also held that the right to make contracts is not absolute, and that it is subject to certain limitations which the State may impose. As is said by Mr. Justice Brewer in the case of *Muller* v. *Oregon,* 208 U. S. 421: "It is undoubtedly true, as more than once declared by this court, that the general right to contract in relation to one's business is a part of the liberty of the individual, protected by the Fourteenth Amendment to the Federal Constitution; yet it is equally well settled that this liberty is not absolute and extending to all contracts, and that a State may, without conflicting with the provisions of the Fourteenth Amendment, restrict in many respects the individual's power to contract."

In a state of organized society every member surrenders something of his absolute and natural rights. "Every man," says Blackstone, "when he enters into society gives up a part of his natural liberty." It has been said that the right of property is even higher than any constitutional sanction; and while this expression represents the sacredness of property and the rights to acquire and deal with it, still it is not entirely beyond the control of the State—of its Legislature and laws, whose protection its possessor and owner seeks for its safety and preservation. But in this case the defendant is not a natural person but a corporation. It is but the creature of the Legislature. It "possesses only those rights, powers or property which the charter of its creation confers upon it, either expressly or as incidental to its existence." The source from which it has secured its right to enter into contracts is the Legislature, and

this right may be altered or amended by the power that granted it. The defendant was created under and by virtue of the general incorporation laws of the State, and these laws were enacted in pursuance of the provisions of the Constitution of the State. Those laws and the constitutional provisions became a part of the charter under which defendant was organized. Section 2 of article 12 of the Constitution provides: "The General Assembly shall pass no special act conferring corporate powers except for charitable, educational, penal or reformatory purposes, where the corporations created are to be and remain under the patronage and control of the State." And section 6 of article 12 of the Constitution provides: "Corporations may be formed under general laws, which laws may, from time to time, be altered or repealed. The General Assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this Constitution, or any that may hereafter be created, whenever in their opinion it may be injurious to the citizens of this State, in such manner, however, that no injustice shall be done to the corporators."

It will thus be seen that the General Assembly reserved the power to alter the privileges which it granted to the appellant when it issued its charter to it; and it could modify or amend them or even extinguish them by revoking the charter. It therefore had the right to regulate the power of the appellant to enter into contracts when that regulation would not be subversive of any vested rights or the object of the charter, but which would be, in the judgment of the legislative body, for the advancement of a sound public policy. That this right to amend the charter of a corporation, and thus to limit or regulate its power to contract, is within the constitutional authority of the Legislature, under the reserved power to amend, has been decided by this court in the case of *Leep* v. *Railway Co.,* 58 Ark. 407. In that case an able and exhaustive opinion was rendered by Mr. Justice BATTLE. In that case there was involved the constitutionality of the act of the Legislature requiring railroad companies or corporations to pay promptly on their discharge with or without cause their employees the unpaid wages of such employees without abatement or deduction, under a penalty for such nonpayment. It was contended that this act was in conflict with the

above provisions of the Fourteenth Amendment of the Federal Constitution. In speaking of the power of the Legislature to amend and in effect to regulate the right of corporations to contract, Mr. Justice BATTLE says: "Being created by statute, the Legislature may so change them by amendment as to make them subserve the purposes for which they were created. If the Legislature, in its wisdom, seeing that their employees are and will be persons dependent on their labor for a livelihood, and unable to work on a credit, should find that better servants and service could be secured by the prompt payment of their wages on termination of their employment, and that the purpose of their creation would thereby be more nearly accomplished, it might require them to pay for the labor of their employees when the same is fully performed at the end of their employment. If it be true that in doing so it would interfere with contracts which are purely and exclusively private, and thereby limit their right to contract with individuals, it would nevertheless, under such circumstances, have the right to do so under the reserved power to amend." This act requiring railroad corporations to pay their employees on the day of their discharge and imposing a penalty for failure to do so was again upheld by this court as a valid and constitutional exercise by the State of the power reserved by the Constitution to alter and amend any charter of incorporation, in the case of *St. Louis, I. M & S. Ry. Co.* v. *Paul,* 64 Ark. 83. This case was taken upon writ of error to the Supreme Court of the United States and by that court affirmed. *St. Louis, I. M. & S. Ry. Co.* v. *Paul,* 173 U. S. 404.

In that case Mr. Chief Justice Fuller says: "Corporations are the creations of the State, endowed with such faculties as the State bestows and subject to such conditions as the State imposes, and if the power to modify their charters is reserved, that reservation is a part of the contract, and no change within the legitimate exercise of the power can be said to impair its obligation; and as this amendment rested on reasons deduced from the peculiar character of the business of the corporations and the public nature of their functions, and applied to all alike, the equal protection of the law was not denied."

In the case of *Woodson* v. *State,* 69 Ark. 521, this court held

that the act of April 10, 1899, which required every corporation engaged in the business of mining and selling coal by weight to procure scales and to pay the miners according to the weight of the coal ascertained before the same was screened, was a valid exercise of legislative power, in so far as it relates to domestic corporations.

In the case of *Ozan Lumber Company* v. *Biddie,* 87 Ark. 587, this court held that the act of March 8, 1907, making railroad and mining companies and all other corporations liable for injuries to a servant by the negligence of a fellow servant, was a reasonable and constitutional exercise of the right reserved by the Constitution to alter corporate charters.

In the case of *State* v. *Brown & Sharpe Mfg. Co.,* 18 R. I. 16, it was held that an act of the Legislature of Rhode Island which required every corporation to pay weekly the employees engaged in its business was not obnoxious to constitutional objections. And in that case the court said: "The reservation to the Legislature of power to amend or repeal a charter contained in the charter itself, upon common law principles, is not repugnant to the grant, but is a constitutional limitation of the powers granted, and the reservation is equally valid and effectual if it exists in the Constitution of the State or in a prior general law."

In the case of *Skinner* v. *Garnett-Gold Min. Co.,* 96 Fed. 735, it was held that an act of the Legislature of the State of California requiring all corporations to pay their employees at least once a month the wages earned during the preceding month did not deprive the corporations of their property without due process of law by interfering with their freedom to make contracts, nor did such provision deny to them the equal protection of the law within the prohibition of the Fourteenth Amendment of the Federal Constitution.

In the case of *Lawrence* v. *Rutland R. Co.,* 80 Vt. 370, it was held that an act of the Legislature of Vermont requiring corporations to pay each week in lawful money to each employee engaged in their business the wages earned by such employee was valid; that the reserved power to amend the charter of the corporation included the right to require it to pay its employees weekly in lawful money; and that the constitutional right of the corporation to contract was not impaired by requiring it to pay

its employees weekly in lawful money; and that the constitutional right of the corporation to contract was not impaired by requiring it to pay its employees weekly.

But the power of the Legislature to alter and amend the charter of a corporation is not without its limitation. As is said by Mr. Justice Swayne in *Shields* v. *Ohio,* 95 U. S. 319, "The alterations must be reasonable; they must be made in good faith; and be consistent with the scope and object of the act of incorporation." The plain purpose of this act now in question was to secure a frequent payment of wages earned by the employees. These corporations represent aggregations of capital and the employees are the laborers who are dependent on their wages for their livlihood. The inconvenience to the corporation to pay the wages semi-monthly could not be as great as it would be to those whose actual necessities require the frequent payments not to receive such payments. The corporation has already received the full value for which it is required to pay; and this requirement to pay semi-monthly the wages of its employees already earned could not substantially impair or destroy the object or purpose of its incorporation. If the Legislature in its wisdom thought that by the more frequent payment of the wages to the laborer better service would be secured for the corporation and the objects of its creation thus advanced, it would be reasonable and just to require such frequent payments. This would not be considered oppressive or wrong. We cannot say that this act is an unreasonable exercise of the power of the Legislature. We only pass upon the power of the legislative body of the government to act; of the wisdom, propriety and policy of such act, under our system of government, the Legislature must solely judge. Cooley on Const. Lim. (6 ed.) 479.

Nor does this act deny to the defendant the equal protection of the law. It applies to all corporations. Within the sphere of its operation all artificial persons are treated alike under like circumstances and conditions. Because the act only applies to corporations and not to natural persons, it does not contravene the equal protection clause of the Federal Constitution. Nearly all legislation is special, either in the objects sought to be attained or in its application to classes. And the general rule is that legislation does not infringe the constitutional right

of equal protection where all persons, whether natural or artificial, of such class are treated alike under like circumstances and conditions. In the case of *Missouri Pac. Ry. Co.* v. *Mackey,* 127 U. S. 205, Mr. Justice Field, speaking of this provision of the Federal Constitution, says: "Such legislation does not infringe upon the clause of the Fourteenth Amendment requiring equal protection of the laws because it is special in its character. * * * And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws if all persons brought under its influence are treated alike under the same conditions." *Orient Ins. Co.* v. *Daggs,* 172 U. S. 557; *St. Louis & San Francisco R. Co.* v. *Matthews,* 165 U. S. 20; *McLean* v. *Arkansas,* 211 U. S. 539.

It is also urged that the act is invalid because it restricts the rights of the defendant's employees to contract with it. But it is the established doctrine of the law that the liberty of contract is not universal, and is subject to restrictions passed by the legislative branch of the government in the exercise of its power to promote the safety, health and welfare of the people. The right to contract is often limited by the law, and certain contracts are prohibited by statute. It is fundamental that the Legislature may declare what persons are competent to enter into a contract. Thus persons under disability cannot enter into a binding contract. Contracts cannot be made in restraint of trade, and contracts against public policy are void. The statute of frauds enables contracting parties to avoid contracts not in writing; a party will not be allowed to contract to waive the benefit of homestead or exemptions; and a married man cannot convey his homestead without his wife joining in the execution of the conveyance. These instances and many others that might be mentioned show that the law-making power of the State may restrict the right to contract. But under this act the restriction of the employee's right to contract is not direct; that restriction only applies to the corporations; and those dealing with them cannot complain of the incompetency of the corporations to make contracts which are inhibited by the law, any more than they could in making contracts with persons laboring under legal disabilities, or in contracting relative to subject-

matters prohibited by law. *Lawrence* v. *Rutland R. Co.,* 80 Vt. 370; *State* v. *Brown & Sharp Mfg. Co.,* 18 R. I. 17; *State* v. *Loomis,* 115 Mo. 307.

A contract made in violation of this act is a contract against public policy. The Legislature has declared by the enactment of this law that it is for the public good. When the Legislature speaks in the exercise of its power to legislate, it thereby declares what is the public policy; and any contract made which is opposed to public policy is void.

The law under consideration, we think, is not contrary to any provision of the Federal or State Constitution; and it was within the valid exercise of legislative power for the General Assembly to enact it.

But, the statute being penal in its nature, it must be construed strictly; and no act that does not clearly violate its provisions can be declared an offense. The act provides that all corporations doing business in the State shall pay their employees their wages semi-monthly, and it declares a violation of that provision an offense. The corporation can only violate this provision by failing or refusing to pay the wages of such employees that have been earned, semi-monthly. But it cannot fail or refuse to do this unless a request or demand has been made for the payment of such wages, or unless by its acts and conduct it shows that it will fail or refuse to pay the wages, even if a request or demand for same should be made. If, upon request for payment, it should fail to pay, or if by acts of intimidation or coercion or oppression it should prevent the employee from making such request or demand for payment; or if it evinces, from the circumstances of the case, an intention not to pay although a request or demand for the payment of the wages should be made, then it would be guilty of a violation of this act. Any contract that might be voluntarily entered into between the corporation and its employee for the payment of the wages at a longer period than semi-monthly would be void, and could not deprive the employee of his right to request or demand the payment of his wages semi-monthly. But the mere agreement entered into not to pay the wages semi-monthly would not subject the corporation to a fine under this act. And if the laborer or servant willingly and without coercion or act of threatened oppres-

sion by the corporation did not desire or request that his wages be paid semi-monthly, then there would be no refusal or failure to pay the wages semi-monthly within the prohibition of this act. The act provides that the corporation should pay its employees semi-monthly their wages, and a reasonable construction of such provision would require that the corporation should have the opportunity to make such payment. If the employee did not desire and did refuse to accept the payment, then it would be requiring an unreasonable thing to be done to make the corporation pay in such event; and so, too, if it should be required to pay in every event. The evident intention of the Legislature was to make more frequent the payment of the wages earned, in order to meet the necessities of those who were dependent upon their wages for a livlihood, and thus to benefit those who would need and desire the payments to be made semi-monthly.

In the first indictment (case No. 1434) it is charged that defendant entered into an agreement with its employee that his wages should be paid monthly and not semi-monthly. It is true that such a contract would be void because it contravenes the provisions of this act, should the employee afterwards request the semi-monthly payment of his wages; but the act does not declare it to be an offense to enter into such agreement. The demurrer to this indictment should therefore have been sustained.

In the trial under the third indictment (case No. 1436) the undisputed evidence showed that the employee requested the defendant not to pay him semi-monthly, and that the defendant did not refuse to pay the wages, but on the contrary may have been willing to do so. The failure of the employee to accept or his desire not to receive the payment of the wages semi-monthly would not be sufficient evidence upon which to convict the defendant of a violation of this act, although it did not as a matter of fact pay the employee semi-monthly, when this resulted by reason of the request and desire of the employee. There was not sufficient evidence therefore to sustain the verdict in the trial upon the third indictment.

The evidence is sufficient to sustain the verdict of conviction in the trial of the case on the second indictment (case No. 1435). In that case it was proved that the defendant failed and

refused to pay its employees semi-monthly, as required by this act, although requested so to do.

It follows from this that the judgment in the trial on the first indictment (No. 1434) will be reversed and the cause remanded with directions to sustain the demurrer to the indictment.

The judgment in the trial of the third indictment (No. 1436) is reversed and the cause remanded for a new trial.

The judgment in the trial on the second indictment (No. 1435) is affirmed.

GRAY v. PARKS.

Opinion delivered February 21, 1910.

1. WILLS—SETTING ASIDE—REMEDY AT LAW.—The remedy at law for setting aside a will for undue influence in its procurement is adequate. (Page 42.)
2. SAME—JURISDICTION OF CHANCERY TO SET ASIDE.—Equity has jurisdiction to set aside the probate of a will for fraud only where the fraud was practiced on the probate court in obtaining the probate. (Page 42.)
3. SAME—FAILURE TO MENTION CHILD.—Under Kirby's Digest, § 8020, providing that when any person shall make his last will and testament, and omit to mention the name of a child if living or the legal representatives of such child born and living at the time of the execution of such will, every such person shall be deemed to have died intestate, etc., *held* that where a will mentioned the name of a child who was dead at the time the will was executed but omitted to mention the names of such child's living children, the testator will be held to have died intestate as to such grandchildren, and they will be entitled to share in the testator's estate. (Page 43.)

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

STATEMENT BY THE COURT.

This was a suit brought by the appellants. The complaint set up that Jesse L. Gray died in White County, leaving a supposed will in which he bequeathed to his son, Harrison T. Gray, who had departed this life prior thereto, five dollars, but making

no mention of plaintiffs, children of Harrison T. Gray and grandchildren of testator.

The appellants also alleged that the will was obtained through the fraud of one Rufus B. Gray, practiced on Jesse L. Gray. The complaint alleged in detail the acts of fraud of Rufus B. Gray (which it is unnecessary here to set forth); then continued as follows: "That as a consequence of such deception the said father caused his said supposed last will to be written in accordance with the false idea so caused to be in his mind by the said Rufus B. Gray as aforesaid, and in the same way caused the said supposed codicil thereto to be written and executed as aforesaid, giving the said Harrison T. Gray and the said James F. Gray the nominal sum of $5 each, and the said Walter Gray $150 as hereinabove set forth; wheras the facts were, and the said Rufus B. Gray at the time well knew the facts to be, that the said estate of the said Jesse F. Gray, now deceased, amounted to vastly more than the said aggregate sum of eleven times five hundred dollars over and above enough to pay the debts and funeral expenses, towit, the sum of $5,500, that is that it amounted to about the sum of $10,000 over and above enough to pay the said debts and expenses; that the shares of the said James F. Gray, Harrison T. Gray, deceased, and Walter Gray, deceased, instead of being $500 each, were more than $900 each; that therefore, instead of being entitled to receive $150, the said Walter Gray, deceased, was entitled to receive more than $550 out of his said father's estate; that, instead of the said Harrison T. Gray, deceased, being entitled to receive a nominal sum only, because of having theretofore received $500 in advancements, his heirs were entitled to have received more than $900; that, instead of the said James F. Gray being indebted to the estate of his said father and so being entitled to receive nothing therefrom, he was entitled to have received more than $900 therefrom." And further alleged:

"That the said Rufus B. Gray was appointed executor of the estate of the said Jesse F. Gray, deceased, by the said supposed last will and testament, and he as such executor presented the said supposed last will and testament to the probate court of White County for probate; that the said Rufus B. Gray as such executor, by falsely and fraudulently representing to the

said probate court that the said will was duly executed by and was the will and deed of the said Jesse F. Gray, deceased, deceived the said probate court, and induced the said court to admit said last will and testament to probate in the common form."

The complaint contained these further allegations: "That the plaintiffs, who are the children of said Harrison T. Gray, at the time of the making of said will and at all times thereafter until more than one year after the date of the probating of said will, were residents of the State of Oklahoma; that they were ignorant during all that time of the death of the decedent, and so had no opportunity to be represented in said probate court nor to appeal from its judgment." It was also alleged that Jesse F. Gray, deceased, at the time of his death owned five hundred and sixty acres of land in White County, which is described; "that each person, party to this suit, both plaintiff and defendant, save and except only David G. Gray, is entitled to a distributive share in the said real estate, as hereinbefore set forth; that the said land is not capable of being divided in kind among the several persons entitled to a share thereof as aforesaid without great damage and prejudice to the parties in interest." The prayer was that the will and codicil be set aside and held for naught, and that the plaintiffs (appellants) be admitted to share in the distribution of the estate according to their respective interests as son and grandchildren of Jesse L. Gray, and for "an order directing the sale of said lands, the proceeds of such sale to be divided among the various parties entitled thereto as aforesaid, pursuant to the orders of this court, and for all further and proper relief."

The appellees demurred, setting up: 1. That there is a misjoinder of parties plaintiff. 2. That the complaint does not state facts sufficient to constitute a cause of action. 3. That this court has no jurisdiction of this case.

The court sustained the said demurrer upon the ground that it had no jurisdiction to hear and determine said cause, and dismissed the bill, whereupon the appellants appealed to this court.

Rachels & Robinson, for appellants.

1. Where a man dies leaving a will which omits the names of some of his deceased children's children, a court of chancery will decree contribution from the distributees in the

will to those children whose names are omitted. 87 Ark. 206; Kirby's Dig. § § 8020, 8021; 23 Ark. 569; 31 Ark. 145; 70 Ark. 483; 86 Ark. 383. Harrison T. Gray being dead at the time of the making of the will, the same was void as to him. 90 Md. 575; 90 N. C. 643; 39 N. C. 320; 59 N. C. 163; 60 Tex. 426; 32 N. J. Eq. 78; 18 Am. & Eng. Enc. of L., 758; 92 Ark. 88.

2. The chancery court had jurisdiction. 23 Ark. 569, 580; 85 Ark. 101, 106; 45 Ark. 513; 16 Ark. 477; 33 Ark. 729; 42 Ark. 189; 84 Ark. 92. Appeal is not the only remedy against a fraudulent and false judgment of a probate court probating a will. Kirby's Dig. § 8030; 85 Ark. 369; 51 281; 64 Ark. 349. See also 45 Ark. 518; 30 Ark. 66. And where equity for some reason takes jurisdiction of a cause, it will retain jurisdiction until complete justice is decreed between the parties. 92 Ark. 15; 7 Cranch 69; 93 Ala. 542; 34 Wis. 658; 6 Grat. 427; 134 U. S. 349; 141 Ill. 308, 316; 51 Ala. 445.

S. Brundidge, Jr., and *H. Neelly*. for appellees.

The chancery court was without jurisdiction, and the demurrer was therefore properly sustained. Kirby's Dig. § § 8028, 8029; 40 Ark. 91; 75 Ark. 146; 64 Ark. 349; 66 Ark. 623; 31 Ark. 175; 34 Ark. 451; 51 Ark. 281; 57 Ark. 508; 29 Ark. 151.

WOOD, J., (after stating the facts.) 1. The chancery court had no jurisdiction in this proceeding to determine the question of the validity of the will. The remedy at law for setting aside the will on account of any fraud or undue influence in procuring it was complete. Kirby's Digest, § § 8028-29-30-38-39-41. *Janes* v. *Williams*, 31 Ark. 175; *Mitchell* v. *Rogers*, 40 Ark. 91; *Ouachita Baptist College* v. *Scott*, 64 Ark. 349. See also *St. Joseph's Convent* v. *Garner*, 66 Ark. 623; *Caraway* v. *Moore*, 75 Ark. 146; *Ludlow* v. *Flournoy*, 34 Ark. 451; *Petty* v. *Decker*, 51 Ark. 281; *Hogane* v. *Hogane*, 57 Ark. 508; *Tobin* v. *Jenkins*, 29 Ark. 151; *Taylor* v. *McClintock*, 87 Ark. 243. The remedy of appellants to set aside the will was by appeal to the circuit court. See cases *supra*. The fraud that would give a court of chancery jurisdiction to set aside the judgment of the probate court admitting the will to probate would be fraud that was practiced upon the court in obtaining the judgment. The allegation that "the said Rufus B. Gray, by falsely and fraudulently representing to the probate court that the said will was duly

executed by and was the will of Jesse L. Gray, deceived the probate court," etc., was not sufficient to show that a fraud was practiced on the court in obtaining the probate of the will, for other allegations of the complaint show that the will was executed by Jesse L. Gray.

The allegations of the complaint, taken together, show that fraud was practiced on the testator in procuring the will, but not on the court in admitting it to probate.

2. The complaint, however, does state a cause of action for contribution to the children of Harrison T. Gray. As to these, Jesse L. Gray must be held to have died intestate, under section 8020 of Kirby's Digest. That section provides: "When any person shall make his last will and testament and omit to mention the name of a child, if living, or the legal representatives of such child born and living at the time of the execution of such will, every such person, so far as regards such child, shall be deemed to have died intestate, and such child shall be entitled to such proportion, share and dividend of the estate, real and personal of the testator as if he had died intestate," etc.

The will names Harrison T. Gray, but the facts stated show that Harrison T. Gray was dead at the time the will was executed, and the testator omitted to mention the names of the children of Harrison T. Gray who were living at the time of the execution of the will. Therefore, under the above statute, Jesse L. Gray died intestate as to them, and they are entitled to contribution of their proportion of the estate, from the legatees and distributees whose names are mentioned in the will. *King* v. *Byrne,* 92 Ark. 88. See also *Brown* v. *Nelms,* 86 Ark. 383; *Rowe* v. *Allison,* 87 Ark. 206-212; *Bloom* v. *Strauss,* 70 Ark. 483; *Trotter* v. *Trotter,* 31 Ark. 145; *Branton* v. *Branton,* 23 Ark. 569.

The court erred therefore in sustaining the demurrer. The decree is reversed, and the cause is remanded with directions to overrule the demurrer, and for further proceedings not inconsistent with this opinion.

WESTERN UNION TELEGRAPH COMPANY v. BANGS.

Opinion delivered February 21, 1910.

1. TELEGRAPHS AND TELEPHONES—DELAY IN DELIVERY OF MESSAGE—EVIDENCE.—An allegation, in a complaint against a telegraph company for delay in delivery of a message requesting the sendee to prepare for the burial of the sender's wife, to the effect that the message advised the sendee that the remains would arrive on the morning train, with a request that the sendee prepare for the funeral, and that the defendant's failure to deliver the message until after the train arrived caused plaintiff mental anguish, was sufficient to admit evidence that there was no one to meet the sender at the depot, and that if the message had been promptly delivered preparation would have been made for the funeral. (Page 46.)
2. SAME—DELAY IN DELIVERY OF MESSAGE—MENTAL ANGUISH.—Where delay in delivery of a message requesting sendee to prepare for funeral of sender's wife merely occasioned a delay of a few hours in her burial, a recovery of damages for mental anguish was not authorized. (Page 47.)

Appeal from Sebastian Circuit Court, Fort Smith Disrtict; *Daniel Hon,* Judge; reversed.

STATEMENT BY THE COURT.

The appellee alleged that his wife, Mrs. Zelah Bangs, died January 23, 1909, at about the hour of 3 o'clock in the afternoon; that "about two hours thereafter, towit, about the hour of 5 o'clock, plaintiff caused to be posted with the telegraph operator at Midland, a telegram to John H. Redmon, a friend of both said plaintiff and his deceased wife, at said Belleville, in substance advising said Redmon of said demise, and that the remains would arrive at Belleville on the morning train, and to make appropriate preparations for the arrival of the remains and funeral company and for the burial. Defendant was negligent in transmitting and delivering said message, and the same was not delivered until after the hour of 11 o'clock on the following day, nor until after the arrival at said Belleville of said funeral company with the remains of plaintiff's said wife, and thereby inflicted on plaintiff great mental pain and anguish and suffering, to plaintiff's damage in the sum of $1,000."

Appellant answered, denying the allegations of plaintiff's complaint.

J. R. Bangs testified that his wife died January 23, about 3 P. M., and that she was buried at Belleville the next day at noon. That about 5 P. M. on January 23, 1909, he delivered to the defendant's agent at Midland, Ark., the following message and paid the charges for the same:

"Midland, Ark., 1-23.

"To Jno. H. Redmon,

"Belleville, Ark.

"Prepare burial of my wife. Will be there on morning train.

"J. R. Bangs."

That Mr. Redmon did not meet him at the depot, and that no one was there to meet him. That he got to Belleville about 11 A. M., and that the funeral took place in the afternoon; could not say whether it was early in the afternoon or late.

It was shown that the charges paid by appellee amounted to 27 cents. John H. Redmon, the sendee of the message, testified that he lived at Belleville in a short distance from the station and next door to Mrs. Crown, the mother of Mrs. Bangs; was a close friend of deceased and her husband. That he was in Belleville on January 23 and 24. That at the time the train arrived bringing the remains and the funeral party he had not received the message in question. That as soon as the train came in he went to the train. That as quickly as the news spread a very large crowd of relatives, friends and acquaintances gathered at the home of the mother of the deceased. That the funeral took place that afternoon. Could not state the exact time, but it was very near night when they got through. That, had the message been delivered promptly, he could and would have made the preparations for the burial.

The jury returned a verdict in favor of appellee for the sum of $500. Judgment was entered against appellant for that sum.

The motion for new trial was as follows:

That the verdict was not sustained by sufficient evidence.

That the amount of damages allowed by the jury is so excessive as to appear to have been given under the influence of passion or prejudice.

That the court erred in permitting the plaintiff to testify, over the objection of the defendant, that there was no one to meet

him at the depot at Belleville when he arrived with the remains of his wife.

That the court erred in permitting the witness John H. Redmon to testify, over the objections of defendant, that he could have prepared for the funeral had he received the telegram before the arrival of the train.

That the court erred in permitting the witness John H. Redmon to testify that he would have prepared for the funeral if he had received the telegram before the arrival of the train.

Which motion the court overruled and the defendant excepted. This appeal has been duly prosecuted.

George H. Fearons, Rose, Hemingway, Cantrell & Loughborough and *Mechem & Mechem,* for appellant.

1. There was no allegation in the complaint that if the message had been delivered promptly appellee would have been met at the depot, and that Redmon could and would have made preparation for the funeral. Evidence of such facts was therefore inadmissible. 92 S. W. 1036.

2. About the only thing of which appellee can complain is that no one met him at the depot when he arrived; yet Redmon was there immediately after he arrived, a large number of friends, relatives and acquaintances attended the funeral, and there is nothing to show that, had the message been delivered on time, the funeral would have occurred earlier than it did. The verdict is so excessive as to manifest passion and prejudice.

Jo Johnson, for appellee.

The allegations of the complaint are sufficient to charge that, if the message had been promptly delivered, Redmon would have met appellee at the depot, and that preparation for the funeral would have been made. If it was insufficient, appellant should have filed a motion to make it more specific.

2. Having failed to abstract all the testimony, appellant cannot be heard to say that the verdict was excessive. 89 Ark. 349; 88 Ark. 449; 87 Ark. 212.

WOOD, J., (after stating the facts.) 1. Appellant contends that the judgment should be reversed because the court permitted appellee to testify, over appellant's objection, "that there was no one to meet him at the depot," and because the court permitted witness Redmon, the sendee, to testify, over appellant's

objection, "that, had he received the message, he could and would have made preparation for the burial."

The appellee alleged that the telegram advised Redmon "that the remains would arrive at Belleville on the morning train, and to make appropriate preparations for the arrival of the remains and funeral company and for the burial," and that the failure of the appellant to deliver the telegram "until after the arrival of said funeral company with the remains" inflicted on plaintiff great mental pain and anguish.

The allegations of the complaint were sufficient to admit proof that there was no one to meet appellee at the depot, and also that, if the message had been received before the arrival of the remains, due preparation would have been made for the burial before that time. The complaint in substance alleges that the purpose of the telegram was to have some one to meet the remains and funeral party at the train and to have preparations made in advance for the burial. Alleging that the failure to deliver the telegram caused appellee mental anguish in connection with the above allegation was tantamount to an allegation that, if the telegram had been delivered before the arrival of the remains, there would have been some one to meet appellee and the remains, and that Redmon could and would have made preparation for the burial. In no other way, according to the allegations, could appellee have suffered mental anguish.

2. The appellant next contends that the verdict was excessive. This necessarily involves the question as to whether, under the evidence, appellee suffered any mental anguish; for, if he did not, the verdict was excessive to the full amount thereof.

We are of the opinion that the evidence does not warrant a verdict for damages for mental anguish in any sum whatever. What mental anguish could there be in having the funeral or burial delayed for a few hours or in the failure to have Redmon or some one else to meet appellee at the depot? It was the duty of the employees of the railway company to lift the remains from the train at the depot and to deliver same to appellee. It must be assumed, in the absence of evidence to the contrary, that they performed their duty, and not that they were derelict in that respect, as appellee would have us presume. We cannot assume that the employees and servants of the railway company

were unmindful of the respect due the living as well as the dead under the circumstances, and that, by reason of the failure of some one to meet appellee at the depot, they handled the remains of appellee's consort in such manner as to cause him mental anguish. No such irreverence and disrespect for the dead in their charge is proved against the employees of the railway company. We must therefore assume that they handled the coffin containing the corpse of Mrs. Bangs with the same becoming decency and tenderness that they would have done had appellee been met by all his relatives and friends. Then in what other way could appellee have been subjected to mental anguish on account of the absence at the depot of some one to meet him? The evidence shows that his expected friends and relatives soon gathered around him in large numbers. He thus, in very short time, had the benefit of whatever consolation could come to him from that source, and we are unable to see that any real mental anguish could grow out of the fact that the burial of the remains was postponed for a few hours. "The grave has its horrors," and it cannot be a cause for mental anguish that one is compelled to withhold the remains of his loved one from the yawning tomb, especially when there is still ample time for the last sad rites to be duly performed in the open day and without any special circumstances of annoyance or inconvenience. Such was the case here. So we conclude that the damages of appellee for mental anguish were entirely imaginary. At least, they were too indefinite and remote to be the basis of a cause of action against appellant under section 7947 of Kirby's Digest. *Western Union Tel. Co.* v. *Archie*, 92 Ark. 59. The judgment is therefore reversed, and judgment will be entered here in favor of appellee for 27 cents and the costs of this suit accrued in the lower court.

HALL v. CALLAWAY.

Opinion delivered February 21, 1910.

MUNICIPAL CORPORATIONS—AUTHORITY OF COUNCIL TO REMOVE SEWER COMMISSIONERS.—A city council has no authority to remove the commissioners of improvement districts for any cause.

Appeal from Clark Chancery Court; *James D. Shaver,* Chancellor; reversed.

J. E. Callaway sued E. M. Hall, R. A. Stuart and R. H. Greene, commissioners for Sewer Improvement District No. 1 in Arkadelphia, to restrain them from assuming to act as such commissioners.

The evidence showed that the commissioners were appointed in December, 1905. On March 2, 1908, a resolution was adopted by the city council of Arkadelphia removing the above commissioners for neglect of duty, and certain others were thereupon appointed commissioners in their stead. A subsequently elected city council thereafter refused to recognize the latter commissioners as members of the board. Thereupon plaintiff brought this action.

The chancellor held that the act of the city council in removing defendants from office was valid, and enjoined them from assuming to act as a board. Defendants have appealed.

John H. Crawford, for appellants.

The city council did not have power to remove the commissioners arbitrarily and without a hearing. 71 Ark. 4, 7; Acts 1909, p. 224; Kirby's Dig. § 5739.

Callaway & Huie, for appellee.

The city council had the right to remove the commissioners. Kirby's Dig. § 5670; 71 Ark. 4.

WOOD, J. The only question presented by this appeal is whether or not the city council of the city of Arkadelphia had power to remove the commissioners for Sewer Improvement District No. 1 without giving them an opportunity to be heard upon the facts as stated in their report to the council. The statutes of this State do not confer any power upon the city council to remove commissioners of improvement districts. Section 5670 of Kirby's Digest provides: "If all the places on the (improve-

ment) boards shall become vacant, or those appointed shall, after qualification, refuse or neglect to act, new members shall be appointed by the council, as in the first instance."

The act of March 23, 1909, gives to the city council the right to fill all vacancies on such boards. But there is nothing in these statutes conferring on the city council the power to remove commissioners at all for any cause, and the council in such matters can only exercise such powers as are conferred upon it by the Legislature. *Board of Directors, etc.* v. *Moreland, post* p. 380.

In *Morrilton Waterworks Improvement District* v. *Earl,* 71 Ark. 4, Judge BATTLE, speaking for this court, said: "The statutes do not expressly give the city of Morrilton power to remove them, but, assuming without deciding, that it has the power, we think it is evident that it cannot do so except for cause, and that the power cannot be exercised without notice and hearing, and that the existence of the cause must first be determined, after notice has been given to them of the charges made against them, and they have been given an opportunity to be heard in their defense." The same might be said with reference to the facts here, if the council had the right to remove at all; but, as we have seen, it has not that power. We held also in the case of *Morrilton Waterworks Imp. Dist.* v. *Earl, supra,* that a city council had no express or implied power to abolish an improvement district. There is nothing in this record to warrant a finding that the improvement district has ceased to exist. On the contrary, the pleadings and the evidence show that the improvement district was duly organized, and that it is still in existence.

The finding of the chancellor therefore "that the acts and doings of the said city council in removing said defendants as commissioners of Sewer District No. 1 were valid and effective, and that said defendants thereafter ceased to be the authorized board of commissioners of Sewer Improvement District No. 1, in the city of Arkadelphia," was an erroneous conclusion both of law and fact.

The decree is therefore reversed, and the complaint is dismissed.

CLEVELAND v. ALDRIDGE.

Opinion delivered February 21, 1910.

1. ADVERSE POSSESSION—POSSESSION OF VENDEE OF LAND.—Payment of taxes on land by a vendee in possession, the making of improvements thereon, and his claiming of ownership thereof are insufficient to give notice that he holds adversely to the vendor. (Page 53.)
2. SALES OF LAND—REMEDY OF VENDOR.—Where possession of land is given under an executory contract of sale, and the purchase money is unpaid, the vendor may recover possession in ejectment for the purpose of applying the rents and profits to the payment of the purchase money. (Page 53.)
3. PARTIES—NONJOINDER—WAIVER.—Objection to the nonjoinder of parties is waived by failure to raise it in the court below. (Page 54.)
4. SALES OF LAND—RECOVERY OF POSSESSION BY VENDOR.—Where a vendee of land went into possession, but failed to pay the purchase money, the vendor is entitled to recover possession for the purpose of applying the rents and profits to discharge the lien for the purchase money. (Page 54.)

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

STATEMENT BY THE COURT.

This is an action in ejectment brought by appellees in the circuit court against appellants to recover certain lands situated in Columbia County, Arkansas.

Appellees alleged in their complaint that they and appellants, Nora and Otho Cleveland, are owners as tenants in common of the lands described in the complaint, and that appellants are in the unlawful possession of the same, claiming them adversely to appellees.

Appellants answered, denying that appellees had any interest in said lands, and claimed title to the same by adverse possession of more than seven years.

The facts are as follows: Appellees deraign title from the United States through mesne conveyance to W. R. Aldridge, who was their father and the grandfather of appellants, Otho and Nora Cleveland. W. R. Aldridge died intestate sometime between September 16, 1904 and July 23, 1907, the date of the commencement of this action. The date of his death is not more definitely shown by the record.

The appellants adduced evidence tending to show that W. O.

Cleveland, the husband of appellant, Lenna Cleveland, and the father of appellants, Otho and Nora Cleveland, went into the possession of said land in 1887, and lived there until the date of his death, about four years before the commencement of this suit; and that since his death his widow and children have remained in possession of the land, claiming it as their own. During the time that W. O. Cleveland was in the possession of said land, he cleared and put in cultivation 25 or more acres of it, and made other substantial improvements on it. During that time he also paid the taxes on the land and claimed it as his own.

The undisputed evidence shows that W. O. Cleveland admitted that he went into possession of said land under an agreement with W. R. Aldridge to purchase it, and that he had never paid any part of the purchase money.

At the conclusion of the testimony, the court instructed the jury to find a verdict for appellees, which was accordingly done. Thereupon the court rendered judgment against appellants in favor of appellee for the recovery of an eight-ninths interest in said lands.

From this judgment the appellants have duly prosecuted an appeal to this court.

Stevens & Stevens, for appellants.

The court erred in giving a peremptory instruction for the appellees. Appellants allege and prove adverse possession for more than the statutory period. If Aldridge put appellant's ancestor in possession under any kind of contract, the terms of this contract should have been alleged, and a forfeiture of same alleged and proved. 58 Ga. 129; 13 Ark. 534. Any statements Cleveland might have made in 1902, he having been in adverse possession more than seven years prior to that time, would not operate to divest him of title. 66 Ark. 29; 17 S. W. 640.

C. W. McKay and *J. G. Lyle,* for appellees.

1. Before appellants would be entitled to recover, they would have to show the extent of W. O. Cleveland's actual possession. The evidence does not show how much nor what part of the lands was in his actual possession. 65 Ark. 422.

2. The evidence does not sustain the claim of title by adverse possession. While admitting that Cleveland obtained pos-

session under some kind of contract with Aldridge, appellants do not claim that he purchased and paid for the land, nor that he obtained it by gift from Aldridge. There is shown no open disavowal and disclaimer of holding under Aldridge. 43 Ark. 521; *Id.* 469; 56 Ark. 492; 83 Ark. 375; 1 Cyc. 1144-5.

HART, J., (after stating the facts). It is earnestly insisted by appellants that the testimony shows that they have become vested with the title to said lands by adverse possession; but we can not agree with their contention. It must be remembered that W. O. Cleveland went into possession of said lands under an agreement of purchase from his father-in-law, W. R. Aldridge, and that the purchase price was never paid. The payment of taxes by W. O. Cleveland, the making of improvements by him, and his claiming the land to be his own were all acts not inconsistent with the rights of his vendor, W. R. Aldridge. In such cases the vendee's outward acts of ownership must have been of such an unequivocal character as to impart a notice to his vendor that an adverse possession is intended to be asserted against him.

In the case of *Tillar* v. *Clayton,* 76 Ark. 405, the court said: "The statute of limitations does not run against a vendor in favor of a vendee holding under a contract for sale and purchase; nor does it run where the original possession of the holder seeking to plead the statute was in privity with the rightful owner, until there be an open and explicit disavowal and disclaimer of holding under that title and assertion of title brought home to the other party."

The object and purpose of this suit, as shown by the pleadings, was to try the title to the land in controversy, but the undisputed evidence shows that W. O. Cleveland went into possession of the land in controversy under a contract for the purchase thereof, and that the purchase price remains due and unpaid. Hence we will treat the answer as amended to correspond with the proof. *Roach* v. *Richardson,* 84 Ark. 37, and cases cited.

Where possession of land is given under an executory contract for the purchase thereof and the purchase money is due and unpaid, the vendor may, by ejectment, recover possession of the land for the purpose of applying the rents and profits to the payment of his debt. *Smith* v. *Robinson,* 13 Ark. 538;

Fears v. *Merrill,* 9 Ark. 559; *Newsome* v. *Williams,* 27 Ark. 632.

It will not be necessary to consider whether or not the administrator of the estate of W. R. Aldridge, deceased, should have been joined as a party plaintiff to the suit, for the reason that no objection is made that the heirs were not the proper parties to bring this action. See *Sims* v. *Richardson,* 32 Ark. 297.

The pleadings show that the action was in ejectment to try the title to the land, and on the issue thus joined the court rendered judgment for appellees.

Treating the action as, under the undisputed facts, we have determined it to be, one in ejectment to recover the possession of the land for the purpose of receiving the rents and profits to discharge the incumbrance against it, and considering the pleadings amended to conform to the proof, the right of appellants to bring a suit to redeem is not barred.

Therefore, the judgment will be affirmed.

GREGG *v.* HATCHER.

Opinion delivered February 21, 1910.

1. MUNICIPAL CORPORATIONS—LIABILITY.—Municipal corporations are not liable for the negligent or illegal acts of their officers in the discharge of their public duties, as, for example, for wrongfully impounding animals running at large. (Page 56.)
2. REPLEVIN—IMPOUNDED STOCK.—The owner of an animal wrongfully impounded may recover possession thereof from the person in whose possession it is found. (Page 57.)
3. CERTIORARI—VOID JUDGMENT.—A judgment will be quashed on certiorari when it appears that the court had no authority to render it upon any evidence that might have been introduced. (Page 58.)

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

Charles D. Frierson, for appellants.

1. The judgment of the justice of the peace was void for want of jurisdiction. 34 Ark. 105; 13 Ann. Cas. 1016 and note; 12 L. R. A. (N. S.) 537 and note; 17 L. R. A. (N. S.) 741 and note; Kirby's Dig. § § 5450-1; 1 Abbott, Mun. Corp.

§ 115 and note p. 270; 3 *Id.* § 873; 72 Ark. 8; 89 Ark. 564; 75 Ark. 340; 58 Pac. 604; 14 Pac. 65; 140 U. S. 254; 93 U. S. 274; 41 Pac. 580; 37 Pac. 1096; 48 Pac. 569; 4 Words and Phrases, "Jurisdiction," 3878 *et seq.;* Kirby's Dig. § 4552; 3 Abbott, Mun. Corp. § § 1167, 2575; 75 U. S. 307; 74 Pa. 249.

2. Certiorari was the proper remedy. 6 Cyc. 759; 44 Ark. 509; 39 Ark. 347; 40 Ark. 219; 68 Ark. 205; 87 Ark. 519; 30 Ark. 159; 52 Ark. 87; 72 Ark. 394; 52 Ark. 213; 66 Ark. 139; 12 Ark. 95; 29 Ark. 173. It is the proper remedy also in cases where, as in this case, the right of appeal is lost without fault of the party against whom the judgment was rendered. 6 Cyc. 762-3; 69 Ark. 587, and cases cited above.

Hawthorne & Hawthorne, for appellees.

1. The judgment of the justice of the peace was regular. After service had upon the proper party, the mayor, the city was represented by its regular attorney, and the case was heard and decided upon the evidence introduced. The justice of the peace did not exceed his jurisdiction. 28 Cyc. 1763; 50 Ill. 154; 13 S. W. 264; 28 Cyc. 1756-7-8; 126 Fed. 288; 41 Ill. 502; 75 Ga. 761; 65 Mo. 620; 50 Mo. App. 98; 35 Ark. 352; 51 Ark. 447; 75 Ark. 340; 76 Ark. 443.

2. Appellants having lost their appeal by their own neglect, certiorari does not lie. A judgment of a justice of the peace will not be quashed on certiorari if it could have been sustained by competent evidence. 23 Ark. 110; 25 Ark. 518; 39 Ark. 348; 43 Ark. 341; *Id.* 33; 47 Ark. 511; 51 Ark. 281; 50 Ark. 34; 80 Ark. 200.

HART, J. Appellants filed a petition in the circuit court for a writ of certiorari to quash a judgment of a justice of the peace. The circuit court refused to quash the judgment, and they have appealed to this court.

The facts, as shown by the petition and the return of the transcript of the justice, are as follows: J. F. Young filed a suit in replevin before P. A. Hatcher, a justice of the peace, against the city of Jonesboro and C. B. Gregg, as mayor of said city, to recover the possession of a mare and a mule, which had been impounded by Pink Hilbourn under the ordinances of said city. Pursuant to the order of delivery issued in the case, the said mare and mule were delivered to the plaintiff,

Young. On the trial of the cause, the justice only rendered judgment in favor of the plaintiff, Young, against the city of Jonesboro, and C. B. Gregg, as mayor of said city, for damages in the sum of fifty dollars.

The judgment of the justice of the peace was without jurisdiction and void: and should have been quashed by the circuit court.

Our statutes expressly delegate to municipal corporations the power to prevent the running at large within their corporate limits of certain designated animals and prescribe impounding as a method they may adopt to enforce such ordinances. Kirby's Digest, § § 5450, 5451.

In the case of *Fort Smith* v. *Dodson,* 46 Ark. 299, the court said: "Hogs and other animals running at large, contrary to lawful prohibition, are regarded in the light of a nuisance, and the usual and established method of suppressing the nuisance is by impounding the animals and causing a sale for the costs of the proceeding."

The exercise of the power thus conferred upon the municipalities gives to their ordinances the same force and effect as if they had been passed directly by the State Legislature. In such cases they are in the discharge of duties imposed by law for the promotion and preservation of the public welfare, and discharge governmental functions. Their officers in the enforcement of their ordinances act in their public capacity.

"The rule is general that a municipal corporation is not liable for alleged tortious injuries to the persons or property of individuals, when engaged in the performance of public or governmental functions or duties. So far as municipal corporations exercise powers conferred on them for purposes essentially public, they stand as does sovereignty whose agents they are, and are not liable to be sued for any act or omission occurring while in the exercise of such powers, unless by some statute the right of action is given; and where the particular enterprise is purely a matter of public service for the general and common good, it makes no difference whether it is mandatory, or whether only permitted and voluntarily undertaken. A municipal corporation, therefore, is not liable for negligence in the course of work undertaken purely for the public benefit and advantage,

and not for the benefit of the corporation. Nor is liability incurred by a city in the exercise of its police power in measures adopted for the general health, comfort and convenience of the public." 20 Am. & Eng. Enc. of Law. (2 ed.) pp. 1193 and 1194; *Gillmor* v. *Salt Lake City,* 13 Am. & Eng. Ann. Cas. p. 1016 and note; 28 Cyc. p. 1257; *Valentine* v. *Englewood,* 19 L. R. A. (N. S.) p. 262 and cases cited.

In the cases of *Fort Smith* v. *Dodson,* 51 Ark. 447, and *White* v. *Clarksville,* 75 Ark. 340, the construction of ordinances having for their object the preventing of certain animals running at large within the corporate limits of the municipalities was involved, and the city was made a party defendant; but in those cases the liability of the city was not raised or considered, and the cases were determined on other issues. The effect of these and other decisions of our court on the question is that the owner of property improperly impounded may recover the possession thereof from the person in whose possession it is found.

The rule that municipal corporations are not liable for the negligent or illegal acts of its officers in the discharge of their public duties has, for many years, been established in this State. *Trammell* v. *Russellville,* 34 Ark. 105; *Arkadelphia* v. *Windham,* 49 Ark. 139.

In the case of *Culver* v. *City of Streator* (Ill.), 6 L. R. A. p. 270, the court held (quoting syllabus): "A municipal corporation is not liable for injuries resulting from negligent acts of one employed by it to enforce an ordinance forbidding the running at large of unmuzzled dogs, committed while in the discharge of the duties of his employment." To the same effect, see *McKay* v. *Buffalo,* 9 Hun (N. Y.) 401; *Whitfield* v. *Paris,* 84 Tex. 431, 15 L. R. A. 783.

"The nonliability of municipalities in such cases is based upon the ground that they are subdivisions of the State, created in part for convenience in enabling the State to enforce its laws in each locality with promptness, and simultaneously, when occasion requires it, in the different subdivisions within its boundaries; and that, while enforcing those laws which pertain to the general welfare of the State and to the people generally in all its subdivisions, the State acts through these subdivisions, and

uses them and their officers as its agent for the purposes for which a State government is instituted and granted sovereign power for State purposes; and, further, that the State has not made them the insurers of public or private interests or liable for any careless or wilful acts of its officers." *McIlhenney* v. *Wilmington,* 127 N. C. 146, 50 L. R. A. 470. A judgment may be quashed on certiorari where it appears that the court had no authority to render it upon any evidence that might have been introduced. *State use Izard County* v. *Hinkle,* 37 Ark. 532; *Dicus* v. *Bright,* 23 Ark. 110.

It follows, then, that in rendering judgment for $50 damages in favor of J. F. Young against the city of Jonesboro and C. B. Gregg, its mayor, the justice exceeded his jurisdiction and his judgment was void. The judgment is, therefore, reversed, and the cause remanded with directions to quash the judgment of the justice of the peace against the city of Jonesboro and C. B. Gregg, its mayor.

TATUM v. CROWNOVER.

Opinion delivered February 21, 1910.

APPEAL AND ERROR—PRESUMPTION.—Where the bill of exceptions in a chancery cause was not filed within the time allowed by the court, the presumption will be indulged that the decree was correct.

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

L. C. Hall, for appellants.

U. L. Meade, for appellees.

HART, J. This was a chancery suit instituted by appellees against appellants. The record shows that the case was heard on oral evidence. A decree was entered in favor of appellee on the 8th day of April, 1909, and the appellants were given 60 days within which to prepare and file a bill of exceptions. The bill of exceptions was signed by the chancellor and filed with the clerk on the 26th day of June, 1909, which was not within the time granted. Therefore, the evidence is not brought in the record, and the presumption is that the decree was correct.

The decree will, therefore, be affirmed.

HAWKINS *v.* MCADOO.

Opinion delivered February 28, 1910.

CLOUD ON TITLE—EVIDENCE.—In a suit to quiet title proof that plaintiff's father died seized and possessed of the land in controversy is sufficient to make out a *prima facie* case so as to entitle plaintiff to relief unless a better title be shown in opposition.

Appeal from Saline Chancery Court; *Alphonso Curl,* Chancellor; affirmed.

W. L. Cooper, for appellants.

In a suit to quiet title the plaintiff must prevail, if at all, on the strength of his own title, and not upon the weakness of his adversary's title. In this case the appellee has proved no sufficient title in himself. 88 Ark. 31; 89 Ark. 298; 90 Ark. 420; 92 Ark. 30; 82 Ark. 295; 77 Ark. 338.

W. R. Donham, for appellee.

1. Appellants admit that the tax sale under which they claim is void. They have no rights in the land except to be reimbursed for taxes paid. Having no color of title, their payment of taxes for seven years does not constitute the possession necessary to acquire title to wild and unimproved land. Kirby's Dig. § 5057. A collector's certificate of purchase is not color of title. 84 Ark. 316. Possession of unimproved and unoccupied land is presumed to follow the title. 74 Ark. 383.

2. Appellee is the owner of the equitable to the land, and as such has the right to have the void tax sale canceled as a cloud on his title. 77 Ark. 338; 42 Ark. 215.

MCCULLOCH, C. J. Appellee, E. J. McAdoo, instituted this action against appellants in the chancery court of Saline County to quiet his title to a tract of land and to cancel a void tax sale under which they, appellants, are asserting title. Appellee asserts title by inheritance from his father, who is alleged to have been the owner of the land at the time of his death in the year 1889, and by purchase from the other heirs of his father.

Appellants assert title only under said tax sale, which is conceded to be void. They invoke the principle that appellee, being the moving party as plaintiff in the action, must rely on the strength of his own title, and not on the weakness of his adversary's title, and that he must prove title in himself before

he can be permitted to call in question the validity of the tax sale. We are of the opinion, however, that the evidence in the record is sufficient to justify a finding that appellee's father died seized and possessed of the land in controversy, claiming to be the owner under color of title, and this is sufficient to make out a *prima facie* case, so as to entitle appellee to question the tax title and to quiet his title unless a better title be shown in opposition. *Jacks* v. *Dyer,* 31 Ark. 334; *Wheeler* v. *Ladd,* 40 Ark. 108; *Weaver* v. *Rush,* 62 Ark. 51.

It is unnecessary to decide whether or not appellee has in other respects established his title to the land, as appellants assert no other outstanding title, either in themselves or any one else, in opposition to appellee's title.

Decree affirmed.

STEWART v. THOMASSON.

Opinion delivered February 28, 1910.

1. ADMINISTRATION—STATUTE OF NONCLAIMS.—Under Kirby's Digest, § 110, providing that "all claims not exhibited to the executor or administrator, as required by this act, before the end of two years from the granting of the letters shall be forever barred," all claims or demands which run to certain maturity, although not yet payable, are barred at the end of two years from the granting of letters upon the estate of a decedent. (Page 62.)
2. SAME—BARRED CLAIM—LIABILITY OF HEIRS.—A claim barred by the statute of nonclaims cannot be successfully prosecuted in equity either against the representative of the estate or against the heir or distributee to whom assets may have descended or been distributed. (Page 63.)
3. SAME—BINDING EFFECT OF STATUTE OF NONCLAIMS.—The statute of nonclaims is binding upon infants as well as adults. (Page 64.)

Appeal from Clark Chancery Court; *James D. Shaver,* Chancellor; reversed.

John H. Crawford, for appellants.

1. Appellees' claim is barred by the statute of nonclaims, the same not having been presented to T. J. Stewart's administrator for allowance and classification within two years as re-

quired by the statute. Kirby's Dig. § § 113, 114; 39 Ark. 577, syllabus; 23 Ark. 604; 45 Ark. 299, 302-3; 49 Ark. 76, 82; 54 Ark. 33; 61 Ark. 528, 548; 66 Ark. 327, 330; 187 U. S. 211; 14 Ark. 246; 18 Ark. 334, syllabus; 113 U. S. 449, syllabus; 33 Ark. 658; 45 Ark. 495; 15 Ark. 412.

2. This was not a contingent or inchoate claim. The trust estate was created in distinct terms by the will and codicil, and was capable of being asserted in a court of justice. Because one of the beneficiaries was under age did not make it a contingent claim, but only postponed the right of distribution. 14 Ark. 246; 18 Ark. 334; 31 Ark. 229; 32 Ark. 714, 716; 40 Ark. 433; 53 Ark. 291; 74 Ark. 521, 527; 78 Ark. 531, 534; 85 Ark. 144, 154.

Sain & Sain, for appellees.

During Mary A. Thomasson's life, the claim could not have been presented to T. J. Stewart's administrator while any of her children were minors. It could not have been presented to such administrator because the amount was unknown, and it would have required a court having jurisdiction to ascertain the amount they were entitled to recover. It was an immature claim until the youngest child reached his majority. It was not such a claim as the statute requires to be presented to the administrator within two years after his appointment. 9 Ark. 412; 12 Ark. 593; 8 Am. & Eng. Enc. of L. (2 ed.) 1079; *Id.* 1066; 14 Ark. 246; 63 Ark. 218. The youngest child reached his majority more than two years after T. J. Stewart's administrator was appointed. There is no evidence that the administration was not closed at the time the intervention was filed. The administrator is required to make final settlement within three years from the date of his letters. Kirby's Dig. § 244. And officers are presumed to have performed their sworn duties. 24 Ark. 431; 76 Ark. 450; 82 Ark. 31; 84 Ark. 1.

McCULLOCH, C. J. David Stewart died in the year 1875, leaving an estate in Clark County, Arkansas, consisting of lands and personalty, which he devised and bequeathed in equal shares to his wife and seven children, after making specific bequest of a sum of money and certain articles to his wife. His son, T. J. Stewart, and son-in-law, E. G. Wilder were named as executors of the will. He added a codicil to his will directing

that the share of his daughter, Mary A. Thomasson, should be safely invested by the executors of the will, and the income therefrom, or so much thereof as she should demand, be annually paid to her during her lifetime, and that after her death said share, with the unexpended accumulation, should be equally divided between her children and paid to them as they come of age—three-fifths of the estimated amount to be paid to them severally as they come of age, and the remainder when the youngest came of age.

T. J. Stewart and E. G. Wilder qualified as executors, and took charge of the estate. They filed a settlement account in the probate court on April 10, 1880, showing that they had distributed to each of the legatees the sum of $240.71, and invested the share of Mary A. Thomasson in accordance with the provisions of the will. The last settlement account filed October 18, 1899, which was confirmed by the court, shows that they had on hand belonging to the estate of David Stewart the sum of $2,285.58. No other settlement was ever filed, the administration of the estate was not closed, and no distribution of said sum shown by the last settlement to be in the hands of the executors was ever made. Nothing was ever paid to Mary A. Thomasson.

T. J. Stewart died in 1904, and John H. Crawford was appointed administrator of his estate. After the expiration of the time allowed by statute for proving claims against the estate of T. J. Stewart, Mrs. Thomasson instituted proceedings in equity against the two children and heirs of said T. J. Stewart to subject lands descended to them from said T. J. Stewart to the payment of the distributive share of Mrs. Thomasson in the estate of David Stewart which had come into the hands of said executors, and for which they had never accounted. The two-year statute of nonclaims was pleaded in bar of the right to enforce said demand. Mrs. Thomasson died while the cause was pending below, and it was revived in the name of a special administrator. The court rendered a decree subjecting the lands to the payment of said claim in the sum of $603.75, and an appeal was prosecuted to this court.

In the case of *Walker* v. *Byers,* 14 Ark. 246, Mr. Justice SCOTT delivered an exhaustive opinion construing the statute

of nonclaims and defining its relation to other statutes of limitation. That was a case where one member of a dissolved co-partnership sued a co-partner and the administrator of another deceased co-partner for an accounting of funds and property which came to the hands of the latter two for the purpose of winding up the partnership. The court decided that such a claim must be authenticated and exhibited within the period of the statute of nonclaims, and overruled two former decisions, *Burton* v. *Lockert,* 9 Ark. 412, and *Allen* v. *Byers,* 12 Ark. 593. The following general rule, which has ever since been steadily adhered to by this court, was there laid down: "The claims and demands which the statute contemplates shall be exhibited to the executor or administrator in the manner provided by the statute before the end of two years from the granting of letters, on pain of being forever barred, are all claims capable of being asserted in any court of justice, either of law or equity, existing either at the time of the death of the deceased, or coming into existence at any time after the death, and before the expiration of the two years—including, of course, all claims or demands, running to certain maturity, although not yet payable, to be adjusted presently upon equitable principles of discount according to the rate of interest when matured, or to be provided for at the day of maturity without discount, and excluding such claims only as might be inchoate and contingent, like that in the case of *Burton* v. *Lockert,* 9 Ark. 412, and like dormant warranties, broken by eviction after the expiration of the two years."

In *Bennett* v. *Dawson,* 18 Ark. 334, Judge SCOTT, again speaking for the court, reiterated the rule laid down in *Walker* v. *Byers, supra,* and held that a claim barred by the statute of nonclaim could not be "successfully prosecuted in equity, either against the representative of the estate or the heir or distributee to whom assets may have descended or been distributed."

In *Hill* v. *State,* 23 Ark. 604, Chief Justice ENGLISH speaking for the court, it was held that (quoting syllabus) "as upon the death of a trustee he ceases to be such, and as to him the trust is no longer continued, his indebtedness to the trust becomes a demand against his estate, to be authenticated, allowed

classed and paid out of the assets of his estate, as other demands."

The case of *Patterson* v. *McCann,* 39 Ark. 577, was very similar to the present one, it being a suit in equity by one of the distributees of an estate against the heirs of a deceased administrator to enforce payment of a claim for assets of the estate unaccounted for. The court held that the claim was barred and said: "Gabriel Calliotte (the administrator) was a trustee for the persons interested in his father's estate. But, upon his death, his indebtedness to the trust became a simple claim against his estate, to be authenticated, allowed, classed and paid out of his assets as other demands."

Purcelly v. *Carter,* 45 Ark. 299, was a suit by legatees to establish their claim against the estate of a deceased executor, and the court again held that such a claim must be exhibited in the manner and within the period prescribed by the statute.

The Supreme Court of the United States in a similar case held that the Arkansas statute of nonclaims applied. *Morgan* v. *Hamlet,* 113 U. S. 449.

In other cases it has been held that the claim of a ward against his deceased guardian must be presented to his administrator within two years after qualification, whether there has been a settlement of the guardianship in the probate court or not, and that infant wards are not excepted from the operation of the statute. *Connelly* v. *Weatherly,* 33 Ark. 658; *Padgett* v. *State,* 45 Ark. 495.

Counsel for appellee contend that the case falls within the exception as to claims which are "inchoate and contingent * * * like dormant warranties, broken by eviction after the expiration of the two years," and they rely on the fact that the children of Mrs. Thomasson were not of age during the time allowed for presentation of claims against the estate of T. J. Stewart. As we have already shown, by authority of previous decisions, the statute applies alike to infants and to adults. According to the provisions of the last will of David Stewart, the share of Mary A. Thomasson could not be divided between her children until after her death, which did not occur until after the institution of the present suit. Still, the executors of David Stewart were trustees for Mrs. Thomasson and her children, and upon

the death of either of said executors the claim of Mrs. Thomasson and her children became one capable of assertion in a court of justice against the estate of such deceased executor. Their claim was not any less capable of assertion then than at the time of the commencement of the present suit. It was not inchoate or contingent. Inasmuch as the claim against the estate of T. J. Stewart was barred, no action could be maintained against his heirs to subject the lands which descended to them to the payment of the claim. *Bennett* v. *Dawson, supra; Turner* v. *Risor,* 54 Ark. 33.

Reversed and remanded with directions to enter a decree in accordance with this opinion.

HARDING *v.* STATE.

Opinion delivered February 28, 1910.

1. HOMICIDE—INDICTMENT.—An indictment for murder in the first degree which charges that defendant did "unlawfully, feloniously, of his malice aforethought, with premeditation and deliberation kill and murder," etc., is sufficient, though the word "wilfully" is omitted. (Page 66.)
2. CRIMINAL LAW—SAVING EXCEPTIONS IN CAPITAL CASES.—Under the act of May 31, 1909, providing that upon appeal or writ of error from a conviction of a capital offense "all errors of the lower court prejudicial to the rights of the appellant shall be heard and considered by the Supreme Court, whether exceptions were saved in the lower court or not," questions as to the admission of evidence must be raised in the lower court before they can be raised in the Supreme Court. (Page 67.)

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

M. P. Remley, and *Mann & Rollwage,* for appellant.

1. The indictment is fatally defective. The word *wilful* is omitted, and no word substituted sufficient to charge murder in the first degree. 60 Ark. 564; 28 So. Rep. 1002; 43 La. Ann. 183; 8 So. 440; 45 La. Ann. 1182; 41 *Id.* 598; 7 So. Rep. 125; 2 S. E. 455; 11 Am. Rep. 206; 50 Tenn. 6; 76 Ark. 84; 71 *Id.* 403.

2. Incompetent testimony was admitted to the prejudice of defendant. 73 Ark. 152; 82 *Id.* 58.

3. No exceptions need be saved under the act of 1909. Acts 1909, p. 259.

Hal L. Norwood, Attorney General, and *W. H. Rector*, Assistant, for appellee.

1. The indictment is good under our statutes. 60 Ark. 564; 25 *Id.* 405; 74 *Id.* 403; 76 *Id.* 84; 62 *Id.* 368.

2. No exceptions were saved to the introduction of evidence, and the act of 1909 is invalid. Elliott on App. Pro. § 7; 49 Ark. 161; 13 Cal 25; 76 Ark. 184; 14 Ore. 29; 24 So. Car. 60-75; 39 Ind. 515; Elliott, App. Pro. § 481.

BATTLE, J. Henry Harding was indicted by a grand jury of Cross County for murder in the first degree; the indictment, omitting caption, being as follows:

"The grand jury of Cross County, in the name and by the authority of the State of Arkansas, accuse Henry Harding of the crime of murder, first degree, committed as follows, towit:

"The said Henry Harding, in the county and State aforesaid, on the 10th day of October, A. D. 1909, did unlawfully, feloniously, of his malice aforethought, with deliberation and premeditation, make an assault upon J. T. Patterson with a pistol, the same then and there being loaded with gunpowder and leaden balls and being then and there had and held in the hands of him, the said Henry Harding, and did there and then unlawfully, feloniously, of his malice aforethought, with premeditation and deliberation, kill and murder him, the said J. T. Patterson, by shooting him, the said J. T. Patterson, with said pistol, against the peace and dignity of the State of Arkansas.

"T. H. Caraway, Prosecuting Attorney."

The defendant contends that the indictment is defective because the word "wilful" is omitted.

The statutes provide: "The indictment is sufficient if it can be understood therefrom:

"First. That it was found by a grand jury of a county impaneled in a court having authority to receive it, though the name of the court is not accurately stated.

"Second. That the offense was committed within the jurisdiction of the court, and at some time prior to the time of finding the indictment.

"Third. That the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment on conviction, according to the right of the case." Kirby's Dig., § 2228.

"The words used in an indictment must be construed according to their usual acceptation in common language, except words and phrases defined by law, which are to be construed according to their legal meaning." Kirby's Dig., § 2242.

"The indictment must contain * * *

"*Second.* A statement of the acts constituting the offense, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended." Kirby's Dig., § 2243.

The indictment in this case fully meets the requirements of these statutes. The words used in it are "unlawfully, feloniously, of his malice aforethought, with deliberation and premeditation." They clearly and certainly mean that the act charged was wilful. It could not have been committed in the manner charged unless it was wilful. *Aubrey* v. *State,* 62 Ark. 368; *Carroll* v. *State,* 71 Ark. 403; *Daniels* v. *State,* 76 Ark. 84; *State* v. *Peyton,* 93 Ark. 406.

The defendant was convicted of murder in the first degree. He saved no exceptions to the evidence adduced or to the instructions given. He relies on an act entitled "An act to regulate the practice in the Supreme Court," approved May 31, 1909, which is as follows:

"In all cases appealed from the circuit courts of this State to the Supreme Court, or prosecuted in the Supreme Court upon writs of error, where the appellant has been convicted in the lower court of a capital offense, all errors of the lower court prejudicial to the rights of the appellant shall be heard and considered by the Supreme Court, whether exceptions were saved in the lower court or not; and if the Supreme Court finds that any prejudicial error was committed by the trial court in the trial of any case in which a conviction of a capital offense resulted, such cause shall be reversed and remanded for a new trial, or the judgment modified, at the discretion of the court."

The Supreme Court of this State has appellate jurisdiction only, except it may issue writs of quo warranto to the circuit judges and chancellors and to officers of political corporations when the question involved is the legal existence of such corporation. Art. 7, § § 4 and 5.

The Legislature cannot add to or take from the jurisdiction vested in it by the Constitution. It cannot vest it with the jurisdiction to try capital offenses on appeal or writ of error as the circuit court. It is only for errors of that court that it has been or can be vested with jurisdiction to reverse or modify the judgments of such courts. Unless it appears that the circuit court has committed errors, this court can only affirm. As to the admission of evidence in a trial, a question as to its admissibility or competency must be presented to the circuit court by objection or otherwise for decision before it can err as to its admission, and the same is true as to the law of the case. No exception to such decision is necessary, under the act of 1909, to present it to this court for review, neither is a motion for new trial in cases in which the defendants have been convicted of capital offenses. But it must appear that the decision was made before we can find that the court erred. It is only for errors of the lower court that the act of 1909 authorizes this court to reverse or modify judgments of conviction of capital offenses. Such errors must appear in the manner indicated before such authority can be exercised. Any other jurisdiction would be original, which cannot be exercised by this court in such cases under the Constitution of this State.

We have carefully read and considered the evidence in the case, and find it amply sufficient to sustain the verdict of the jury. The instructions of the court to the jury were full, complete and comprehensive, and we find no reversible error in them.

Judgment affirmed.

ROBERSON *v.* STATE.

Opinion delivered February 28, 1910.

1. ASSAULT WITH INTENT TO KILL—SUFFICIENCY OF PROOF.—To convict of an assault with intent to kill, there must be proof of a specific intent to kill the person assaulted, and the evidence must prove that, had the person died as a result of the assault, the assailant would have been guilty of murder in the first or second degree. (Page 75.)
2. SAME—SUFFICINCY OF PROOF.—Under an indictment for assault with intent to kill it is unnecessary to prove that the assault was committed after or with deliberation. (Page 75.)

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

Webber & Webber, for appellant.

1. There is no evidence of an assault with the intent to kill, within the language of our statute. The *intent* must be coupled with the *ability* to commit a felony. 49 Ark. 179; 77 *Id.* 37. There is no proof of the *specific intent to kill,* and the burden was on the State to prove such intent. 54 Ark. 283; *Id.* 340.

2. There was error in the court's charge. It was error to strike out the words "after deliberation" and "with deliberation" and insert "maliciously." 21 Cyc. 704; *Id.* 706; Blackstone Com. 199; 25 Ark. 446; Wharton on Hom. (3 ed.) 101 and notes 14-15. It is error to refuse a specific instruction clearly applying the law to the facts, even though the law in a general way is given in other instructions. 90 Ark. 251; 69 *Id.* 134; 82 *Id.* 503.

Hal L. Norwood, Attorney General, and *W. H. Rector,* Assistant, for appellee.

1. To constitute the crime of assault with intent to kill, it must appear that, had the person died, the assailant would have been guilty of murder. 8 Ark. 451; 34 Ark. 275; 10 Ark. 318.

2. There is no prejudicial error in the charge. The assault must be with malice aforethought, or malice with premeditation. 25 Ark. 446. Deliberation is not synonymous with premeditation. 1 N. Y. Cr. Rep. 411; 74 Mo. 247; 60 Ark. 564.

3. The refused instructions were covered by others given,

which correctly stated the law, and the evidence is ample to sustain the verdict.

BATTLE, J. The indictment in this case, omitting caption, is as follows:

"The grand jury of Miller County, in the name and by the authority of the State of Arkansas, accuse Harry Roberson of the crime of assault with intent to kill, committed as follows, towit:

"The said Harry Roberson, in the county and State aforesaid, on the 10th day of November, A. D. 1909, upon one Fate Floyd, with a certain pistol, a deadly weapon, unlawfully, feloniously and of his malice aforethought, did make an assault with intent him, the said Fate Floyd, then and there being, unlawfully, wilfully, feloniously and of his malice aforethought to kill and murder, and then and there no considerable provocation appearing, against the peace and dignity of the State of Arkansas."

The defendant pleaded not guilty; was tried before a jury, and convicted, and was sentenced to be imprisoned in the State penitentiary for one year. The defendant appealed.

The testimony in behalf of the State was substantially as follows:

Fate Floyd testified: "I know the defendant. On the 7th day of August, 1909, the defendant assaulted me with a pistol in Miller County, Arkansas, at the house of Jenkins. Berton Colter and I were going home together, and I stopped at Jenkins's for him. While I was there, Roberson came in just as I was getting ready to go, and got as far as the middle door. I had been in the kitchen, and had started out, when Roberson came to the door and said: 'There is that damn negro now!' and jerked out a pistol and shot. Colter and I were wearing white hats. I made no effort to shoot him, or to do anything to him. The room was about fourteen feet square. We were about the distance of the room apart. We had never had any difficulty. I had no words with him. I only knew him when I saw him. We got to the door about the same time the shot was fired. I did not see Pearl Vaughan as the shooting took place. Just as I got in the door, and heard Harry come in the front door, I remember seeing him come up with the

gun. I don't know whether he got it out of his pocket, but he had it in a shooting position, and did shoot. It was pointed at me. I stooped behind the counter when the gun fired. I saw him come up with the gun, at which time he shot. His hand seemed to be raised at the time he shot. It seemed to shoot as it came up. I don't know where the ball went. I did not see any signs of it that night. Afterwards I came down and saw where the ball lodged by the door. The ball did not lodge anywhere near where I was standing, but was by another door. All I know about the ball is what they said about it. I don't know where it went. There was a window right behind where I was standing, and it had some lights out of it. It would be a straight shoot by me out of the window."

Jim Jenkins testified: "I know Fate Floyd, Berton Colter and Harry Roberson. I saw the shot. It happened at my place of business in Miller County, Arkansas. Harry Roberson came down there one time, and then left; then came back and said he wanted to ask me about some negroes that had been talking to Pearl Vaughan. Some 'white hat' negroes. Did not call the name. About that time Fate Floyd stepped to the door, and he said, 'There is one of those damn negroes now,' and shot. It seems that he was aiming to shoot at him, but I don't know. It was very quickly done. Fate had on a white hat. Colter had on a white hat. I did not see Pearl Vaughan at the time of the shooting. Saw her afterwards. When Roberson came in, he said if I did not stop those white hat negroes from talking to that woman, that there would be a shooting scrape in my house. Roberson had been there once before, but had left. Pearl left with him, but afterwards came back. There is a window just behind the door. It has some lights broken out of it. It was in August that the difficulty happened. I don't know whether the window was raised or not. I was looking at Harry when the pistol shot. The pistol ball went toward the right; about six feet in the floor. I can't say that Harry held the pistol straight out, because it was done so quick. I found the ball afterwards. I found the ball about six feet from where Harry was standing. Some two or three days after the difficulty I found it. Had not found it at the time I testified in the justice's court. Harry got me to look for

the ball. My wife was the first to find it. When we looked at first, we looked around the door, but afterwards Harry was down there, and Mr. Crenshaw, and we looked and found it where I have just stated."

Annie Jenkins and Berton Colter testified in behalf of the State; and their testimony corroborated that of Floyd and Jim Jenkins.

The testimony on behalf of the defendant was substantially as follows:

Harry Roberson, the defendant, testified: "I am the defendant in this case. That evening I was down town, and Pearl was at Jenkins's place. She said she was going to be down town late, and asked me to come by after her when I went home. She lived three blocks on the other side of me. When I went in the first time, I did not stay over three minutes. I started out after my wife. I got to thinking about telling her I would come by after her, and went back and met her just as I was going in, and she asked me what I was mad about, and I told her nothing; and I passed by the door and got to the window, and Jim Jenkins and his wife was sitting on that side of the table; and I says to Jim, 'You see, now, things are going to turn out just as I expected, and if you don't stop Pearl from talking to Colter, you are going to have some trouble.' I did not say anything about a shooting scrape. About that time Floyd or Colter one stepped to the door, and I put my hand to my side. I thought I saw a knife in his hand. Pearl stepped up and grabbed my hand. I am perfectly confident that I never pulled the gun out myself, and I never put my finger on the trigger, and, just as she grabbed it, the gun fired, and the ball went into the floor. I never ran anywhere. I just walked off. I had not drawn my gun when I made the remark to Jenkins. I won't be positive whether it was a knife I saw in Floyd's hand, but I thought it was. I won't say just what way the gun fired, because I was all turned around. I had no idea of shooting. I had some money that night, is the reason I happened to have the pistol. It was about 9 o'clock. Pearl is not any kin to me. I live about two blocks from her. She told me to come by there, that she would be there late, and asked me to take her home. That was about the first

time she ever asked me. When I went down there, she asked me what was the matter. I don't know what she meant by that. I guess it was because I went away and did not say anything to her. She was not talking to the fellows when I saw her. I got superstitious when I went into the house and Floyd came in behind me with a knife in his hand. I did not know that he had been talking that night, but that evening he did. I did not testify about this before, because I did not think it worth while. I testified in the justice of the peace court about seeing him with a knife. That was when I went there the first time."

Pearl Vaughan testified: "I was standing behind Roberson when the shot was fired. Floyd was coming in behind Roberson —out of the kitchen. Harry reached back like that and got his gun. He did not pull it out, but drew it up, but never did get it from his side. I grabbed his hand, and the gun went off. I don't know who shot the gun. The ball went five or six feet in the floor off to the right. Harry never got the pistol up, and did not point it at Floyd. I asked him to come by that night and go home with me."

The defendant asked for the following instructions to the jury:

"1. Before the State can ask a conviction in this case, the State must prove beyond a reasonable doubt every material allegation in the indictment, and you are instructed that to convict the defendant it devolves upon the State to prove beyond a reasonable doubt that the defendant, with malice aforethought and after deliberation and with intent to kill and murder one Fate Floyd, made an assault on said Fate Floyd, with a pistol under circumstances which would have constituted murder, if death had resulted; and unless you so find beyond a reasonable doubt, you should find defendant not guilty.

"2. An assault is an attempt coupled with a present ability to commit a violent injury on the person of another. Before the jury can convict this defendant, the State must prove, beyond a reasonable doubt, that the defendant, with malice aforethought and with deliberation, attempted to kill Fate Floyd; and, unless you so find from the evidence beyond a reasonable doubt, you should acquit the defendant.

"3. The defendant is entitled to the benefit of every reasonable doubt upon every material element in the case, and this is a substantial right of defendant guarantied him by law. The State must prove its case and every material element thereof beyond a reasonable doubt; and if, after a comparison and consideration of all the testimony in the case, the jury cannot say that they have a firm and abiding conviction to a moral certainty of the truth of the charge, it is their duty to find the defendant not guilty.

"4. If you find from the evidence that the defendant drew his pistol, but did not point it at or towards Fate Floyd, and that the pistol was discharged in a scuffle between defendant and Pearl Vaughan, or that said pistol was discharged by Pearl Vaughan catching the hand of defendant, you should find the defendant not guilty.

"5. You are instructed that, to constitute the offense of assault with intent to kill, it is not sufficient for the State to prove that the defendant drew his pistol from his pocket, unless the State further shows by the testimony, beyond a reasonable doubt, that defendant pointed said pistol at or towards Fate Floyd and shot the same at said Fate Floyd with the intention of killing him; and unless you find these facts from the testimony beyond a reasonable doubt, you should find the defendant not guilty.

"6. If you find from the evidence that the pistol was discharged by accident or by some one other than the defendant, you will find the defendant not guilty; or if you have a reasonable doubt as to whether said pistol was discharged by accident or by some one other than the defendant, you must give the defendant the benefit of said doubt, and find the defendant not guilty."

The court gave the third request, and amended the first by striking out the words "and after deliberation," and amended the second by striking out the words "and with deliberation" and gave them as amended, and refused to give the fourth, fifth and sixth.

The court gave instructions other than those named.

The statute under which the defendant was indicted is as follows:

"Whoever shall feloniously, wilfully and with malice aforethought assault any person, with intent to kill or murder * * * shall, on conviction thereof, be imprisoned in the penitentiary not less than one nor more than twenty-one years." Kirby's Dig. § 1588. To convict of this offense, there must be proof of a specific intent to kill the person assaulted. *Scott* v. *State,* 49 Ark. 156; *Chrisman* v. *State,* 54 Ark. 283; and *Felker* v. *State,* 54 Ark. 489. And the evidence must prove that, had the person died as a result of the assault, the assailant would have been guilty of murder in either the first or second degree. *McCoy* v. *State,* 8 Ark. 451; *Cole* v. *State,* 10 Ark. 318; *Lacefield* v. *State,* 34 Ark. 275; *Davis* v. *State,* 72 Ark. 569; *Satterwhite* v. *State,* 82 Ark. 64. No other evidence than that indicated is necessary to prove the commission of the offense of an assault with an intent to kill, and the use of the words, "and after deliberation," "and with deliberation" in the instructions was unnecessary.

The requests for instructions refused were sufficiently covered by those given, and they were not necessary to make those given more intelligible, and consequently no reversible error was committed by the refusal to give them, is correct.

The evidence was sufficient to sustain the verdict.

Judgment affirmed.

ARKANSAS SOUTHWESTERN RAILROAD COMPANY *v.* WINGFIELD.

Opinion delivered February 28, 1910.

1. CARRIERS—OPERATION OF FREIGHT TRAINS.—In the operation of freight trains railway companies are held to exercise only the highest degree of care that is usually and practically exercised and consistent with the operation of a train of that nature. (Page 79.)
2. EVIDENCE—COMPETENCY OF EXPERT.—A graduate of a medical school who is a physician of six years' experience, although he has had no actual experience with respect to the subject of investigation, is competent to express an opinion as an expert on a matter pertaining to his profession based on knowledge derived from reading books on the subject. (Page 79.)

Appeal from Pike Circuit Court; *James S. Steel,* Judge; affirmed.

Kinsworthy & Rhoton, and *James H. Stevenson,* for appellant.

1. The third instruction given at appellee's request involves a contradiction of ideas, in stating to the jury that in taking passage on a mixed train appellee "assumed the risk of necessary and usual jolts and jars" incident to the operation of such a train, and then proceeding to tell them that the appellent was, nevertheless, held to the exercise "of the same high degree of care *in the handling* of said train as if she were riding on a regular train," etc. Such an instruction destroys all distinction between the handling of the two classes of trains, and nullifies the declaration that plaintiff by taking passage on this train assumed any risk whatever. 87 Ark. 109; 76 Ark. 520; 83 Ark. 22; 71 Ark. 590.

2. The fourth instruction errs in charging the jury that they could consider the mental pain and anguish endured by the plaintiff on account of the injury. There is no evidence of any mental pain and anguish. 63 Ark. 177; 65 Ark. 222; 70 Ark. 441; 63 Ark. 387; 76 Ark. 348; 77 Ark. 20; 71 Ark. 351.

3. The testimony of Dr. Buchanan as to the effect railway accidents have upon the nerves was inadmissible. He qualifies as a physician, but not as an expert on nervous diseases. He admits that he has had no experience, and his testimony is a mere rehearsel of what Dr. Bailey and others have said, specially looked up for this case. There is no showing of that "careful and discriminating study" resulting "in the formation of a definite opinion" which would entitle him to "respect as an expert." 64 Ark. 523, 533; Lawson, Exp. and Op. Ev. 247; *Id.* 202.

McRae & Tompkins, and *D. L. McRae,* for appellee.

1. There is no error in the third instruction. In the first instruction given the rule was stated to be the highest degree of care consistent with the practical running of the train. The third noted the difference between regular passenger and mixed trains. 87 Ark. 101.

2. Where there is serious bodily injury, the law implies mental suffering. The evidence is ample to support a finding of mental anguish in this case. 175 Ill. 401, 42 L. R. A. 199; 11 Allen, 73; 64 Ark. 538, 546; 1 Sutherland on Damages 706; 13 Cyc. 136, notes 95 and 98.

3. The testimony of Dr. Buchanan was competent. 64 Ark. 532.

BATTLE, J. This is an appeal by the Arkansas Southwestern Railroad Company from a judgment against it in favor of Mrs. W. H. Wingfield for injuries alleged to have been received by her from a sudden jolt caused by the coupling of a mixed freight and passenger train in which she had taken her seat as a passenger and was sitting at the time of the injury.

The facts as shown by the evidence in the trial of the action were substantially as follows: "In January, 1908, the appellee took passage at Smithton, Arkansas, upon a mixed train on appellant's road. Two seats were turned facing each other, and she and her husband sat in one of them. While waiting in the yards, the engine came back with such unusual force as to throw her forward against the seat in front and back against the seat in which she was sitting. She was so badly injured that she told the conductor at the time: 'You have broken my back.' She laid down and become very sick at her stomach, and when she arrived at home she was practically carried from the train to her home, about 200 yards distant. She used ordinary home remedies for a few days; and as she grew constantly worse she sent for a doctor. She had always been a healthy woman. Had worked in the field. Since the injury, she has had to walk slowly, and if her heel slips off something, as for instance the door board, she will fall, and has to be picked up and put in bed. She is a nervous wreck. The normal pulse beat is 72 to 75. Her pulse rate is 108 sitting down; lying down 100, and after walking twelve feet 128. There is a tremor of the hand and a twitch of the muscles of the eyelids. The muscles of the back were sprained and rigid and protude. Her kidneys are affected. These symptoms and others have continually grown worse, resulting in traumatic neurasthenia, a weakened nervous condition. The doctors testified that at her age she would probably grow worse, instead of better. After the injury she quit work altogether."

In the trial Dr. Buchanan in behalf of the appellee, testified that he had been practicing medicine for six years; that he was a graduate of the Arkansas Medical Department of the

University of Arkansas, and had taken two post graduate courses at the New York Polyclinic; and had examined Mrs. Wingfield. Over the objection of appellant he was asked, "From what you know, from your medical education and your observation, state whether or not there is anything in railway accidents that peculiarly predisposes sufferers from such accidents to this nervous affection?" He answered: "I think there is something in a railroad accident. From the standpoint of experience I don't know very much about it. I get my knowledge all from the medical books, and I refer to my books and to the authorities I have read, and they bear me out in saying that there is something to a railroad accident as well as in other accidents. Not only railroad accidents, but street car accidents, runaways, etc., that has a tendency to upset the nervous system in different ways."

Over the objections of the appellant the court instructed the jury as follows:

"3. You are told that, while the plaintiff in taking passage upon a mixed train assumed the risk of necessary and usual jolts and jars, this did not relieve the railroad company from exercising the same high degree of care in the handling of its train as if she was riding on a regular passenger train, to avoid injuring her. The risk of usual jolts and jars assumed by plaintiff is the risk incident to the mode of conveyance, and does not relax the rule as to the high degree of care to be exercised by the servants of the defendant to avoid injuring passengers. So in this case, if you believe that the plaintiff was without fault and would not have been injured if the defendant's servants had exercised such high degree of care, your verdict should be for the plaintiff."

"4. If you find for the plaintiff, you will, in assessing her damage, take into consideration her age and condition in life, the injury sustained by her, and the physical and mental pain and anguish endured by her on account of the injury, together with such as she will necessarily endure in the future, resulting from her injury, if any, together with all other facts and circumstances in the case, and assess her damages at such sum as you believe from the evidence will fully compensate her for her injury."

In *St. Louis, Iron Mountain & Southern Railway Company* v. *Brabbzson,* 87 Ark. 109, the duty of a railroad company to a passenger riding on a freight train is defined as follows:

"It is well settled that, though a passenger riding on a freight train must be deemed to have assumed all the risks incident to travel on such trains, yet, where the railway company undertakes the carriage of passengers on freight trains, it owes to such passengers the same high degree of care to protect them from injury as if they were on passenger trains. *Rodgers* v. *Choctaw, O. & G. Rd. Co.,* 76 Ark. 520; *Pasley* v. *St. Louis, I. M. & S. Ry. Co.,* 83 Ark. 22.

"But, as it is not practical to operate freight trains without occasional jars and jerks, calculated to throw down careless and inexperienced passengers standing in the car, 'the duty of the company is therefore modified by the necessary difference between freight and passenger trains and the manner in which they must be operated; and, while the general rule that the highest practical degree of care must be exercised to protect passengers holds good, the nature of the train and necessary difference in the mode of operation must be considered, and the company is bound to exercise only the highest degree of care that is usually and practically exercised and consistent with the operation of a train of that nature. 4 Elliott on Railroads, § 1629." *Arkansas Central Railroad Co.* v. *Janson,* 90 Ark. 494.

As we understand instruction numbered 3, copied in this opinion, it is in accord with this statement of the law, and was properly given to the jury by the court.

Appellant objected to instruction numbered 4, because it told the jury, in assessing the damages sustained by appellee, to take into consideration "the mental pain and anguish endured by her on account of the injury." It says there was no evidence of such pain or anguish. We do not think that the evidence sustained this contention. The facts stated in this opinion prove the contrary, and the suffering of mental pain and anguish as necessarily incident to her condition.

The question asked Dr. Buchanan and his answer to the same were competent evidence. He was a graduate of a medical school, and a physician of six years' experience. Although he had no actual experience with respect to the subject of in-

vestigation, yet he can express an opinion as an expert on a matter pertaining to his profession, based upon knowledge derived from reading books upon the subject. It is for the jury to determine what value his opinion is entitled to under the circumstances, and to give it such weight as they think it deserves. *Green* v. *State,* 64 Ark. 532.

The judgment of the circuit court is affirmed.

BROWNE *v.* BENTONVILLE.

Opinion delivered February 28, 1910.

MUNICIPAL CORPORATIONS—DISCRETIONARY POWERS—LIABILITY.—For the negligence of the city council or other agents while performing governmental duties, as in determining whether the necessity exists for extension of water mains to particular territory, and what size is needed, and whether the financial condition of the city will warrant the expenditure, neither the city nor its officers are liable.

Appeal from Benton Chancery Court; *T. Haden Humphreys,* Chancellor; affirmed.

STATEMENT BY THE COURT.

The pleadings show that a waterworks improvement district was formed co-extensive with the corporate limits of the city (then town) of Bentonville in 1897. The commissioners of the district had the waterworks system constructed according to certain plans which it adopted, and by which water mains or pipes varying from eight inches to one inch were laid in different portions of the city, and fire plugs were furnished at certain locations. The work was done under a contract at a cost of $25,585.30. Bonds were issued to the amount of $27,000 dollars, and the full net proceeds of these bonds were required to pay for the work done under the contract. The plans and specifications did not call for water mains or pipes to be laid in each street of the city, so as to furnish fire protection to every resident property owner within the city limits.

After the system was completed under the contract, and according to the plans and specifications adopted by the com-

missioners of the district, the incorporated town of Bentonville assumed the duty of operating and maintaining the same under the authority of section 5675, Kirby's Digest. This suit was brought by appellant against appellee and the city council, and among other things appellant asks that the city council be required "to extend a four-inch main to a point within five hundred feet of the residence" of appellant in order that he might have adequate fire protection. After hearing the evidence the court in its decree directed the city of Bentonville to lay a two-inch main opposite the residence of appellant. From this decree appellant prosecutes this appeal, contending that the court should have ordered appellee to lay a four-inch, instead of a two-inch main, and appellee has taken a cross appeal, contending that appellee should not be required to lay any main.

E. B. Wall, for appellant.

1. Cities are liable for the negligence of their officers. 19 Fla. 110; 136 U. S. 455; 63 Fed. 303; 96 N. Y. 264; 48 Am. Rep. 622; 30 Am. St. Rep. 403-4. The town assumed the duty of operating the system (Kirby's Dig. § 5675) and is liable for acts of its officers. 91 U. S. 540, 544-5-6; 133 U. S. 156; 44 S. W. 818-19.

2. The city of Bentonville took over all the liabilities of the town. 93 U. S. 268-271; 116 U. S. 300; 167 U. S. 653; 29 Fed. 744; 35 Fed. 33; 74 Fed. 533; 89 Cal. 396; 1 Okla. 202; 124 N. C. 490-2.

Rice & Dickson, for appellee.

1. Where there is discretion vested in a body, it has the power not only to vacate an order made by it, but could take up water mains and deprive consumers of the use of water, without liability. 40 L. R. A. 171.

2. A city is not liable for the negligence of its officers. 74 Ark. 519.

3. The duty (or power) to extend water mains is not mandatory but purely ministerial. Kirby's Dig. § § 5321 *et seq.,* 5368, 5718, 5765. Courts will not control, or interfere with, the discretion of governmental agencies. Abbott, Mun. Corp. § § 110, 361, 439, 520, 446, 798; *Ib.* 2229-2272. The performance or nonperformance of discretionary powers creates no liability.

The courts are powerless to interfere. Abbott, Mun. Corp. 2511, 2517; Spelling on Inj., § 687; Dillon, Mun. Corp. (3 ed.), § § 9, 832-6, 949.

WOOD, J., (after stating the facts.) Section 5675 of Kirby's Digest provides: "In case of the construction of waterworks * * * by any improvement district, the city council, after such works are constructed, shall have full power and authority to operate and maintain the same, instead of the improvement district commissioners, and said city council may supply water to private consumers, and make and collect uniform charges for such service, and apply the income therefrom to the payment of operating expenses and maintenance of such works."

The maintenance and operation of the waterworks under the above section are governmental functions, in the performance of which the city council must necessarily be invested with judgment and discretion. Conceding that they have the power, by implication, to make additions and extensions to the system as it was constructed by the commissioners, it is a power to be exercised at the discretion of the council. The council, for instance, in each case must determine whether the necessity exists for the extension of a main to a particular territory, and what size main is needed, and whether the financial condition of the city will warrant the expenditure. The city fathers in these matters act in a legislative or governmental capacity for the city, and their discretion, exercised in good faith, can not be controlled by mandatory injunction. For the negligence of its council or other agents while performing governmental duties, in the absence of a statute so declaring, the city is not liable. *Board of Directors Improvement Sewer Dist. No. 2* v. *Moreland, post* p. 380.

Nor are the officers themselves liable "for the improper exercise of those discretionary powers. *Gray* v. *Batesville,* 74 Ark. 519, and cases cited.

The law applicable to such cases is well expressed by Mr. Spelling in his work on Injunctions as follows: "The general rule of noninterference with the exercise of discretionary powers legally conferred applies with exceptional force and appropriateness to municipal bodies having extensive and important trusts of a public character confided to them and being generally

vested with important legislative powers. And it is a well settled equitable doctrine that the domain of discretionary powers conferred upon municipal bodies will in no case be invaded by the courts. This rule is being very strictly adhered to with respect to legislative powers conferred by statute. * * * Nor will courts, when it is found that municipal legislative bodies have acted in good faith and within the scope of the authority conferred upon them, investigate as to the wisdom or expediency of their action, or interfere because in the light of circumstances the court would have acted differently." 2 Spelling, Injunctions, § 687.

The court erred therefore in requiring the appellee to lay a two-inch main opposite the residence of appellant. But, inasmuch as this decree of the court has been already performed by appellee, as is conceded by counsel for both appellant and appellee, neither is prejudiced thereby, and it will be affirmed.

HALL v. BOARD OF DIRECTORS OF ST FRANCIS LEVEE DISTRICT.

Opinion delivered February 28, 1910.

LEVEES—TAX SALES—DESIGNATING NEWSPAPER.—Acts 1903, p. 108, providing for the enforcement of delinquent taxes due St. Francis Levee District, impliedly authorizes the clerk of the court to designate the particular newspaper published in the county in which the notice of the sale shall be published.

Appeal from Mississippi Chancery Court; *Edward D. Robertson,* Chancellor; reversed.

STATEMENT BY THE COURT.

The Board of Directors of St. Francis Levee District commenced this action in the chancery court of the Chickasawba District, Mississippi County, to enforce a lien on certain lands for levee taxes. The attorney for the Levee District requested the clerk of the court to issue the warning order to the *Blytheville Herald,* a newspaper edited and published by Law-

horn. For reasons of his own, the clerk declined to comply with this request, but issued the warning order to the *Blytheville Courier,* a newspaper owned by Hall and published in Blytheville, with a *bona fide* circulation in the Chickasawba District. The *Courier* published the notice in the manner and for the length of time required by law. The *Herald* also published it, as the court found, at the request of the attorney for the plaintiff, but without the consent of the clerk. Hall had himself made a party to the proceeding, and asked that the fee for publication be taxed in his favor, but the court overruled his motion and declined to tax the printer's fee in his favor.

J. T. Coston, for appellant.

The levee act required the notice to be published "in some newspaper published in the county where the suit is pending." Acts 1903, § 3, p. 108. The court erred in its judicial amendment to the act, which pertains only to the legislative department. The ruling of the court was a violation of the statute.

H. F. Roleson, for appellee.

The publication in the *Herald* was a sufficient legal publication. Acts 1903, p. 108. The act is not mandatory, but merely directory. Black on Int. Laws, 339; 30 Ark. 31. Statutory requirements are deemed directory merely when they relate to some immaterial matter of convenience, rather than substance. 34 Ark. 491; 26 A. & E. Enc. of L. 689; 79 Am. Dec. 739.

WOOD, J., (after stating the facts). The court erred in holding "that the attorney for the plaintiff had the right to designate the paper in which said publication should appear, and that therefore the publication of said notice in the *Blythevnlle Courier* without his consent and against his request was unlawful."

The law under which this proceeding was instituted does not prescribe that the notice in question shall be published in a newspaper "designated by the plaintiff's attorney."

The act providing for the enforcement of delinquent levee taxes by suit in the chancery court (Acts 1903, page 108), after providing that, in case the assessments are not paid, the Board of Directors shall enforce the same by chancery proceedings, and providing that all of the delinquent owners may be joined

in one action, and that the proceedings shall be *in rem,* continues as follows:

"And notice of pendency of such suit shall be given as against nonresidents of the county and unknown owners, respectively, when such suits may be pending, by publication weekly for four weeks prior to the day of the term of the court, on which final judgment may be entered for the sale of said lands, in some newspaper published in the county where such suits may be pending, which notice may be in the following form:

"Board of Directors
St. Francis Levee District.
v. Notice.
Delinquent Lands.

"The following named persons and corporations, and all others having or claiming an interest in any of the following described lands, are hereby notified that suit is pending in the chancery court of ——— County, Arkansas, to enforce the collection of certain levee taxes on the subjoined list of lands, each supposed owner's lands being set opposite his or her name, respectively, together with the amounts severally due from each, towit. Then shall follow a list of the supposed owners, with a descriptive list of said delinquent lands, and amounts due thereon respectively, as aforesaid; and said published notice may conclude in the following form: Said persons and corporations, and all others interested in said lands, are hereby notified that they are required by law to appear and make defense to said suits or the same will be taken for confessed and judgment final will be entered directing the sale of said lands for the purpose of collecting said delinquent levee taxes, together with the payment of interest, penalty and cost allowed by law.

"..... "Clerk of said Court."

The form of the notice is prescribed by the statute, and this is to be signed by the "clerk of the court."

While the statute does not in express terms declare that the clerk of the court shall designate the newspaper or the newspapers published in the county in which the publication shall be made, it does, by the form of the notice, make it the duty of

the clerk to give the notice, and this by necessary implication gives him the power to designate the particular newspaper in which to make the publication. The law contemplates that the notice shall be given by the "clerk of the court," and not by the "attorney for the plaintiff." In giving the notice the clerk is acting for a public governmental agency of the State. *Carson* v. *St. Francis Levee District,* 59 Ark. 513. He is representing the public, and not a private individual. The statute, we think, designates him, rather than the attorney for the Levee District, as the agent to have the notice given by publication and to designate the particular paper published in the county in which the notice shall appear.

The judgment is therefore reversed with directions to tax the cost for publication in favor of appellant.

HART, J., dissents.

WESTERN UNION TELEGRAPH COMPANY *v.* SEE.

Opinion delivered February 28, 1910.

TELEGRAPHS AND TELEPHONES—DAMAGES FOR MENTAL ANGUISH.—Where a contract for the transmission of a telegram was not made in this State, and the negligence in its transmission did not occur here, but occurred in a State where damages for mental anguish alone are not recoverable, such damages cannot be recovered in this State.

Appeal from Crawford Circuit Court; *Jeptha H. Evans,* Judge; reversed.

Geo. H. Fearons, Rose, Hemingway, Cantrell & Loughborough, and *Mechem & Mechem,* for appellant.

1. The court should have instructed the jury to find for defendant. The evidence showed that the only negligence of appellant occurred in either Kansas of Missouri. 39 Kans. 93; 116 Mo. 34.

2. The court erred in refusing appellant's third instruction, submitting the contributory negligence of appellee's agent in failing to give sufficient address. 3 So. 566; 76 S. W. 613; 60 S. W. 687; 62 S. W. 136; 82 Ark. 127; 116 S. W. 895.

3. The court erred in refusing to instruct the jury that Whelan was the agent of appellee in writing the message. Jones, Tel. & Tel. § 317.

Sam R. Chew, for appellee.

1. The evidence sustains the finding that appellant was guilty of negligence. 77 Ark. 531.

2. The question of sufficiency of address was properly presented, and decided adversely to appellant. 77 Ark. 531; 89 *Id.* 375.

3. The question as to the negligence occurring in Missouri or Kansas was not raised below, and cannot be raised here for the first time. 64 Ark. 305; 71 *Id.* 242; 74 *Id.* 615; 76 *Id.* 48; 77 *Id.* 103. This is, however, no defense. 77 Ark. 531; 122 S. W. 489; Thompson on Electricity, § 427.

HART, J. Mrs. M. A. See instituted this action in the Crawford Circuit Court against the Western Union Telegraph Company to recover damages for a failure on the part of the latter to deliver to her a telegram announcing the death of her sister at Columbus, Kansas, whereby she was prevented from attending her funeral. The facts are as follows:

J. P. Galleher testified that on the 10th day of April, 1909, between 2 and 3 o'clock in the afternoon, he applied to the agent of the Western Union Telegraph Company at Scammon, Kansas, to send a message in the name of Mrs. Joe Francis to Mrs. M. A. See, at Fort Smith, Arkansas, announcing the death of their sister. That the agent wrote out the message and collected 45 cents for the transmission of the same. That about 5 o'clock of the same afternoon he inquired for the answer to the message, and, upon being told that none had been received, he paid the agent 45 cents to wire to learn if the telegram had been received by Mrs. See. That he told the operator to spell her name "Sea" or "See," as he had sent her mail both ways, which she had received. The burial took place about half past 2 o'clock on the afternoon of April 11, 1909. That, had the telegram been promptly delivered, Mrs. See could have reached Columbus in time for the funeral.

Mrs. M. A. See testified that on the 12th day of April, 1909, she received a letter from her sister, dated April 9, stating that she was sick and asking her to come. That she tele-

graphed that she was coming and went to Columbus on the same day. That afterwards, she inquired at the office at Fort Smith for the telegram, which she should have received, and was shown one addressed to "M. A. Shea." She further testified that she would have gone at once to Columbus had the telegram in question been delivered, and that she could have reached there in time for her sister's funeral.

J. P. Whelan, the telegraph company's operator at Scammon, testified that a boy stated to him that Mrs. Joe Francis wanted to send a message to her sister at Fort Smith telling her of the death of another sister at Columbus. Then he wrote out the message, and that the boy signed the name Mrs. Joe Francis to it. The message was filed at 2:59 P. M. on April 10, 1909, and is as follows:

"To Mrs. M. A. Sea,

"Fort Smith, Ark.

"Come at once. Sister at Columbus is dead. Answer.

(Signed) "Mrs. Joe Francis."

Ira Luntsford testified that he was the operator of the company, who received the message at Fort Smith. He produced a carbon copy of it, which he stated was exactly as he received it from the Kansas City office. The carbon copy read to Mrs. M. A. Shea, instead of Sea or See. On the 12th inst. information was received from the sending office, Scammon, that the name was See and not Shea, but the funeral had already occurred on the 11th inst.

H. C. Stannard, the manager of the company's office at Fort Smith, said that a message was received on the 10th of April, 1909, addressed to Mrs. M. A. Shea. That there was no street number on the message, and that Fort Smith was a city of 35,000 inhabitants. That he did not know the person to whom the message was addressed, and at once tried to find her by looking in the city directory and by seeking information at the postoffice; but failed to find her. That on the 13th inst. they received a message stating that the name was M. A. Sea, and that he again made effort to find her, but was not successful until the 14th inst. when he discovered that Mrs. M. A. See ran a boarding house on North Fourteenth Street in the city of Fort Smith.

In a trial before a jury there was a verdict for the plaintiff

in the sum of $500, and defendant has appealed to this court from the judgment rendered.

The undisputed evidence in this case shows that the negligence of the telegraph company occurred in the State of Missouri or of Kansas. Luntsford says that he was the operator at Fort Smith, who received the message from the Kansas City office, and that it was addressed to Mrs. M. A. Shea. Stannard, the manager of the telegraph company's office at Fort Smith, says that it was so addressed, and the plaintiff says that a message from her sister, Mrs. Joe Francis, announcing the death of her other sister at Columbus, was shown her on her return from Columbus, and that it was addressed to Mrs. M. A. Shea. Whelan, the operator at Scammon, says that he wrote the message, and that it was addressed to Mrs. M. A. Sea; but does not say anything about its transmission. The testimony shows that the telegraphic characters to send the word "Shea" are different from those to send "Sea," and the words are not *idem sonans*. So it must be taken as established by the undisputed evidence that the mistake in the name was made in transmitting the message by Whelan, or by the operator in the relay office at Kansas City, Missouri. In either event the negligence did not occur in the State of Arkansas, but must have occurred in the State of Missouri or of Kansas.

In neither of those States are damages for mental anguish recoverable against a telegraph company for negligence in failing to transmit or deliver a death message. *West* v. *Western Union Tel. Co.*, 39 Kan. 93; *Cannell* v. *Western Union Tel. Co.*, 116 Mo. 34. See also *Western Union Tel. Co.* v. *Ford*, 77 Ark. 531.

For the reasons that the contract was not made in this State and the negligence did not occur here, but occurred in a State where damages for mental anguish alone are not recoverable, the court should have directed a verdict for the defendant as requested by it. The precise question has been so recently determined by this court in the case of *Western Union Tel. Co.* v. *Crenshaw*, 93 Ark. 415; and *Western Union Tel. Co.* v. *Griffin*, 92 Ark. 219, that it is only necessary to say that the rule established by those cases controls the present case.

Therefore the judgment will be reversed, and the cause dismissed.

FIDELITY & CASUALTY COMPANY OF NEW YORK v. FAYETTEVILLE WAGON, WOOD & LUMBER COMPANY.

Opinion delivered February 14, 1910.

INSURANCE—CONSTRUCTION OF POLICY.—When a policy of casualty insurance was ambiguous on its face, resort may be had to the applications which constituted a part of the contract to explain what the policy meant.

Appeal from Washington Circuit Court; *Joseph S. Maples,* Judge; affirmed.

Nathan B. Williams, for appellant.

E. B. Wall, for appellee.

McCULLOCH, C. J. This is an action to recover a balance alleged to be due as per contract for premiums on a series of liability policies issued by appellant to appellee. The premium was based on the total wage roll of appellee paid to employees covered by the policies. The clauses of the policies which bear on the question at issue read as follows:

"C. Premium is based on the compensation to employees to be expended by the assured during the period of this policy. Whenever employees are compensated in whole or in part by store certificates, board, merchandise, credits or any other substitute for cash, the amount of compensation covered by such substitutes shall be included in the pay-roll. If the compensation actually paid exceeds the sum stated in the schedule hereinafter given, the assured shall pay the additional premium earned; if less than the sum stated, the company will return to the assured the unearned premium *pro rata;* but the company shall first retain not less than $25, it being understood and agreed that this sum shall be the minimum earned premium under this policy.

* * * * * * * * * * * * * * * *

"E. The company shall have the right and opportunity at all reasonable times to examine the books of the assured, so far as they relate to the compensation paid to his employees, and the assured shall, whenever requested, furnish the company with a written statement of the amount of such compensation during any part of the policy period under oath if required.

* * * * * * * * * * * * * * * *

"G. In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

"H. The statements contained in the schedule hereinafter given are hereby made a part of this contract, which statements the assured makes on the acceptance of this policy and warrants to be true, saving as to matters which are declared to be matters of estimate only.

"SCHEDULE.

"12. The estimated pay-roll covers the wages of all persons employed on the premises including executive officers, office men, piece workers and drivers and driver's helpers, except as follows: President, vice-president, secretary, treasurer, office men, drivers and helpers."

The daily reports made by appellee to appellant, which served as applications and were parts of the contract, specified that the employees insured were "engineer, firemen, sawyers, laborers, superintendent and night-watchman," and there was evidence to the effect that these were all shop men. The point at issue in the case was whether or not the policies included yard men. The appellant asked for a peremptory instruction in its favor, which the court refused to give, and this refusal is assigned as error.

The case was submitted to the jury, and a verdict in appellee's favor was returned. We think that, upon a proper construction of the contract and upon the evidence, this verdict was correct. The insured employees specified in the schedule included only "executive officers, office men, piece workers, and drivers and drivers' helpers," except "president, vice-president, secretary, treasurer, office men, drivers and helpers." The most that can be said in appellant's favor is that the language of the contract is ambiguous, and we have a right to look to the daily reports and applications as parts of the contract, which show that only the "engineer, firemen, sawyers, laborers, superintendent and night-watchman" were insured, and the evidence, which shows that this meant shop men and not yard men. This construction disposes of the case.

Judgment affirmed.

WESTERN COAL & MINING COMPANY v. PRUETT.

Opinion delivered February 14, 1910.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.—Where the negligence of a fellow servant placed an employee in a position of apparent danger, and he was injured in attempting to escape therefrom, the fact that he would not have been injured if he had remained where he was does not convict him of contributory negligence as a matter of law, it being a question for the jury.

Appeal from Logan Circuit Court; *Jeptha H. Evans*, Judge; affirmed.

Ira D. Oglesby, for appellant.

Sam R. Chew, for appellee.

McCULLOCH, C. J. Appellee, George Pruett, was employed by appellant as a miner in its coal mine, and received injuries for which he sues to recover compensation. The jury returned a verdict in his favor, and appellant seeks a reversal, principally upon the ground that the evidence is not sufficient to warrant the verdict. It is insisted that, putting the evidence in its strongest light, it fails to establish any negligence on the part of appellant, and shows beyond dispute that appellee was guilty of contributory negligence. The facts of the case are as follows:

In the straight plane or entry of the mine there was a track along which the coal cars were propelled by use of an electric motor, coal being thus hauled from where it was mined to the bottom of the shaft. At the place where appellee was injured there were two parallel tracks, connected with the main track by a switch. One of these tracks was for empty cars to stand on, and was called the "empty track," and the other was for loaded cars. The motor would run back and forth between this place and the shaft of the mine for the purpose of carrying loaded cars to the shaft and bringing back empty cars. On the return trip, as the motor approached the switch, it would be opened, and a flying switch would be made, throwing the empty cars on to the empty track on the one side, and the motor would run on the loaded car track so as to couple to the loaded cars. It was the rule of the mine for this to be done between the hours of beginning work in the morning and four o'clock in the afternoon, when the miners quit work. The electric lights

burned when the motor was running, and there is some evidence that, even when the hour of four o'clock arrived, if the motor was out on a trip, it completed the trip, even if it passed the hour to do so.

There was a conflict in the testimony as to whether the accident occurred immediately before or after the hour named above. The evidence does show, however, that it was and had been for a long time the custom of the miners to quit work at four o'clock and to assemble themselves at this switch, or parting, as it is called, where the empty cars are left, and to be hauled from that place to the bottom of the shaft in some of the empty cars drawn by mules, as the mules were there waiting to be taken to the barn. The miners would get in the empty cars and wait till the motor quit running, if it was running when they got there, so that the mules could pull the empty cars along the tracks.

On this occasion fifty or seventy-five of the miners had thus assembled, and had got into the empty cars. There was a space of five or six feet between the two tracks, and the mules were along in this space. The motor was out on a trip, and the lights were still burning, and the men were waiting for it to return, so that they could start on their journey toward the shaft. The motor came in sight up the plane with a string of cars, and was running at an unusual, and, as some of the witnesses described, a dangerous rate of speed. Many of the men, among whom was the plaintiff, became frightened at the unusual speed of the motor, thinking that in making the flying switch the empty cars would be thrown in on the empty car track with such great force as to cause a collision with the cars on which the men were seated and kill or injure them. Many of the men remained in the cars, and others jumped out and attempted to escape. None were injured except the plaintiff. In his fright he jumped out of an empty car and attempted to make his escape by climbing over one of the loaded cars, and as he did so the motor, after throwing the empty cars in the switch, came against the loaded cars with such violence as to cause them to bump together and catch appellee's foot between the couplings and crush it. The entry or plane was of sufficient width only to allow space for these two tracks, which were within a foot or two of the coal rib on each side.

We think this evidence is sufficient to convict the appellant of negligence and to acquit appellee of contributory negligence. The negligence consisted of the act of the motorman in running the motor and attempting the flying switch at such a dangerous rate of speed as to lead plaintiff and his companions to believe that a serious injury was about to be inflicted and to cause him to leave the empty cars and attempt to escape. It is true the evidence shows that if he had remained in the empty car he would not have been injured; but the high rate of speed at which the motor and empty cars approached placed him apparently in a situation of peril, and he had to choose whether he would brave the peril by remaining in his place or attempt to escape from it. The fact that the result shows he made a mistake in leaving the cars does not necessarily convict him of contributory negligence. That was a question for the jury to determine under all the circumstances.

The court refused to give two of appellant's instructions, but we are of the opinion that they are both fully covered by another of appellant's instructions which the court gave. We find no error in the record, and the judgment is affirmed.

COLLINS v. STATE.

Opinion delivered February 14, 1910.

1. LIQUORS—UNLAWFUL SALE—GOVERNMENT LICENSE AS EVIDENCE.—In a prosecution under Kirby's Digest, § 5140 *et seq.*, for violation of the "blind tiger" statute, evidence that defendant had a United States license or stamp tax is competent to show the purpose for which defendant kept liquor, but does not raise a presumption of guilt unless it is found on the premises owned or controlled by defendant. (Page 96.)
2. SAME—POSSESSION OF LIQUOR AS EVIDENCE OF GUILT.—Where defendant's premises were searched under a search warrant, the finding of liquors thereon, under Kirby's Digest, § 5144. is made *prima facie* evidence that he was engaged in the illegal sale of liquors. (Page 96.)

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

Edwin Hiner, for appellant.

1. There was no proof of any fact at issue in this cause. Statements by defendant that she had a government license are not evidence at all. The law requires that such license be "*found*" on the premises.

2. Bare *possession* of liquor is not *prima facie* evidence of guilt. 85 Ark. 102.

Hal L. Norwood Attorney General, and *W. H. Rector*, Assistant, for appellee.

1. The admissions of a defendant are always admissible against him. It was competent to prove possession of a government license. Kirby's Digest, § 5144.

2. The court properly charged the jury. A revenue license is *prima facie* evidence against the owner of the premises. 77 Ark. 143; 83 Ark. 102. See also 88 Ark. 393.

McCULLOCH, C. J. Appellant's premises in the city of Fort Smith were, in September, 1909, raided under a search warrant, issued under the "blind tiger" statute, and about two dozen bottles of beer were found in the house. The character of the premises is not disclosed in the record, further than by the statement of one of the witnesses that the beer was found in the ice box in the dining room.

In the trial of appellant in the circuit court for violation of the "blind tiger" statute, it was proved by the testimony of the raiding officers that the beer was found by them as indicated above, and that appellant admitted to them that she had a United States internal revenue license (so-called), or special tax stamp, denoting the payment of a special tax on liquor. The officers did not find the license or special tax stamp in the house, but testified that they asked appellant to produce it, and she declined to do so. This was all the testimony introduced which was material to the issue, and appellant rested her case without introducing any testimony. The court, among other instructions, gave one over appellant's objection telling the jury that "if the defendant had a government license that was in effect at that time, one that had not expired, that would be *prima facie* evidence against her." The jury returned a verdict of guilty, and judgment was entered accordingly; and appellant brings the case here for review.

The case is controlled by *Peyton* v. *State,* 83 Ark. 102, and *Appling* v. *State,* 88 Ark. 393. The mere issuance of a Federal stamp tax to one accused under the "blind tiger" statute of the clandestine sale of liquor does not make a *prima facie* case of guilt of a violation of the statute, as it reads that if the same "be found therein"—that is to say, if it be found in the raided premises—it makes a *prima facie* case of guilt. The having of such a license or tax receipt may be received in evidence as indicating the purpose for which the liquor was held; but its possession does not make out a *prima facie* case unless it is found on the premises owned or controlled by the accused. *Appling* v. *State, supra.*

The court therefore erred in instructing the jury that if the defendant had a government license it would be *prima facie* evidence against her. An instruction as to a *prima facie* case by reason of the Federal tax stamp would have been improper in this case, for there is no evidence that any such stamp was found. The most that the evidence established is that she had a stamp. There was enough evidence to go to the jury on the *prima facie* case established by reason of the finding of the liquor on the premises, but the jury may, under the circumstances, have believed that she kept the liquor for private use and not for sale, and the *prima facie* case in that respect might have been overcome. The instruction was therefore prejudicial.

Reversed and remanded for new trial.

BELMONT v. JONES HOUSE FURNISHING COMPANY.

Opinion delivered February 14, 1910.

SALES OF CHATTELS—IMMORAL CONSIDERATION.—A contract for the sale of furniture on credit to the keeper of a bawdy house, with the knowledge that it was to be there used, was not illegal if the seller was not interested in the business, and the furniture was such that it might be used for a lawful business.

Appeal from Garland Chancery Court; *Alphonso Curl,* Chancellor; affirmed.

STATEMENT BY THE COURT.

This action was instituted in the Garland Chancery Court by appellee against appellant on a contract between the parties, dated September 1, 1905, and two promissory notes for $417 each, dated November 21, 1907, and due on November 21, 1908, and November 21, 1909, respectively, and upon a mortgage given on November 21, 1907, to secure the payment of said notes.

The appellee set up the contract, which it made an exhibit. This contract shows that for the sum of $993.95 appellee sold to appellant certain household furnishings, and the appellee reserved the title and the right to take possession if the installments of the purchase money were not paid at the time specified. Appellee also set up the notes and mortgage given to secure them, and alleged that the appellant had not paid the purchase money, as evidenced by the contract, notes and mortgage, and prayed for judgment for the balance alleged to be due, and that the property included in the contract of sale and the lot embraced in the mortgage all be sold to satisfy the judgment.

The defense of appellant was as follows: "At the time she purchased the goods from plaintiff she was engaged in running a house of prostitution in the city of Hot Springs, which fact was well known to the plaintiff; that the consideration for the contract and for the notes and mortgage sued on was for furniture supplied by plaintiff to defendant for furnishing a house of prostitution, and was to be paid for, as plaintiff well knew, out of the profits arising from the business of keeping said house of prostitution, and that said contracts, notes and mortgage were founded upon an illegal consideration, contrary to public policy, good morals, and are therefore void, and that there was no other consideration for said contract, notes or mortgage except the illegal consideration aforesaid. That said contract contains the following: And it is expressly understood and agreed by and between the payee and the makers hereof that the title to the above-described property shall be and remain in the said Jones House Furnishing Company until all of said installments of purchase money are fully paid; and that, in default of payment of any one of said installments when due, the whole of this note and all of said installments shall become

and be considered immediately due and payable, and the payee shall have the right to enter and retake possession of said property, or any part thereof, without process of law, and any payments theretofore made on this note shall then go and be considered as rent on all of said property to said payee during the time it may have been in the possession of the makers hereof."

The appellant does not question the purchase of the goods nor the amount of appellee's claim. Her only defense is that the consideration for the contract was illegal; that the furniture was for a bawdy house, which fact appellee knew at the time it sold her the goods, and that appellee sold her the furniture knowing that it was to be paid for out of the profits of the bawdy house business, and that therefore the contract was void.

The testimony on behalf of appellant tended to show that it was understood between her and Jones, the manager of appellee, that the money to pay for the furniture in suit was to be made out of the bawdy house business, that the contract was made with that understanding. The testimony of appellant tended also to show that the notes and mortgage were given with the understanding that the money to pay them was to be made out of the bawdy house business.

Appellant testified in part: "That Mr. Jones and she talked it over, and it was their idea that if she bought these attractive goods it would make business better and she would be able to pay for them; that plaintiff depended on her making the money in that way; that there was no other consideration for the mortgage;" that appellee "put the furniture down in her house." Appellant testified on cross examination that she never made any agreement with appellee to give it any interest in her business.

On behalf of appellee the evidence tended to show that appellee never had anything to do with, or any interest in. the bawdy house business, that it merely sold appellant the goods, knowing at the time of the sale, and at the time the notes and mortgage were executed, that the goods were bought by appellee to be used, and that same were used, by her in the house which she occupied and used for a bawdy house.

C. V. Teague, for appellant.

1. If the original contract was illegal, the notes and mortgage are void. 9. Cyc. 562-3; 36 S. W. 99; 3 Barn. & Ald. 179-185.

2. The original contract was illegal. Where a vendor sells goods, knowing the goods are to be used in violation of law, no recovery can be had. This has been held by all the courts, unless 85 Ark. 9 has expressed a contrary view. 15 A. & E. Enc. L. (2 ed.) 963, 987; 25 Ark. 209; 27 Am. Dec. 266; 51 L. R. A. 889; 76 Am. Dec. 154; 48 Ark. 487; 36 S. W. 99; 34 Tex. 246; 36 Ia. 555; 4 Dana (Ky.) 381; 33 Mich. 469; 3 Mo. App. 468; 32 Vt. 110; 97 N. W. 693; 10 L. R. A. 439; L. R. 1 Exch. 212; 20 Ga. 449; 22 La. Ann. 54; 4 Burr. 2069.

Jones & Hamiter, for appellee.

Hollenberg Music Co. v. *Berry,* 85 Ark. 9, is conclusive of this case. 11 Wheat. 258.

WOOD, J., (after stating the facts). While appellee at the time it sold the furniture to appellant knew that she was keeping a bawdy house, and knew that she bought the furniture to use in the bawdy house, yet, according to the testimony of appellee, such use of it was not a part of the contract of sale and purchase. Appellee had no interest in the business, but merely sold appellant the goods, so its manager testified, and the chancellor accepted his testimony as the truth. It can not be said that the use of the goods by appellant was inseparable from the business in which she was then engaged. Appellant might have changed her business from bawdy house to boarding house, and the furnishings could have been used in the latter as well as the former. The furnishings were not such as could be used only in the bawdy house business, and therefore they were not "inseparable" from the bawdy house business. Nor can it be said by the terms of the contract, as appellee states it, that appellee was knowingly to derive some benefit from the use of the furnishings in the bawdy house.

Jones, the manager of appellee, says it had no interest in her business, and appellant in her cross examination corroborated Jones by saying that she "never made any particular agreement with him to give him any interest in the business."

The findings of the chancellor are not clearly against the

preponderance of the evidence. We are unable to distinguish the case in principle from *Hollenberg Music Co.* v. *Berry,* 85 Ark. 9, where the law of such cases is stated. See authorities there cited.

The judgment is affirmed.

BOTHELL v. FLETCHER.

Opinion delivered February 14, 1910.

1. BILLS AND NOTES—INNOCENT PURCHASER—DEFENSE.—A promissory note in the hands of an innocent holder will not be affected by any fraud in its execution or by a contemporaneous oral agreement that it shall not be negotiable. (Page 102.)
2. SAME—INNOCENT PURCHASER—DEFENSE.—One who purchases negotiable paper before maturity for value without notice, actual or constructive, at the time of purchase, of any defect in its execution, will be held an innocent purchaser. (Page 103.)
3. SAME—INNOCENT PURCHASER.—The maker of a negotiable instrument, when sued by an innocent holder, cannot set up that it was procured by fraud. (Page 103.)

Appeal from Washington Circuit Court; *Joseph S. Maples,* Judge; reversed.

STATEMENT BY THE COURT.

This was a suit by appellant against the appellees on four negotiable instruments, acceptances, dated February 5, 1906, and executed by appellees to the American Jobbing Association, and by it assigned to the appellant before due. The suit was begun in a justice's court. There were no written pleadings.

Appellant testified in substance that he was in the loan and brokerage business in Iowa City, Iowa; that the American Jobbing Association applied to him to discount some paper; that he discounted the acceptances in suit twelve per cent. and paid cash for same; that he bought them in the usual and ordinary course of business, and took the instruments, less the discount, at just what the instruments purported on their face to be. The paper was purchased by him in the manner aforesaid, and was trans-

ferred to him by the payee April 20, 1906. The acceptances were due in ten, thirteen, sixteen and eighteen months, respectively. There were two other notes or acceptances in the purchase for the same amounts, due, respectively, in four and seven months, which appellees paid about the time they were due. The original acceptances were introduced in evidence, and by agreement they have been brought here for the inspection of the court. On the back of each acceptance is its number. On 3408 is the following: "Bank—Farmers and Stobaugh. Address, Springdale, Arkansas. Apr. 20, Pay to the order of C. Bothell. American Jobbing Association, by C. H. Dayton, Mgr." Then there are further indorsements which have been erased by pen and ink marks across them as follows: "Pay to order of Johnson County Sav. Bank, Iowa City, Iowa. C. Bothell. Pay any bank or banker order, Johnson County Savings Bank, Iowa City, Iowa. Geo. L. Falk, Cashier." The other notes have similar indorsements.

The appellant testified that he never had any connection with the American Jobbing Association; that he found by inquiring of the banks that they were buying this paper, and that it was satisfactory to them, so he purchased it. He gave his check for the money used in purchasing the paper, and the check was in evidence. He was not personally acquainted with the makers, and had no knowledge of their financial standing.

The court permitted appellees, over the objection of appellant, to show that the acceptances were given for certain articles of jewelry purchased by appellees from the American Jobbing Association; also to show, over appellant's objection, that the jewelry was worthless, and that the acceptances were given with the understanding at the time between the payee and appellees that they were not to be assigned or transferred.

The bill of exceptions recites: "Defendant calls attention of the jury to the indorsement on the acceptances—the color of the ink, dates, etc., showing that all of the indorsements were made at the same time."

The appellant testified, among other things, "that the acceptances were not sold to him without recourse," that "the acceptances show just what the indorsement was on them," that

the American Jobbing Association was solvent at the time the transfer of the acceptances was made.

The appellant, *pro se.*

Appellant was a *bona fide* holder for value. He purchased in good faith before maturity for a valuable consideration without notice of any defense. 61 Ark. 81-6-7; 64 *Id.* 39-53; Kirby's Dig., § 512. An innocent purchaser or *bona fide* holder of a note is not affected by want of consideration, or other equity between the original parties. 41 Ark. 243; 64 *Id.* 39; 65 *Id.* 543.

Walker & Walker, for appellees.

The question whether appellant was or not a *bona fide* holder was properly submitted to the jury. The jury were authorized from the evidence to discredit his testimony and find that he was a party to the "job" put up on appellees.

WOOD, J., (after stating the facts). The court erred in permitting any evidence to go to the jury except that which would tend to prove that appellant was not an innocent purchaser for value before maturity. That was the only issue between appellant and appellees, and the evidence should have been confined to that issue.

Therefore evidence of what the contract was between appellees and the American Jobbing Association was wholly irrelevant and incompetent. It was no concern of appellant, if he was without notice of any fraud, that the jewelry for which the acceptances were given was worthless, or that it was the contract between appellees and the American Jobbing Association that the acceptances were not to be assigned or transferred. If appellant had no notice of these things, he could not be affected by them.

The above evidence in itself in no manner tended to prove that appellant had notice of these things, and the court should not have permitted it for that purpose.

A negotiable instrument, as these acceptances were, could not be varied in the hands of an innocent holder for value by any contemporaneous oral argreement between the original parties to it that it should not be negotiated.

The *bona fide* character of a holder of negotiable paper can be destroyed only by proof of his knowledge (or facts of

which he would have to take notice) of some defects or fraud in connection with the execution of the instrument rendering same invalid in the hands of the payee and of his purchase thereof notwithstanding such knowledge. In such case he would not be an innocent holder, even if he paid value and had the instrument transferred to him before maturity. But otherwise he would be. *Thompson* v. *Love,* 61 Ark. 81; *Hogg* v. *Thurman,* 90 Ark. 93.

The maker of a note or acceptance given in payment or settlement of an account can not set up, when sued by an innocent holder, that the note or acceptance was procured through fraud or mistake. *Lanier* v. *Union Mortgage & Trust Company,* 64 Ark. 39, 53.

In the absence of any evidence first tending to show that appellant was not an innocent purchaser of these acceptances (and we find none in this record), the court should not have permitted any testimony as to the fraudulent character of the account or transaction out of which the acceptances originated. Upon the evidence adduced the instructions of the court were abstract. The appellant was entitled to a verdict.

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

SOUTHERN EXPRESS COMPANY *v.* MEYER.

Opinion delivered February 14, 1910.

1. CARRIERS—LIMITATION OF LIABILITY.—Where a shipper had no opportunity to ship under any other than a contract of limited liability, he is entitled to recover for loss of the goods, regardless of the contract. (Page 106.)
2. SAME—LIMITATION OF LIABILITY.—A contract for an interstate shipment of goods which stipulates that the carrier's liability shall be limited to loss occurring while in its possession is void as being in conflict with section 7 of the act of Congress of June 29, 1906, known as the Hepburn Act. (Page 106.)

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

STATEMENT BY THE COURT.

The appellee delivered to appellant at Jonesboro, Arkansas, certain mink hides for transportation to New York. One lot was consigned to Joe Frak, and another lot to J. T. Silverstein. Appellee alleged that these were interstate shipments, and that appellant "then and there agreed to safely deliver said hides to their destination, which it failed and refused to do, to plaintiff's damage in the sum of two hundred dollars."

The complaint had two counts, which were the same except that different assignees were named. Appellant answered, admitting that it received a bale of furs of appellee for shipment. It set up that the furs were shipped under a written contract by which appellant's liability was limited to loss or damage while the furs were in appellant's possession; that appellant delivered the furs to its connecting carrier, and thereupon its liability ceased. Appellant further set up "that it was provided in the written contract of shipment that in no event should appellant be liable for loss or damage for more than fifty dollars, unless a just and true value of the furs was stated in the contract and an extra charge paid or agreed to be paid for transportation, which extra charge was to be based upon the value in excess of the sum of fifty dollars; that at the time of making the contract the value of the furs was not declared or made known to appellant; that it had no knowledge or information with reference thereto." "That it was an interstate carrier, and filed with the Interstate Commerce Commission a schedule of its rates for carriage and service with reference to interstate carriage; had properly published such rates, and that thereunder the rate for carrying goods increased in proportion as the value of the shipment exceeded fifty dollars; that by the terms of the written agreement appellant was not liable for a sum in excess of fifty dollars; that to permit appellee to fix or prove value of the furs at a sum in excess of fifty dollars would make the rates and charges for transportation illegal and discriminatory and in violation of the Interstate Commerce laws of the United States."

There was evidence to sustain the allegations of the complaint, and also evidence on behalf of appellant to sustain the allegations of its answer as to the written contract of shipment.

But there was no evidence showing what appellant charged appellee for the shipments in suit. There was no evidence to the effect that appellant had an unlimited liability rate, and that it gave appellee the privilege of shipping by that rate. So far as the evidence abstracted in this record shows, appellee had no opportunity to ship under any other. At the request of appellee, the court gave the following declarations of law:

"1. A shipper who delivers freight to a common carrier of the value of more than fifty dollars, and, without any agreement or knowledge as to the rate of freight to be charged for transportation, accepts, without reading or having his attention called to the contents, a receipt limiting the liability of the carrier to fifty dollars, in event of loss or damage to the shipment, is not bound by the clause limiting the amount of recovery.

"2. The court declares the law to be that where a shipper delivers to a carrier freight to be transported from a point in one State to a point in another State, the carrier has no legal right to deliver to the shipper a bill of lading or receipt limiting its liability for loss or damage to such property to any certain sum, and, if it does so, such limitation is not binding upon the shipper.

"3. The Interstate Commerce Act, sec. 20, provides: That all carriers shall be liable for any loss or damage to property caused by it or any common carrier to which it may deliver property, and that no receipt or rule shall exempt it from such liability."

To which exceptions were properly saved.

The appellant prayed findings of fact and declarations of law in harmony with the allegations of its answer and the evidence it adduced. The court refused its prayers, and it duly excepted.

From a judgment rendered in favor of appellee for four hundred dollars and interest, this appeal has been duly prosecuted.

Robert C. Alston, for appellant.

1. If a recovery can be had at all, it must be upon contract and not in tort. There is no proof of negligence. Having elected to sue upon contract, it is bound by its election. 76 Ark. 333; 70 *Id.* 319; 67 *Id.* 1; 49 *Id.* 94; 64 *Id.* 213; 63 S. E. 809.

2. The contract being void under the Federal law, no recovery can be had. The receipt was a contract, although not signed by the shipper. 112 U. S. 331; 114 S. W. 1052. Appellee is estopped to claim more than is authorized by the classification to which he assented. 114 S. W. 1052; 162 Fed. 585; 63 S. E. 809.

3. When both parties violate the law in making a contract, neither can recover. 162 Fed. 996.

4. The doctrine announced in 89 Ark. 154 and 121 S. W. 932 is not sound, and cannot be sustained.

Hawthorne & Hawthorne, for appellee.

1. A contract for an interstate shipment over connecting lines to the effect that the initial carrier shall not be liable after delivery to a connecting carrier is void. Interstate Com. Act, § 20; 89 Ark. 154; 91 Ark. 97; 121 S. W. 932.

2. No opportunity was given the shipper for shipment on any other terms than those in the contract. 81 Ark. 469. He was not bound by the recitals of limited liability.

WOOD, J., (after stating the facts). As appellee, under the evidence, had no opportunity to ship under any other than a contract of limited liability, he was entitled to recover, under the decision of this court in *St. Louis & S. F. Rd. Co.* v. *Wells,* 81 Ark. 469.

As the contract under which these shipments were made limited the liability of appellant to loss occurring while in its possession, and limited the damages to the amount stated in the contract, it was void in these particulars, and appellee was also entitled to recover under the doctrine of this court announced in *St. Louis S. W. Ry. Co.* v. *Grayson,* 89 Ark. 154; *Kansas City S. Ry. Co.* v. *Carl,* 91 Ark. 97, and *Smeltzer* v. *St. Louis & S. F. Rd. Co.,* 158 Fed. Rep. 649. See also *Chicago, R. I. & P. Ry. Co.* v. *Miles,* 92 Ark. 573.

Affirmed.

MASON v. DIERKS LUMBER & COAL COMPANY.

Opinion delivered February 14, 1910.

1. HOMESTEAD—CONVEYANCE—NECESSITY OF WIFE'S JOINDER.—A husband's conveyance of his homestead in this State, in which his wife did not join, is void under the act of March 18, 1887, though she was living in another State. (Page 110.)
2. SAME—ESTOPPEL.—A wife who did not join in her husband's conveyance of his homestead will not be estopped by his representation that he was single. (Page 110.)
3. ESTOPPEL—PERSONS BOUND.—With respect to the persons who are bound by or who may claim the benefit of an estoppel, it operates between the immediate parties and their privies, whether by blood, by estate or by contract. (Page 110.)
4. HOMESTEAD—ESTOPPEL BY REPRESENTATIONS.—Where the owner of a homestead conveyed it on the representation that he was single, the grantee, as against the heirs of the grantor, acquired title by estoppel, though the grantor was in fact married. (Page 110.)

Appeal from Howard Chancery Court; *James D. Shaver*, Chancellor; reversed in part.

STATEMENT BY THE COURT.

This is an action by Mrs. Z. F. Mason, wife of the late George E. Mason, and the heirs at law of the said George E. Mason, to set aside a deed which George E. Mason executed to the appellee, the Dierks Lumber & Coal Company, to the land in controversy, upon the ground that said land at the time of the execution of said deed was the homestead of the said George E. Mason, and his wife did not join him in the execution of said deed.

There was a prayer also to have appellant enjoined from cutting and removing the timber growing on the land until said action could be heard.

The answer sets up three defenses to the complaint, as follows:

1. Mrs. Mason was not the wife of George E. Mason at the time of the conveyance.

2. She was living apart from her husband at the execution of said deed.

3. That George E. Mason at the time of the execution of said deed represented to appellee that he was a single or

unmarried man, and for that reason his said wife and heirs at law are estopped from asserting any claim or title to said land.

The evidence shows that Mrs. Z. F. Mason was married to George E. Mason in Chambers County, Alabama, November 5, 1863. She testified that they lived together as man and wife until his death. She gives the names of six children born to them. Her husband left her to go to Arkansas about September, 1897, and he lived in Arkansas about five years, then he returned and lived with her in Alabama until his death. There was no cause of separation, and he never obtained any divorce. He went to Howard County, Arkansas, and homesteaded about 160 acres of land. He wrote her from Arkansas that he had homesteaded the land. He told her that he had sold the land. She never signed or acknowledged any deed to the land."

The witness Mrs. Sarah Gammill, daughter of George E. Mason, testified as follows:

"He homesteaded that land from the government. He resided on the land at the time he homesteaded it. He lived with me at that time. The tract of land was his homestead. At that time he was living on the land as his homestead. He lived on it five years after he homesteaded it. During that time he would come down and stay with me two or three months at a time, and then would go back. He lived on the land by himself part of the time, and part of the time Mrs. Chandler was living with him. She lived with him maybe a year. My father lived in the neighborhood of this land during all the time he was in Arkansas, except when he was staying with me."

Another witness testified that he knew the land that Mason homesteaded; it was his homestead.

The testimony on behalf of appellee showed that on February 13, 1903, it purchased the land in controversy from George E. Mason, paying him therefor the sum of $320. Mason was living at the time at the home of his daughter, Mrs. Gammill. Mason represented at the time of the purchase that he was a single man. Mrs. Gammill was there at the time of the trading, and heard Mr. Mason represent himself as being a single man.

The deed was exhibited, and was a warranty deed from George E. Mason to appellee to the land in controversy. The consideration named being $320. It was not signed by Mrs. Mason.

In rebuttal, Mrs. Gammill testified that she did not hear her father represent to the agent of appellee before the sale of the land that he was an unmarried man.

W. D. Lee and *W. P. Feazel,* for appellants.

The deed was void. It was a homestead, and the wife did not join in the execution nor acknowledge it. 57 Ark. 242; 64 *Id.* 492; 71 *Id.* 283; 55 Minn. 244; 56 N. W. 817; 87 Am. St. 704; 71 Vt. 193. The subsequent abandonment of a homestead does not impart vitality to a deed void by virtue of the fact that one of the spouses only signed it. 57 Ark. 242.

2. The fact that husband and wife are living apart does not obviate the necessity of the wife's joining in and acknowledging the deed. 65 Ark. 251; Rodgers on Dom. Rel., § 173; 22 Neb. 370; 23 Kans. 393; 69 Am. St. 593; 29 Ark. 280.

3. Appellants are not estopped. 65 Ala. 431; 115 *Id.* 561; 49 Am. St. 303; 36 S. W. 910; 44 Minn. 482; 47 N. W. 53; 80 *Id.* 937; 27 Am. St. 71.

John S. Kirkpatrick, for appellee; *Sain & Sain,* of counsel.

1. The land was not a homestead. Waples on Homest. & Ex., 189, § 7; 59 Tex. 321; 54 *Id.* 571.

2. If it was, appellants are estopped. 2 Pom. Eq. Jur., § 813, 821; 2 S. W. 865; 7 Hurl. & N. 477; 50 Mo. 278; 41 L. R. A. 637; 16 Cyc. 718; 42 Ala. 389; 13 Ark. 214-220; 35 *Id.* 365; 98 N. W. 821; 72 Pac. 769; 33 Ark. 465; 64 Ark. 628; Waples on H. & Ex. 302, § 8.

WOOD, J., (after stating the facts). The uncontroverted evidence establishes the following facts: That Mason entered the land in controversy as his homestead, acquired title to it under the homstead laws, that he impressed it with the character of a homestead by residing on it as his home, that it was his homestead at the time it was sold, and that his wife, Mrs. Z. F. Mason, did not join him in the execution of the deed; that before the deed was executed Mason represented that he was an unmarried man to the agent who negotiated the sale for appellee, and who asked Mason before the deed was made whether or not he was a married man, with the view of ascertaining the fact.

The testimony is in conflict as to whether Mrs. Gammill at the time of the sale or before heard her father represent himself as a single man. The finding of the chancellor as to this fact against Mrs. Gammill would not be clearly against the weight of the evidence. Inasmuch as Mrs. Mason did not join in the execution of the deed, the same was void, and appellee acquired no rights by that conveyance. Act March 18, 1887; *Pipkin* v. *Williams,* 57 Ark. 242; *Bluff City Lumber Co.* v. *Bloom,* 64 Ark. 492; *Park* v. *Park,* 71 Ark. 283. The fact that at the time of the sale Mason was living in Arkansas and his wife in Alabama makes no difference. See *Duffy* v. *Harris,* 65 Ark. 251. So far as Mrs. Mason is concerned, any representations made by her husband could not estop her, for she was not his privy in estate or blood. *Gober* v. *Smith,* 36 S. W. 910. But as to the heirs of Mason the case is different. They are his privies. Mason could have abandoned the land as his homestead, although he could not have alienated it without his wife's joining in the deed. *Farmers' Building & Loan Association* v. *Jones,* 68 Ark. 76.

Mason did something more than merely accept the purchase money and sign the deed. He made a positive representation as to his status that he knew was untrue, and that was intended to and did mislead appellee to its damage, should the deed be cancelled. Because of such false representation, he could not maintain the suit, and neither can his privies in blood and estate. *Schwarz* v. *National Bank of Texas,* 2 S. W. 865. See on estoppel: *State Bank* v. *Robinson,* 13 Ark. 214, 220; *Jowers* v. *Phelps,* 33 Ark. 465; *Conner* v. *Abbott,* 35 Ark. 365; *Rogers* v. *Galloway Female College,* 64 Ark. 628, and other authorities cited in appellee's brief.

With respect to the persons who are bound by or who may claim the benefit of the estoppel, it operates between the immediate parties and their privies, whether by blood, by estate or by contract. Pom. Eq. Jur., § 813.

"The most striking instance of the estoppel recognized by courts of equity is that * * * wherein by intentional misrepresentation, misleading conduct, or wrongful concealment, a party may preclude himself from asserting his legal title to land, or from enforcing an incumbrance on, or maintaining an

interest in, real estate. This doctrine was established in equity long before the modern rules concerning equitable estoppel by conduct had been developed; and its operation is somewhat more extensive than the effects produced by the ordinary forms of estoppel. A person may not only be prevented from asserting his title or interest, he may even be compelled at the suit of an innocent purchaser, to make good and specifically perform his representations." Pom. Eq. Jur., § 821.

The decree as to Mrs. Mason is reversed, and the cause as to her will be remanded with directions to enter a decree in her favor for possession of the land in controversy. As to the heirs, the decree is affirmed.

MERCHANT v. GEBHART.

Opinion delivered February 14, 1910.

JUDGMENT—CONCLUSIVENESS.—A plaintiff cannot get relief in equity against a judgment at law obtained against him on the ground of fraud if the facts constituting the fraud were known to him at the time the former judgment was entered.

Appeal from Garland Chancery Court; *Alphonso Curl*, Chancellor; affirmed.

Wood & Henderson, for appellant.

1. The failure or refusal to perform an obligation assumed expressly or by implication, or the voluntary abandonment of the contract, releases the obligee from the duty of making demand and performance and tender, and justifies him in abandoning the contract without waiting until the contract period expires, and gives him an immediate right of action for the breach and to rescind. 7 Am. & Eng. Enc. Law, p. 150; 1 Beach on Cont., § 409 *et seq.*; 9 Cyc. 635 to 649; 38 Ark. 174; 64 *Id.* 228; 67 *Id.* 526; 67 *Id.* 156; 79 *Id.* 271.

2. Appellant had no adequate remedy at law. In cases like this equity will always decree a cancellation and rescission of the contract, and relieve against fraud. 21 L. R. A. (N. S.) 823 and note; 11 Ark. 58; 19 *Id.* 522; 20 *Id.* 424; 30 *Id.* 686;

21 *Id.* 236; 44 *Id.* 145; *Id.* 197; 51 *Id.* 333; 60 Mo. 398; 59 Am. Dec. 677; 50 *Id.* 762, notes; 77 *Id.* 681, note; 35 *Id.* 403 and note; 28 Am. St. 851.

3. The consent order and judgment was merely a proposition in a spirit of compromise and settlement, which was never accepted by appellee.

M. S. Cobb, for appellee.

1. No fraud nor deceit is shown, and there was no failure of consideration. There is a sufficient consideration for a promise if there is any benefit to the promisor or loss or detriment to the promisee. A mere expectation or hope or a contingent benefit is sufficient. 9 Cyc. 311-12-13; 21 Ark. 249; 43 Am. St. 105; 39 Pac. 582; 44 Am. Rep. 16; 5 L. R. A. 856.

2. If a party intends to rescind a contract on the ground of its violation by the other party, he must do so promptly on the first information of the breach. 51 Miss. 422; 22 Ala. 258: 13 B. Mon. 172; 3 Johns. Ch. 231; 17 Johns. 437. Prompt action to repudiate when fraud is discovered and notice of disavowal is necessary (37 Fed. 418) and within a reasonable time. 86 Ala. 116; 45 N. J. Eq. 234. He must elect to rescind with reasonable promptness. 44 N. J. Eq. 513. One cannot rescind and still retain the benefits of a contract. Parties must be placed *in statu quo.* 93 U. S. 55; 17 Ark. 228; 25 *Id.* 196; 53 *Id.* 16. The right is lost by laches. 53 Ark. 147.

HART, J. W. B. Merchant obtained a judgment in the State of Texas against D. L. and Johnnie A. Gebhart, under their assumed names of J. B. and Johnnie A. Trever, for the sum of $5,688.40. On the 28th day of January, 1906, he assigned a one-half interest in said judgment to J. C. Gebhart in consideration that said Gebhart should employ for him attorneys to collect said judgment and should bear the expense of same. Pursuant to said agreement J. C. Gebhart employed attorneys, who brought suit in the name of W. B. Merchant in the circuit court of Garland County, Arkansas, against D. L. and Johnnie A. Gebhart, and caused to be attached certain real estate in the city of Hot Springs, in said Garland County, which the defendants claimed to be their homestead. A judgment was rendered in the Garland Circuit Court in favor of W. B. Merchant against D. L. and Johnnie A. Gebhart for the sum of $5,688.40, with

interest from the 8th day of October, 1901, at the rate of 6 per cent. per annum. The judgment also sustained the attachment, and the attached property was ordered sold on the 11th day of August, 1906.

After the property had been advertised for sale, J. C. Gebhart filed a petition in the circuit court, setting up that he had an undivided one-half interest in the judgment, and asking that the proceeds of sale be paid into court or be held by the sheriff until his interest could be ascertained and protected. Subsequently, J. C. Gebhart filed another petition in the Garland Circuit Court, in which he alleged that he was the owner of a one-half interest in said judgment, and stated that W. B. Merchant became the purchaser at the said attachment sale for the sum of $6,350. His prayer was that the sheriff be ordered to pay over to him one-half of the proceeds of said sale, and that, if the same had not been paid by said Merchant, judgment be rendered against him therefor, and that the same be declared a lien on the property so purchased by said Merchant under the attachment proceedings. W. B. Merchant filed his response to said petition, in which he alleged, among other things, that D. L. and Johnnie Gebhart had appealed to the Supreme Court from the judgment rendered against them in his favor. That said appeal operated to prevent persons from bidding at the sale, and thus forced him to become the purchaser of the property. He alleged that in that regard J. C. Gebhart was in collusion with D. L. and Johnnie Gebhart. His response concludes as follows:

"Wherefore he prays that the said sale be confirmed, and that the report of said sheriff of said sale be approved, and the deed to said property be executed to the said plaintiff (W. B. Merchant) and J. C. Gebhart jointly."

The circuit court directed that the deed should be made to W. B. Merchant and J. C. Gebhart jointly. J. C. Gebhart appealed to this court, and the judgment of the circuit court was affirmed on the 25th day of November, 1907. *Gebhart* v. *Merchant,* 84 Ark. 427.

The appeal in the case of D. L. and Johnnie A. Gebhart *v.* W. B. Merchant was decided on the 18th day of November 1907, and the judgment of the lower court was affirmed. The case is reported in 84 Ark. 359 (*Gebhart* v. *Merchant*).

The present action was instituted in the Garland Chancery Court by W. B. Merchant against J. C. Gebhart for the purpose of setting aside the assignment of said W. B. Merchant to said J. C. Gebhart of one-half of the Texas judgment and also the judgment of the Garland Circuit Court directing the sheriff to execute a deed to W. B. Merchant and J. C. Gebhart jointly to the lands sold under the attachment proceedings in the case of W. B. Merchant and D. L. and Johnnie Gebhart. This suit was commenced before either of the aforementioned suits was determined in this court.

The complaint in the case at bar and the evidence adduced by the plaintiff show that J. C. Gebhart was guilty of fraud in procuring the contract of the assignment of an undivided one-half of the Texas judgment from W. B. Merchant, and was also guilty of fraud in his subsequent conduct in conducting the litigation for the purpose of collecting that judgment. In his complaint plaintiff also alleges that up to the time of the judgment and order of the circuit court denying J. C. Gebhart's petition for an order directing him to pay into court the full amount of his bid, he was willing and consented to the order of said court directing a joint deed to him and to J. C. Gebhart, but that, because J. C. Gebhart continued to harrass and annoy him by taking an appeal from that judgment, he refused to longer recognize the assignment of the Texas judgment as binding upon him.

J. C. Gebhart filed an answer, denying all the material allegations of the complaint, and the evidence introduced in his behalf tended to sustain his answer. The chancellor, upon hearing the case presented upon the pleadings and evidence, found the issues in favor of the defendant, J. C. Gebhart, and accordingly entered a decree dismissing the complaint for want of equity. The plaintiff, W. B. Merchant, has duly prosecuted an appeal to this court.

In the case of *Gebhart* v. *Merchant,* 84 Ark. 426, the court said: "Certainly, appellant (J. C. Gebhart) had no cause of action at law against appellee (W. B. Merchant) as alleged in appellant's petition or motion. The lower court was correct in its ruling dismissing the same, and it is difficult to see how under the circumstances appellant could get any further relief in

equity. For the circuit court directed the deed to be made to appellant and appellee jointly, thus giving appellant all he was entitled to in any court." While Merchant alleges facts sufficient to constitute fraud by Gebhart in procuring the assignment to him of a one-half interest in the Texas judgment and in his subsequent conduct in regard to the collection of the same, these fraudulent acts were known to Merchant at the time he asked the circuit court to direct the sheriff to make a joint deed to himself and Gebhart.

In the present bill he has alleged nothing additional except the fact that Gebhart took an appeal from the judgment of the circuit court directing the sheriff to make the joint deed. There was nothing in the conduct of Gebhart at that time that was calculated to induce Merchant to believe that he would not appeal from a decision adverse to his contention. The issues between the parties were made and determined in that case, and the decision of the court has concluded the rights of the parties thereto.

In the case of *Church* v. *Gallic*, 76 Ark. 423, the court held that "a judgment of a court of competent jurisdiction operates as a bar to all defenses, either legal or equitable, which were interposed, or which could have been interposed, in the suit."

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

YOUNG v. VINCENT.

Opinion delivered February 14, 1910.

1. APPEAL AND ERROR—PRESUMPTION FROM ABSENCE OF EVIDENCE.—Where the record does not contain the evidence adduced at the trial, every intendment is indulged in favor of the action of the trial court, and the court on appeal will presume that every fact susceptible of proof was proved. (Page 117.)
2. TRESPASS—WHO MAY SUE THEREFOR.—One who owned land at the time a trespass was committed is entitled to sue alone therefor, though he subsequently sold the land to another. (Page 117.)
3. APPEAL AND ERROR—HARMLESS ERROR.—The Supreme Court will only reverse cases for prejudicial errors. (Page 117.)

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

Ira D. Oglesby, for appellant.

1. A chose in action for trespass is not transferable with the subject-matter trespassed upon. Only the person in whom rests the legal title, etc., can sue. 10 Ark. 9; 14 *Id.* 431; 1 *Id.* 448; *Id.* 465; 8 *Id.* 470; 45 *Id.* 341; 21 Enc. Pl. & Pr. p. 805; 4 Harr. (Del.) 345; 5 N. H. 391; 35 Fla. 385; 66 Miss. 618.

2. For injury to the possession of lands, the proper party plaintiff is the party who has possession when the injury is done; no one else can sue. 15 Enc. Pl. & Pr. 519; 62 Ala. 372; 30 *Id.* 328; 69 Cal. 155; 2 *Id.* 267; 4 Houst. (Del.) 324; 56 Ind. 166; 64 Me. 48.

3. Misjoinder of parties is ground of demurrer. 19 Ark. 602; Kirby's Dig., § 6093; 25 Ark. 327. Misjoinder in tort defeats a recovery. 26 Ala. 426; 11 Gray (Mass.) 381; 102 Mich. 473; 5 N. H. 391.

HART, J. This suit was brought in the circuit court by W. A. Vincent, W. W. Bailey and W. W. Bailey, trustee of the estate of J. H. Bailey, against D. J. Young.

The plaintiff alleges that W. W. Bailey and W. W. Bailey, trustee of the estate of J. H. Bailey, were the owners of two lots in the city of Fort Smith, Arkansas, and that on the 12th day of December, 1907, by separate contracts in writing, they agreed to sell said lots to John Clark for the sum of $350 on deferred payments. Each contract provided that a deed should be executed when the purchase price was paid. On the 2d day of July, 1908, each contract was assigned by John Clark to the plaintiff, W. A. Vincent. The complaint further alleges:

"That D. J. Young on or about the 1st of December, 1907, by his agents, who were working for him and under his direction, entered upon said premises and carried away and converted to his own use a great amount of the soil belonging to said lots of W. A. Vincent, W. W. Bailey and W. W. Bailey, trustee, knowing that the same was not on his premises at the time said depredations were made. That by reason of the said D. J. Young's unlawful entry upon said premises, and unlawfully carrying away the soil, there is now a large pit dug into

the rear end of the two lots. Wherefore plaintiffs pray for damages," etc.

The defendant, Young, filed a demurrer to the complaint, which was overruled. The defendant then answered, denying the allegations of the complaint. There was a trial before a jury, and from the judgment rendered on the verdict the defendant has appealed to this court.

No bill of exceptions was filed or brought into the record. Where the record does not contain the evidence adduced at the trial, "every intendment is indulged in favor of the action of the trial court, and this court will presume that every fact susceptible of proof that could have aided appellee's case was fully established. The salutary rule of law is that every judgment of a court of competent jurisdiction is presumed to be right unless the party aggrieved will make it appear affirmatively that it was erroneous." *McKinney* v. *Demby,* 44 Ark. 74; *Hempstead County* v. *Phillips,* 79 Ark. 263, and cases cited.

The complaint alleges that the trespass was committed and the injury to the lots was done on or about the 1st of December, 1907, and that the contract of sale was not executed until December 12, 1907. Hence we may easily conclude that the evidence showed that the damage to the lots was suffered by W. W. Bailey and W. W. Bailey, trustee of the estate of J. H. Bailey, before the contract of sale was executed and before any one else acquired any interest in the property. It can not be denied that under such proof, W. W. Bailey and W. W. Bailey, trustee of the estate of J. H. Bailey, would have been entitled to recover, had he alone instituted the action. *McKinney* v. *Demby, supra; Bentonville Rd. Co.* v. *Baker,* 45 Ark. 252, and cases cited; *Davenport* v. *Devenaux,* 45 Ark. 341.

The rule that this court will only reverse cases for prejudicial error is so well settled as to render a citation of authorities to support it unnecessary. If, then, the proof showed, as under the rule above announced we must presume it did show, that the injury was suffered by W. W. Bailey while he was the owner and in the possession of said lots for himself, and in trust for another, and before any one else acquired an interest in the lots, how can it be said that the rights of the defendant were prejudiced by the mere act of making Vincent a party to

the suit? The question carries its answer; for it is manifest that the mere act of making Vincent a party plaintiff worked no prejudice to the defendant, Young.

The judgment will therefore be affirmed.

BRADLEY LUMBER COMPANY v. MILLER.

Opinion delivered February 28, 1910.

ADVERSE POSSESSION—BURDEN OF PROOF.—Where plaintiff relies on the seven-years statute of limitation of March 18, 1899, providing that uninclosed and unimproved lands shall be deemed to be in possession of the person who pays taxes thereon under color of title, it must sustain the burden of bringing itself within the terms of such act.

Appeal from Bradley Chancery Court; *Zachariah T. Wood,* Chancellor; affirmed.

Appellant sued Miller & Daniels to recover timber cut from a certain tract of land. The cause was transferred to equity. The decree quieted title in Miller. Plaintiff appealed.

D. A. Bradham, Austin & Danaher, and *John B. Jones,* for appellant.

Williamson & Williamson, for appellees.

McCULLOCH, C. J. There is involved in this case the title to a tract of land in Bradley County, described as the southwest quarter of section 36, township 12 south, range 9 west, containing 160 acres. Appellant's claim is based on color of title and payment of taxes for seven years in succession, the turning point in the case being whether or not the continuity of appellant's possession was broken before payment had been made seven times in succession by failing to pay the taxes assessed for the year 1900. The case was heard on an agreed statement of facts recited in the decree and copies of tax receipts introduced in evidence by agreement of the parties. The chancellor found against appellant's claim of title, and we discover no evidence in the record establishing the fact that appellant paid the taxes for the year 1900. Neither the agreed statement of facts nor the copies of tax receipts show such payment. Appellant contends that there is a clerical error in the tax receipt for that year in failing to properly describe the tract; but this is not

proved, and there is no entry on the tax receipt which can be construed as describing the tract in controversy. The entry referred to by counsel, which is in the following letters and figures, "SW qr. 12, 9, 9," plainly refers to another tract, if it be held to be a sufficient description of any tract at all.

The burden was on appellant to bring itself within the terms of the act of 1899 providing that uninclosed and unimproved lands shall be deemed to be in possession of the person who pays taxes thereon under color of title. *Price* v. *Greer,* 76 Ark. 426; *Gaither* v. *Gage,* 82 Ark. 51.

On the record presented, the decree of the chancellor was correct, and the same is therefore affirmed.

MALLETT v. HAMPTON.

Opinion delivered February 28, 1910.

1. APPEAL AND ERROR—INTERLOCUTORY JUDGMENT.—An order of the circuit judge in vacation sustaining a demurrer to the petition for certiorari is not final, and therefore is not appealable. (Page 120.)
2. SAME—PROCEDURE—An appeal from an order of the circuit judge in vacation sustaining a demurrer to a petition for certiorari cannot be treated in the Supreme Court as an application for a writ of mandamus to compel the circuit judge to proceed to try the application for certiorari and render a judgment in term time. (Page 121.)

Appeal from Dallas Circuit Court; *Henry W. Wells,* Judge; appeal dismissed.

Robert Martin and *Miles & Wade,* for appellant.

T. B. Morton and *Rose, Hemingway, Cantrell & Loughborough,* for appellees.

FRAUENTHAL, J. This is an appeal from the order of the judge of the Dallas Circuit Court, made in vacation, sustaining a demurrer to a petition praying for a writ of certiorari. The purpose of the petition was to secure the issuance of a writ of certiorari directed to the clerk of the county court of Dallas County ordering him to send up a copy of the records and papers relating to the removal of the county seat of said county from Princeton to Fordyce; and seeking to set aside and quash the orders of the county court in said matter relative to the re-

moval of said county seat. Upon the presentation of the petition to the circuit judge the parties appearing in this court as appellees were allowed to be made parties defendants to the petition; and thereupon they filed a demurrer thereto. The circuit judge in vacation proceeded to hear said demurrer, and sustained same. The judge thereupon made an order in which it is stated that, the petitioner "refusing to amend or plead further, it was ordered and adjudged that the petition be dismissed." And from that determination and order of the judge in vacation the petitioner prosecutes this appeal.

It is provided by section 1188 of Kirby's Digest that "the Supreme Court shall have appellate jurisdiction over the final orders, judgments and determinations of inferior courts." Appeals therefore will only lie to this court from the final judgment or decree of an inferior court, and not from any order, judgment or decree made out of court by a judge. In a case of Ex parte *Batesville & Brinkley Rd. Co.*, 39 Ark. 82, it is said: "We understand that the framers of our Constitution, when they speak of 'appellate jurisdiction,' meant the review by a superior court of the final judgment, order or decree of some inferior court. This, if not its common-law sense, was the statutory definition of an appeal, and its signification in the acceptation of American courts at the time of the adoption of the Constitution." In the case of *Sanders* v. *Plunkett*, 40 Ark. 507, a petition was presented to this court asking a writ of certiorari to bring up and quash the proceedings and order of a chancellor in vacation dissolving an injunction which he had previously issued in vacation. In that case the court said: "Whatever may be the practical result respecting the facts, we cannot regard any mere interlocutory order of a judge at chambers made in a cause as final in the sense of being subject to appeal. There must be a final order of the court itself upon the rights of the parties." In that case it was urged that the action was final for all practical purposes, and that great injustice would be done to await the action of the court, and that this court should proceed by virtue of its general supervisory powers. In passing upon that contention the court said: "The result of this doctrine, once admitted, would be that in all cases where the object of the bill would be accomplished by obtaining or defeated by the refusal of an interlocutory injunction, an application might be made

directly to this court * * * to determine upon its merits a cause never presented to any court at all, nor entered upon its records. This under the Constitution can never be permissible." Ex parte *Hawley,* 24 Ark. 596; *Miller* v. *O'Bryan,* 36 Ark. 200.

By section 1315 of Kirby's Digest it is provided that circuit courts shall have power to issue writs of certiorari to inferior tribunals of their respective counties. The application for the writ may be made to the judge in vacation, but the final determination of the cause must be made by the court; and an appeal only lies from the judgment of the court made in such action. It follows that an appeal does not lie in this matter from the order or judgment of the judge in vacation dismissing the petition for the writ of certiorari; and this court has acquired no jurisdiction by such attempted appeal.

It was stated in the oral argument of this case that at the term of the Dallas Circuit Court following the order of the judge dismissing the petition, a petition for certiorari in said proceeding was presented to said circuit court for its action, and the court refused to entertain or hear the same, so that the petitioner could not obtain from the circuit court an order or judgment upon said petition from which to appeal. It was suggested in the argument that this appeal should be taken and considered as an application for a mandamus directed to said circuit court ordering it to exercise its jurisdiction in hearing and determining said petition; that, inasmuch as the issuance of a writ of mandamus is a matter of judicial discretion, this court could determine whether or not the petition for certiorari was demurrable in passing upon the rights of the petitioner to have the writ of mandamus awarded; and it was also stated by counsel that the proper parties to such application for mandamus would enter their appearance in this court. We have considered this suggestion with the desire to accommodate the parties to this litigation with a speedy hearing and determination by this court of the questions involved therein. But the petition for a writ of mandamus is an action so different from an appeal from the order of a judge dismissing a petition for certiorari that we do not think that this can be done. The proper and orderly procedure of this court requires that the matters presented for its hearing and determination should not be by oral suggestion but

by written pleadings. The facts upon which a party relies to obtain relief from the highest court in the State should not rest upon oral statements, but must be presented in a proper written manner. A different holding would result in possible confusion and uncertainty as to the allegations of the parties and the issues presented. Nor can one action be converted into another. Each action must rest upon the pleadings which in the orderly presentation thereof are applicable thereto. It would result in confusion and uncertainty to determine one class of action upon the presentation of a different class. We do not think therefore that the appeal here presented can or should be converted into or considered in the nature of an application for a writ of mandamus against the circuit court.

The appeal is dismissed.

TAYLOR v. LEONARD.

Opinion delivered February 28, 1910.

1. OVERDUE TAX SALE—FAILURE TO ENTER WARNING ORDER.—An overdue tax sale of land is void where the clerk failed to enter the warning order on the record, as required by Acts 1881, p. 65. (Page 126.)
2. LACHES—WHEN A DEFENSE.—Laches cannot grant an investiture of title, as the statute of limitation does, but is a defense which can be interposed only in equity and against claims for purely equitable relief. (Page 126.)
3. TAXATION—CONSTRUCTIVE. ADVERSE POSSESSION—PERSONS UNDER DISABILITY.—The act of March 18, 1899, relating to constructive possession by paying taxes on unimproved and uninclosed land (Kirby's Digest, § 5057), must be construed in connection with the general statute relating to adverse possession (Kirby's Digest, § 5056), so that it will not run as to persons under disability as defined in section 5056. (Page 127.)
4. ADVERSE POSSESSION—PAYMENT OF TAXES.—Under the act of March 18, 1899, providing that unimproved lands shall be deemed in possession of the person paying the taxes under color of title, but that no person shall be entitled to the benefit of the act unless he or those under whom he claims shall have paid the taxes for at least seven years, and not less than three of such payments must be made subsequent to the passage of the act, *held* that the first payment of taxes to put the statute of limitations in motion could not have been for a year earlier than 1894, and the earliest time at which constructive possession began could not have been prior to April 10, 1894. (Page 129.)

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

Wm. H. Carroll, K. D. McKellar, W. A. Percy, and *Allen Hughes,* for appellant.

1. Appellees are barred by laches (72 Ark. 101; 81 *Id.* 352; 81 *Id.* 432) notwithstanding their disabilities. 55 *Id.* 85; 64 *Id.* 345.

2. Appellees are barred by limitation. Act March 18, 1899; 74 Ark. 302; 78 *Id.* 95.

3. The seven years must be reckoned backward from April 10, 1901. 83 Ark. 154; 89 *Id.* 300. Under the testimony, Marcus L. Smith was living at the beginning of this seven-year period, or on April 10, 1894; and no subsequent disability could stop the running of the statute. 10 Ark. 580; 31 *Id.* 364.

4. The fact that Marcus Smith died before the passage of the act of 1899 does not prevent it from running as to him.

Crawford & Hooker, for appellees.

1. The tax sale under which appellant claims is void. 55 Ark. 30; 70 *Id.* 207; 82 *Id.* 294; 83 *Id.* 234. He therefore acquired no rights whatever until after the passage of the act of 1899; and in support of the assertion of these rights, which are purely legal, the doctrine of laches is not available. 16 Cyc. 154, n. 43; 70 Ark. 371; 67 *Id.* 320; 75 *Id.* 194; 70 *Id.* 256; 50 *Id.* 390; 45 *Id.* 81; 2 Pomeroy, Eq. Jur. (2 ed.), § 817; Bispham, Eq. § 40; 88 Ark. 395.

2. The act of 1899 (Kirby's Dig., § 5057) is not in itself a statute of limitation, but must be read in connection with § 5056 to obtain vital force. The proviso in the latter section as to those under disabilities must therefore apply to § 5057 as well. 74 Ark. 303; 83 *Id.* 154.

3. The evidence shows that Marcus Smith died prior to April 10, 1894, viz., on February 14, 1894. Appellees were therefore owners of this land on April 10, 1894, and, being under disabilities at that time, the statute did not run. 74 Ark. 303.

4. Marcus Smith having died prior to the passage of the act, it could not be held to affect his rights, if it be conceded that he died subsequent to April 10, 1894, as contended by appellant.

FRAUENTHAL, J. This was an action instituted by the petitioner below, Horace F. Taylor, to confirm his title to certain land under the act of March 28, 1899. In his petition he alleged that the land was sold for taxes under a decree of the chancery court in pursuance of proceedings had under the overdue tax act of 1881, and that G. W. Sappington, trustee, became the purchaser thereof at said tax sale and obtained a deed from the commissioner of said court; and that he derived title to the land by mesne conveyances from said purchaser. He also alleged that the land was wild, unimproved and unoccupied; and that he and his grantors had paid the taxes thereon for more than seven consecutive years.

The appellees and others intervened in said action, and were made defendants therein. They claimed to be the legal owners of the land, and deraigned title thereto through grantors who had obtained the land from the United States government. They alleged that the tax sale under which the petitioner claimed title was illegal and void, and pleaded coverture of certain of the defendants and minority of others against any alleged rights of petitioner. They also asked by way of cross complaint that the said tax deed be canceled, and their title to the land quieted. By way of answer to this cross complaint the petitioner pleaded laches against the claim of defendants to the land, and also pleaded title by adverse possession.

The petitioner introduced a deed executed in 1886 to G. W. Sappington, trustee, by the commissioner of said chancery court in pursuance of a decree ordering the sale of said land made under the overdue tax act of 1881, and also deeds showing an unbroken chain of mesne conveyances from said Sappington, trustee, to petitioner. He also introduced tax receipts, showing the payment of taxes on the land by him and his grantors continuously for each year from 1886 to the filing of his petition in 1908.

The defendants proved a deraignment of title to said land as follows: (1). A patent from the United States to the State of Arkansas in 1853. (2). A patent from the State of Arkansas to James Smith in 1856. (3). A deed from James Smith to Marcus L. Smith in March, 1858. (4). That Marcus L. Smith died intestate in Alabama in 1884, leaving him surviving as his heirs the defendants, Beatrice Leonard, M. L. Smith, Edward

J. Smith, Nora V. Robinson and Eugene Smith, who are his children, and Warren F. Smith, Jr., and Edith Smith, who are his grandchildren. These two grandchildren are the children and only heirs of Warren F. Smith, Sr., who died intestate on February 4, 1894, and who was a son of said Marcus L. Smith. The two grandchildren are minors, having been born in 1889 and 1892 respectively, and the defendants Beatrice C. Leonard and Nora V. Robinson were married, respectively, in 1872 and 1892 and have been *feme coverts* continuously since those dates. There is a conflict in the testimony as to the date of the death of Marcus L. Smith. We are of the opinion that there is sufficient evidence showing that he died on February 14, 1894. That was the finding of the chancellor, and we think that finding of fact should not be disturbed.

By stipulation of counsel it was agreed:

"(1). The overdue tax sale in Desha County, under which the petitioner claims north half north half, 27-9-3, is void as to that tract, because no warning order was put of record."

"(3). The cross complaints are considered as amended to conform to the evidence with reference to disabilities of any intervener."

"(4). All of the land involved in both these proceedings to confirm is wild and unoccupied."

"(7). The title to the north half north half, 27-9-3, passed from the United States to the State of Arkansas under the act of September 28, 1850, by selection, approval, and patent issued thereunder."

"(9). That the interveners, Edward J. Smith, Eugene S. Smith, Beatrice C. Leonard, Nora V. Robinson, Warren F. Smith and Edith Smith, are nonresidents, and did not know of their claim to the land in controversy until within a year of the commencement of this action."

The chancery court rendered a decree confirming the petitioner's title to one-half interest in the land and quieting the title of the following defendants, Beatrice C. Leonard, Nora V. Robinson, Warren F. Smith, Jr., and Edith Smith, as to the other half interest; and giving to the petitioner a lien on that one-half interest for the taxes that had been paid by him and those under whom he claims. From that decree the petitioner prosecutes this appeal.

The land in controversy was sold under a decree of the chancery court for the nonpayment of taxes. That suit was instituted under and in pursuance of the overdue tax act of 1881. Upon the filing of the complaint in that suit the clerk failed to enter the warning order on the record as required by the provisions of that act; and therefore the court acquired no jurisdiction in the alleged tax suit, and the proceedings thereunder were absolutely void. It follows that the tax sale and the commissioner's deed executed to Sappington, trustee, under which the appellant claims title to the land, are void. *Gregory* v. *Bartlett,* 55 Ark. 30; *Pope* v. *Campbell,* 70 Ark. 207; *Foohs* v. *Bilby,* 83 Ark. 234.

The appellant urges that he and his grantors have paid the taxes on the land for more than seven years, during all of which time it has been wild, unimproved and unoccupied, and that in the meantime it has greatly enhanced in value. He contends that on this account the rights of defendants to the land are barred by laches. We do not think that it is necessary for us to determine whether or not the evidence shows that this land has greatly increased in value during the time that appellant and those under whom he claims have been paying taxes thereon. The doctrine of laches is not applicable to this action in which the appellant is endeavoring to establish a title to the land; nor can it be interposed against the defense of a legal title set up by the defendants. Laches cannot grant an investiture of title like limitation, but it is purely a defense which can be interposed in a court of equity against claims for purely equitable remedies. In the case at bar the appellant instituted this suit to establish his title to the land in a court of equity. In that court he required the defendants to appear and assert their claim. The claim of the defendants is founded on a "strictly legal title," and this claim they had a right to interpose as a defense to the proceeding instituted by appellant. The defendants do not assert an equitable right, nor did they in the first instance seek to obtain an equitable remedy. They set up a legal title. The doctrine of laches does not apply to a case where one is seeking to enforce a legal title, and where the right to assert that title is not barred by the statute of limitation. In the case of *Rowland* v. *McGuire,* 67 Ark. 320, it is said: "The right to plead such facts (laches) as a defense is subject to the important

limitation that it is confined to claims for purely equitable remedies, to which the party seeking to enforce them has no strict legal right." In the case of *McFarlane* v. *Grober*, 70 Ark. 371, it is said: "The doctrine of laches, invoked by the defendant, does not apply to a case where the plaintiff is not asking any equitable relief, but seeks only to enforce a plain legal title in a court of law, and where her action is not barred by the statute of limitation in reference thereto." And this principle is equally applicable in a case where a defendant interposes his legal title in a court of equity as a defense against one seeking to establish title to the land. In the case of *Chatfield* v. *Iowa & Ark. Land Co.*, 88 Ark. 395, the appellant brought suit in equity to quiet title to land founded upon a tax sale. The appellee alleged that the tax sale was void, and interposed a legal title as a defense, and also by cross complaint asked that its title to the land be quieted. In that case this court, speaking through Mr. Justice BATTLE, says: "But appellant says appellee lost its right to the land by laches. Laches is an equitable defense, and the theory upon which it is sustained in equity is 'that nothing can call a court of equity into activity but conscience, good faith and reasonable diligence; where these are wanting, the court is passive, and does nothing.' In this case the appellant has brought a suit to quiet title, and is indirectly seeking to use it for the purpose of establishing title. * * * It could not avail him as a defense to the cross complaint; for if it was dismissed he would have to sustain his complaint by proof of its allegations before he could prevail in this suit. Appellee is the owner of the lands. The lands are wild and unoccupied. They are in the constructive possession of the appellee. Appellant has acquired no title to them. There is no duty nor necessity for resorting to legal or equitable remedies to establish its right till some one threatens to destroy or impair it; and that he has done in this case. See *Penrose* v. *Doherty*, 70 Ark. 256."

It is contended by appellant that the appellees are barred by limitation under the act of March 18, 1899, which reads as follows: "Unimproved and uninclosed land shall be deemed and held to be in possession of the person who pays the taxes thereon if he have color of title thereto, but no person shall be entitled to invoke the benefit of this act unless he and those

under whom he claims shall have paid the taxes for at least seven years in succession, and not less than three of such payments must be made subsequent to the passage of this act."

This statute in itself is not a statute of limitation. It only declares that the land shall be deemed to be in the possession of the person paying taxes thereon under color of title. It only makes the payment of taxes under the conditions named in the act a constructive possession; and it is only by applying thereto the general statute of limitation contained in section 5056 of Kirby's Digest that such possession, like actual possession, can ripen into title by limitation. In order to make effective this act as a statute of limitation, it must be considered in connection with and a part of section 5056 of Kirby's Digest, so that, in addition to the actual adverse possession required by that section, the constructive adverse possession declared by this act may also result in a complete bar by limitation. And, in becoming thus a part of section 5056 of Kirby's Digest, the provisos of that section relative to those laboring under disabilities apply also to this act. This has been the construction placed upon the act in the case of *Towson* v. *Denson,* 74 Ark. 303. In that case we said:

"When the purchaser has paid taxes for seven successive years, as required by the act of March 18, he thereby becomes a possessor for seven years and the holder of a title, to the extent that seven years actual possession under statutes previously in force gave a title, provided that the conditions as to color of title properly obtained, and no fraud or overreaching had been practiced, or other improper act had been done. And the effect of this will be to extend to cases arising under the act of March 18, 1899, the provisions of the provisos of section 5056 of Kirby's Digest." See also *Updegraff* v. *Marked Tree Lumber Co.,* 83 Ark. 154.

So that if at the time the constructive adverse possession by the payment of taxes began under the act of March 18, 1899, the land was owned by those laboring under any of the disabilities mentioned in said section 5056 of Kirby's Digest, the statute bar of limitation as to them would not become complete until three years next after such disability shall have been removed. Under that act it is provided that payment of the taxes for at least seven

years in succession must be made, and three of these payments must be subsequent to 1899, the time of the passage of the act. In this case, therefore, it became necessary for appellant or his grantors to have paid the taxes on the land for four years in succession next prior to the passage of the act to constitute the full seven successive years required by this act in order to make the limitation complete. The first payment of taxes, therefore, required to have been made could not have been for a year earlier than 1894; and the earliest date at which the constructive possession began so as to put in motion the statute of limitation under this act could not have been prior to April 10, 1894. *Sibly* v. *England,* 90 Ark. 420.

Under the evidence in this case Marcus L. Smith died on February 14, 1894, and the appellees became then the owners of an undivided one-half interest in the land. At that time and continuously since then these appellees have been under the disabilities of coverture and minority. On April 10, 1894, when the statute of limitation was first put in motion, these appellees were the owners of said interest in the land, and the statute of seven years constructive adverse possession did not run against them, on account of their coverture and minority. This is decisive of this case.

Counsel for appellees also contend that the act of March 18, 1899, cannot be a bar to the rights of appellees for the reason that they owned the land at the time of the passage of this act, and at that time were laboring under the disabilities mentioned in the provisos of section 5056 of Kirby's Digest; that on this account the act should not be held to be retroactive as to them, even if Marcus L. Smith had died after April 10, 1894, inasmuch as it is conceded that he died prior to the date of the passage of this act. In the case *Towson* v. *Denson, supra,* it was held that the act was retroactive; but in the same connection it was said: "And, as a reasonable time was allowed after the act was passed in which an interested party could prevent the consequences of the act falling upon him, there is no objection to the act upon the ground that it deprives the appellant herein of any vested right." In that case the parties were *sui juris* at the time of the passage of the act. That case does not determine, therefore, the question as to whether the payment of taxes under the act of March 18, 1899, can relate back for

any period prior to the passage of that act in event the land at the time of its passage was owned by persons laboring under said disabilities. We do not deem it necessary to pass on that question in this case. We only note this contention, so that it may not be implied that we have passed upon that question in this case.

The decree is affirmed.

BRADLEY GIN COMPANY v. J. L. MEANS MACHINERY COMPANY, LIMITED.

Opinion delivered February 28, 1910.

1. EVIDENCE—CONTRADICTING WRITING BY PAROL.—Parol evidence is not admissible to contradict or to vary or add to any of the terms of a written contract. (Page 132.)
2. SAME—THING OMITTED FROM WRITING.—The law can not incorporate into an instrument what the parties left out, even though the omission was by the clearest mistake, unless the thing omitted is necessarily implied from that which is expressed. (Page 133.)

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

Warren & Smith, for appellant.

The court erred in sustaining a demurrer to the third paragraph of the answer. 56 Ark. 450; 60 Ark. 387; 4 L. R. A. 202, and cases there cited. Appellee waived all requirements of notice by abandoning the machinery without setting it up. 1 L. R. A. (N. S.) 142; 81 S. W. 663; 85 S. W. 690.

Searcy & Parks, for appellee.

The contract did not contemplate the recovery of special damages, and the demurrer was properly sustained. 64 Ark. 510; 72 Ark. 275; 48 Pa. St. 309; 190 U. S. 540. Moreover, the damages alleged were too remote. 83 Ark. 47.

FRAUENTHAL, J. This was a replevin suit instituted by the plaintiff below, J. L. Means Machinery Company, Ltd., against the Bradley Gin Company, to recover possession of certain gin machinery. On June 16, 1906, the plaintiff sold and

delivered to the defendant the gin machinery involved in this suit under a written contract; and for the purchase money the defendant executed three notes. In these notes it is expressly provided that the title to said machinery was retained in the plaintiff until the payment of the notes. The written contract of sale, amongst other clauses, contained the following provisions:

"SERVICES OF MEN.

"It is hereby expressly understood that if the J. L. Means Machinery Company, Ltd., furnish a man to superintend the erection of above machinery, or should.....need the services of a man for any purpose from the factory, I agree to pay to the said J. L. Means Machinery Company, Ltd., the sum of $4.00 per day, and board their men while at work on the job, and also to pay his railroad fare to and from Shreveport, La., to place of erection of above machinery. I also agree to furnish all material for erection of said machinery not stipulated in this contract, and to furnish said superintendent with all help he may demand to erect above-named machinery with dispatch.

* * * * * * * * * * *

"The purchaser agrees to properly put up and operate the machinery according to the printed directions furnished by the manufacturers, and that if the fault be traceable to not putting up or operating according to printed directions purchaser agrees to pay all expenses incurred in rectifying it.

* * * * * * * * * * *

"We, the undersigned, hereby certify that the foregoing contract is an exact copy of the agreement between us, and that the plans and specifications are accepted by both parties to this contract.

"It is distinctly understood between us that no agreement, verbal or otherwise, will be recognized unless specified in this contract, which includes warranty on back hereof."

Upon the trial of the case the written contract and notes were introduced in evidence.

The defendant paid the first maturing note, and upon its failure to pay the other two notes after their maturity the plaintiff instituted this suit.

The defendant in its answer alleged as a defense and on the trial of the case offered evidence to prove the following:

That the machinery was sold to defendant for the price of $1,931.35; that it was purchased for the purpose of ginning cotton of the crop of 1906, and sold by plaintiff for that purpose; that at the time of the purchase the defendant was not familiar with the manner of erecting the machinery for the purpose of operation, and the plaintiff at the time of entering into the contract agreed to furnish a man from its factory to superintend the erection of the machinery; that, in pursuance of said agreement and understanding, the defendant relied upon plaintiff to furnish the man to superintend the erection of the machinery, which was known to the plaintiff. That plaintiff failed to furnish a man to erect the machinery, and by such failure the defendant was unable to put the machinery in operation for the season of 1906; and thereby it sustained damages in the sum of $2,000. And it asked in its answer that the pleading be taken as a cross-complaint, and that it have judgment for said damages.

The court refused to permit the introduction of said evidence, and sustained a demurrer to the paragraph of the answer setting up the above defense. A judgment was rendered in favor of the plaintiff for the recovery of the property or its value; from which judgment the defendant prosecutes this appeal.

The sole question involved in this case is whether or not the parol evidence offered by defendant that the plaintiff had agreed to furnish a man to erect the machinery was admissible; for, if that evidence was not admissible, then the allegations of the answer setting up that defense would not be sustained by any proof, and the defendant could not succeed in this suit. So that the ruling of the court sustaining the demurrer to the paragraph of the answer setting up that defense could not in any event be prejudicial to the defendant if such evidence offered by him was not admissible. The contract under which the defendant purchased the machinery was in writing, duly executed by both parties. It is conceded that no contract was made thereafter by the parties relative to this property. It is well settled that parol evidence is not admissible to contradict or to vary or to add to any of the terms of a written contract. *Roane* v. *Greene,* 24 Ark. 210; *Woodruff* v. *Tilly,* 25 Ark. 339; *Turner* v. *Baker,* 30 Ark. 186; *Anderson* v. *Wainwright,* 67 Ark. 62;

Lower v. *Hickman,* 80 Ark. 507; *Soudan Planting Co.* v. *Stevenson,* 83 Ark. 163; *Dalhoff Const. Co.* v. *Maurice,* 86 Ark. 162; *Boston Store* v. *Schleuter,* 88 Ark. 213; 1 Greenleaf on Evidence, § 275.

The rights and obligations of these parties must therefore be determined solely by the provisions of this written contract. No promise and no understanding which the language of the written instrument does not itself import can be proved by parol evidence. If the plain and reasonable construction of the language of this written instrument does not show a promise or obligation upon the part of the plaintiff to furnish a man to erect the machinery, then parol evidence is not admissible to add to or engraft upon this written contract such a promise or obligation.

The provision of the contract relative to the "services of men" states in substance that if the plaintiff should furnish a man to superintend the erection of the machinery then and in that event the defendant would pay four dollars per day for the services of such man, in addition to his board. The plain meaning of this language is that the defendant would make certain payments for the services if the plaintiff should see fit to furnish a man; and it cannot be said that by this language the plaintiff did agree and promise to furnish a man to erect the machinery. It is true that necessary implication is as much a part of a written instrument as if that which is thus necessarily implied from the express terms was actually expressed in the instrument. But where there is simply an omission of some term or agreement in the instrument, such omission cannot be supplied by parol evidence. The rule of necessary implication in a written contract is thus stated in the case of *Hudson Canal Co.* v. *Penn. Coal Co.,* 8 Wall. 276: "Where the act to be done by one of the contracting parties can only be done upon something of a corresponding character being done by the opposite party, the law in such a case, if the contract is so framed that it binds the party contracting to do the act, will imply a correlative obligation on the part of the other party to enable the party so contracting to accomplish his undertaking and fulfil his contract." But, as is said in the same case, the law cannot incorporate into an instrument what the parties left out of it, even though the omission was occasioned by the clearest mis-

take; and where the language to express an obligation or binding promise is wanting in the instrument, courts will not imply one.

By the above language of the contract in this case the plaintiff did not agree or obligate itself to furnish a man to erect the machinery. On the contrary, the contract provided that the defendant would only pay for his services in the event that the plaintiff should furnish the man. There was no act to be done by the defendant, and no obligation resting on it if the plaintiff did not furnish the man. In fact, from the language of the instrument it would be inferred that it was not necessary for the plaintiff to furnish a man. The statement that payment for services would be made only in event the plaintiff should furnish a man would imply that the plaintiff might not and would not furnish a man. This inference is further sustained by the other clause of the instrument wherein the defendant agreed to properly put up and operate the machinery according to the printed directions and plans that were furnished. It fully carries out the implication that defendant should either erect the machinery himself or secure a man to do so, and if he secured the man from plaintiff it would pay for his services, in addition to the price it was paying for the machinery.

It follows that the plaintiff did not by the written contract agree, either in express words or by necessary implication, to furnish a man to erect the machinery. Such a promise and agreement would add to the terms of the written contract an obligation not therein contained, and parol evidence of such a promise would therefore contravene the well established rule that parol evidence is not admissible to add to or vary a written contract.

The court did not err in refusing to admit the introduction of parol evidence of such a promise or agreement.

The judgment is affirmed.

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

Opinion delivered February 28, 1910.

1. EMINENT DOMAIN—DAMAGES.—Where land is taken by a railroad company under the power of eminent domain, the measure of the owner's damages is the market value of the land actually taken and the depreciation of the market value of the remaining portion, without deducting the benefits that may accrue to the land by reason of construction of the railroad. (Page 137.)
2. SAME—HOW MARKET VALUE DETERMINED.—In determining the market value of land taken or damaged under the power of eminent domain the fact that the land is suburban property and available for town lots may be considered. (Page 137.)
3. SAME—EVIDENCE.—In determining the value of land taken under the power of eminent domain it is not error to permit witnesses to testify relative to the value of other and similar lands in the neighborhood, with explanations to show the difference between the market value of such lands. (Page 140.)

Appeal from Independence Circuit Court; *Charles Coffin,* Judge; affirmed.

W. E. Hemingway, E. B. Kinsworthy, S. D. Campbell, and *Jas. H. Stevenson,* for appellant.

1. The court did not properly instruct the jury as to the true measure of damages. 39 Ark. 167; 41 *Id.* 431; 2 Lewis, Em. Dom. § § 686, 689, 693. And the judgment is excessive.

2. Testimony as to the selling price of other lands, not similarly situated, was improperly admitted.

Oldfield & Cole, for appellee.

1. The tract in question having been platted into lots and blocks, and the free use of the streets dedicated to the use of the public, it was in fact an addition to the city of Batesville. 77 Ark. 177; 77 *Id.* 221; 9 Am. & Eng. Enc. Law 57, 59; 13 Cyc. 455 *et seq.* And appellee was therefore entitled to recover upon the basis of its value for such purposes. 41 Ark. 202; 49 *Id.* 381; 59 Wis. 364; 83 S. W. 584; 30 N. E. 298; 25 Atl. 635; 70 N. W. 162; 54 N. W. 557; 94 Pac. 259, s. c. 15 L. R. A. (N. S.) 676; 98 U. S. 403. The jury were properly instructed, therefore, as to the true measure of damages. Art.

12, § 9, Constitution; Kirby's Dig., § 2953; 39 Ark. 167; 44 *Id.* 258.

2. The testimony as to the selling price of similar lands in the immediate neighborhood was admissible. 49 Ark. 381; 18 N. W. 328; 3 N. W. 42; 1 Wigmore, Evidence, § 463 and note.

FRAUENTHAL, J. This was an action instituted by the appellant, a railroad corporation, for the condemnation of a right-of-way over certain land owned by the appellee and for the assessment of the damages thereto. The sole question involved in the case is as to the amount of the damages which the appellee should recover. The appellee owned a tract of land adjacent to the city of Batesville, and in 1899 it laid same out into lots and blocks as an addition to said city with the purpose of having it regularly annexed to said city at some future time; but it has never been so annexed. In September, 1899, it filed for record in the recorder's office of the county a deed of assurance to which was attached a plat of said addition, on which were indicated the various lots and blocks and also streets, the free use of which was granted to the public by said deed. Sometime after this, and long before the institution of this condemnation proceeding, it sold four of said lots by reference to said plat. The entire tract was enclosed, and portions of it had been cultivated by the appellee up to the date of these proceedings. The right-of-way varied in width, but it extended substantially one hundred feet in width across the entire tract. It extended across the lower portion of four blocks of the land, as same is now laid out and designated on said plat. The appellee alleged that the appellant took and appropriated for its right-of-way 23 of the lots, as indicated on said plat, which were of the value of $2,875, and that the construction of the railroad depreciated the value of the remaining land to the extent of $2,500; and it asked for judgment for its damages in the sum of $5,375. The appellant made a deposit and tender of $1,000, which it claimed was a full and fair assessment of the damages. The cause was tried by a jury, who, in addition to hearing a number of witnesses as to the value of the land, viewed the same.

A verdict was returned in favor of appellee for $2,325; and from the judgment rendered thereon the railroad company prosecutes this appeal.

The measure of the compensation which an owner is entitled to recover from a railroad corporation, which takes a portion of his land under the right of eminent domain for the construction of its railroad, is the market value of the land actually taken and the depreciation of the market value of the remaining portion. The chief question involved in this case is whether or not, in determining the value of the land, the fact can be taken into consideration that the land is suitable for division into lots and blocks and an addition to the adjacent city; and whether or not the witnesses can take into consideration the value of such lots and blocks in arriving at their opinion as to the market value of the land. It is contended by the appellant that the land, although thus laid out on the plat in lots and blocks, was actually enclosed and cultivated as a farm; and while one or two streets had been opened up along the sides of the tract, the streets were not actually opened up through the tract, and the lots were not actually at the institution of the suit indicated on the land; and it urges that the value of the lots as laid out on the plat should not be considered in arriving at the value of the tract of land. But the measure of the damages which the owner is entitled to recover for property taken for public use or depreciated by such use is the market value of it. This market value is determined, not solely by the uses to which the property has been put or is put at the time of the condemnation proceeding, but by all the purposes to which it is adapted. It may not be used at the time for any purpose that is profitable, but the use to which it may reasonably and probably be put profitably must necessarily be taken into consideration in determining the market value of the land.

In the case of *Little Rock & F. S. Ry. Co.* v. *McGehee,* 41 Ark. 202, this court quotes with approval the following language from the case of *Boom Company* v. *Patterson,* 98 U. S. 403: "In determining the value of land appropriated for public purposes the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability

for valuable uses? * * As a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future." In speaking of the character of testimony that is admissible in arriving at the value of land taken under condemnation proceedings, this court in *Little Rock Junction Ry.* v. *Woodruff,* 49 Ark. 381, said: "As a general guide to the range which the testimony should be allowed to assume, we think it safe to say that the land owner should be allowed to state, and have his witnesses to state, every fact concerning the property which he would naturally be disposed to adduce in order to place it in an advantageous light, if he were attempting to negotiate a sale of it to a private individual." The land involved in this proceeding was adjacent to the city of Batesville, and was available as an addition to that city, and was adaptable for being laid out into lots and blocks. Its proximity to a growing city and its availability for residence or business lots gave it an enhanced market value; and we think that its value, when divided into lots and blocks, might be taken into consideration in arriving at the market value of the land. This is in effect the value of the land for town lot purposes. In the case of *Sherman* v. *St Paul, M. & M. Ry. Co.,* 30 Minn. 227, that court says: "The evidence shows that the 80-acre tract in controversy, though at the time occupied as a farm, was situated in the vicinity of St. Paul, and near certain public institutions. It appeared, on the cross examination of witnesses, that, in forming their estimates of the market value of the land, they had considered its adaptability for suburban residences. If such fact affected its market value at the time in question, it would properly enter into consideration of the witnesses and the jury also in estimating such value." In the case of *Cincinnati & S. Ry. Co.* v. *Longworth,* 30 Ohio St. 108, the following language is used: "In offering testimony on this issue, the owner was not limited to any pre-existing use of the land. If it was of little value as a farm, or for common uses, and was of great value as mineral land or as a town site, that fact might be shown, though it had never been so used." In the case of *Montana Ry. Co.* v. *Warren,* 6 Mont. 275, it is said: "Respondent was allowed to

prove the value of the land for town lot purposes. He had the right to do so, whether he had built upon it or not. As we have seen, the question is not to what use the land had been put. The owner has a right to obtain the market value of the land, based upon its availability for the most valuable purposes for which it can be used, whether or not he so used it."

In the case of *Washburn* v. *Milwaukee & L. W. Rd. Co.*, 59 Wis. 364, it is said: "In the Washburn case the learned circuit judge instructed the jury, in substance, that if the present value of the lands taken was enhanced by reason of the adaptability thereof to some use to which they might be put in the future—as, for example, if land used only for farming purposes was so situated that it might be platted into city lots, and if its present value was thereby increased, such increased value was the proper basis for the assessment. We think this is a correct rule."

See also *South Park Commissioners* v. *Dunlevy*, 91 Ill. 49; *Hooker* v. *Montpelier & W. River Rd. Co.*, 62 Vt. 47; *Somerville & Easton Rd. Co.* v. *Doughty*, 22 N. J. L. 495; *Dickenson* v. *Fitchburg*, 13 Gray, 546; *Missouri, K. & T. Ry. Co.* v. *Roe*, 15 L. R. A. (N. S.) 679.

In the case at bar we are of opinion that the witnesses, in estimating the market value of the tract of land that was appropriated for the right-of-way, could take into consideration its value for the purposes of town lots, and that they and the jury could fix the value thereof upon that basis of the market value of such lots. And in like manner they could estimate the depreciation of the market value of the remainder of the tract of land. The compensation which the owner is entitled to receive from a railroad corporation exercising its right of eminent domain in condemning his property includes not only the value of the part taken but the diminished value of the residue. The damage or injury to the remainder of the land on account of the construction of the railroad is in effect the actual taking of that much of the remainder of the land, for the diminished market value of which the owner is entitled to full compensation. *St. Louis, Ark. & Tex. Rd. Co.* v. *Anderson*, 39 Ark. 167; *Little Rock, M. & T. R. Co.* v. *Allen*, 41 Ark. 431.

It is urged by appellant that, inasmuch as in this case

appellee is seeking compensation not only for the strip of land actually taken, but also damages to the rest of the land, the benefits that may accrue by reason of the construction of the railroad should be considered to offset the benefits against the damages to the residue of the land. But the appellee is seeking compensation for all his property that is appropriated by the railroad corporation in the condemnation of that property for its right-of-way. The property thus appropriated is the property that is actually affected. It includes the property actually occupied by the right-of-way and the property that is in effect, though indirectly, taken by reason of the diminution of its value. The Constitution (article 12, § 9) and the statute (Kirby's Digest, § 2953) provides that the amount of damages to be assessed to the owner of lands in such condemnation proceedings shall be determined and assessed irrespective of any benefits that may be received from the improvement.

In the case of *Little Rock & F. S. Ry. Co.* v. *Allister,* 68 Ark. 600, it is said: "It follows, from the rule firmly established by these decisions, that the damages, which the statute says 'shall be determined and assessed irrespective of any benefit' the owner may receive from the road, include not only those for the land actually taken but all incidental damages to the remainder of the tract as well. The statute makes no distinction between damages for value of land taken and damages to remainder of tract, but declares that the amount of damages to be paid the owner shall be determined and assessed without regard to benefits." In the case at bar, therefore, the appellant is not entitled to diminish the damages that arise by reason of the land actually taken or to the residue of the land by any benefits received by the appellee on account of the construction of the railroad.

Complaint is made that the lower court permitted certain witnesses to testify relative to the value of certain lands in the neighborhood of these lands. The testimony thus admitted related to lands similar to the lands included in this suit, or with explanations sufficient to show the difference between the market value of such lands. This evidence was admissible by way of comparison, in order to show the market value of the lands involved in this litigation, and we find no prejudicial error in permitting the introduction of any of the testimony.

Complaint is also made of some remarks of counsel for appellee in his argument to the jury; but on examination of those remarks we find nothing that in our opinion gave any undue advantage to appellee; and therefore the argument was not prejudicial.

We have carefully examined the testimony in this case, the instructions given and the instructions refused, and we have found no error in the trial of the case that was prejudicial.

There was sufficient evidence to sustain the verdict of the jury in the amount of the damages which they assessed.

The judgment is affirmed.

ALLEN v. DANIEL.

Opinion delivered March 7, 1910.

1. ADVERSE POSSESSION—CONSTRUCTIVE NOTICE FROM POSSESSION.—As against a subsequent grantee whose deed has been duly recorded, no mere constructive possession of a prior or even rightful claimant, consisting only of an original act of taking actual possession, followed by a leaving of the premises vacant, can amount to constructive notice from possession. (Page 145.)
2. SALE OF LAND—INNOCENT PURCHASER.—One who purchases land *pendente lite* and with full notice of his adversary's title is not an innocent purchaser. (Page 146.)

Appeal from Lee Chancery Court; *Edward D. Robertson*, Chancellor; reversed.

STATEMENT BY THE COURT.

On the 31st day of March appellant brought suit against appellee in the Lee Chancery Court, alleging that he, appellant, was the owner of the land in controversy by deed from Rosa Isaacs, and that he was then in possession of same, that appellee claimed to own the land under a deed of the Commissioner of State Lands which was void for reasons stated that are unnecessary to set forth. Appellant tendered the amount paid by appellee for the land, and prayed that appellee's deed be canceled and appellant's title quieted. On May 19, 1908, appellee answered the complaint, denying that appellant was the owner

of the land in controversy, denying that the lands were contained in the deed from Isaacs to appellant, denying that the lands were forfeited to the State for the nonpayment of taxes, and setting up title in himself, appellee, through Scott Congress, who obtained deed from M. and Rosa Isaacs January 1, 1891. Appellant replied to the answer, alleging that neither of the two deeds by which defendant claims title were of record, denied the execution of said deeds, alleged that he had no notice of any adverse claims in the property, alleged that he paid a valuable consideration for said lands, and prayed that he be adjudged a purchaser for value without notice, and the title quieted in him.

The appellee at the hearing admitted the invalidity of the tax title, and claimed only under the deed from Congress. The testimony of appellant is as follows:

That in 1900 he entered into a contract of purchase with M. Isaacs for the property described herein, went into possession thereof, and made five payments under the contract to Isaacs; that Isaacs assigned the purchase notes to defendant, who afterwards brought suit against him thereon; that Mr. Lesser, his merchant, took up the notes from Daniels, and the suit was dismissed, and he received his deed as per the contract; that at the date he entered into the contract with Isaacs for the purchase of the property it was vacant, Congress having moved off prior to that date; that he had a talk with Congress regarding his claim or ownership of the property, and Congress told him he had nothing to do with it; that he had been in the absolute, open, continued and notorious, adverse possession of the property from that date until the present time; that no demand had been made against him by any one until after he had brought this action. The deed from Rosa Isaacs to appellant executed in pursuance of the contract for the purchase of the land bears date May 20, 1907. The description by metes and bounds is of a tract of land containing forty acres more or less, and the lot in controversy is included in the tract conveyed.

Witness Scott Congress testified December 12, 1908. His testimony and the deed from Isaacs shows that he bought the lot in controversy January 1, 1891. In his testimony he says that he lived on the place five or six years after he got his

deed from Isaacs. He repeats this several times. But he also says that he "moved off the place about six years ago;" that he could run it down and get the year he moved off the place. He lived with a Mr. Lindsay two years, and with Mr. Anglin about four years, which will make it six years. He was asked if he knew the year when he was testifying, and answered, "1907 or 1908." When asked if he remembered about John Allen buying some land from Isaacs about the time he, Scott, left the place, his reply was: "No, he was only renting it. He did not buy till I left." He made a cash payment on the land he bought from Isaacs, executed his notes for balance of the purchase money, paid part of them, and then gave the land up. He moved away, and left the lot vacant, did not make deed back to Isaacs, but told him he wanted to turn the property back, and would pay no more on the purchase price. He executed the deed to Daniels in the fall of 1908. Daniels had not paid him one cent for the land. He was asked if he had "any conversation with old man John Allen about this property, about who owned it, and replied: "He got after me before I left there and tried to get me to pay rent. I told him I was not going to pay rent, when I lived there. I said it was mine, and he had no business paying taxes, and it made me mad in that direction; neighbor living right there by me."

Witness M. Isaacs testified that he made, as the agent of his wife, a contract with John N. Allen, December 26, 1900, selling him certain lands, and that he sold Scott Congress a certain lot in January, 1891; that he did not intend to include the Scott Congress lot in the land sold to Allen, but that John Allen bought only what was under fence; that he had a survey made of the property sold Allen, made long before the termination of the rental contract; that the deed to Allen was made from this survey; that he intended to convey to Allen only the land under the fence, and that when the contract was made the survey was made around the fence; that Congress has never paid him over $20 or $25, and owes a balance of $100 at this date; that the property was vacant several years, and is not positive that Congress was occupying the property at the date of the contract with Allen; that he was not living in Haynes at the time; did not tell Allen that Congress had any claim

on the property; and would not remember anything of the transaction, had his memory not been refreshed.

In one place he testifies that Congress was living on the lot at the time he made the contract of sale with Allen, and again that Congress at that time was living there, and that the negroes were "spatting at each other," and were not on good terms. But he also says that he thought Scott Congress abandoned the property about 1899, that he left there about 11 years ago (he was testifying in May, 1909, which would make it the year he left, 1898), and was not there when he made the contract for the sale of the land to John Allen. He further testified that "if there was testimony in this case by Scott Congress and by John Allen that Scott was not living on this property in December, 1900, he would not say of his own certain knowledge that Scott was there."

Appellee testified that he knew Allen was claiming title to the property when he acquired the Congress title; that he had been served with summons in this action; that he had in 1907 sued Allen for the purchase money of the property described in the contract of Allen-Isaacs which had been assigned to him; that he had dismissed the suit on payment of the balance of the purchase money by Allen; that he knew that Congress had abandoned the property; and had never paid Congress for the property deeded to him May 4, 1908; that he thought Congress had been off the place only three or four years when he bought from the State November 21, 1906.

The court dismissed appellant's complaint, and quieted the title in appellee. Appellant duly prosecutes this appeal.

C. E. Daggett, for appellant.

The evidence clearly establishes the fact that Allen was a *bona fide* purchaser without notice. Even if Congress was in possession at the date of the contract, such possession served no other purpose than to put appellant on inquiry or notice of whatever title Congress had; and when appellant went to him and inquired as to his title, that was all that the law required of him. 2 Pom. Eq. Jur., § § 614-615; *Id.* § § 623-624. When appellant took his deed in 1907, the property had been vacant for over five years, with the original owner living in a half a mile of it and exercising no rights over it in any manner. At this

date, therefore, the premises being entirely unoccupied, appellant took without notice. 2 Pom. Eq. Jur., § 621. Congress and his grantee, Daniel, are estopped from asserting title. 2 Pom. Eq. Jur., § § 601, 607, 780, 804.

H. F. Roleson, for appellee.

The testimony fully sustains the chancellor's finding that Scott Congress was in possession of the lot at the time Allen made his contract of purchase with Mrs. Isaacs. This contract describes no certain tract of land, since it describes it only as the "middle part of east half northeast quarter, section 8 and part west half northwest quarter section 9, containing 40 acres more or less." The testimony shows conclusively that it was not intended to include the Congress lot, which was fenced off to itself, and was not a part of the field intended to be sold to Allen. If a mistake or fraud was committed in the procurement of the deed from Mrs. Isaacs to Allen, and it included the land not intended to be conveyed, Isaacs or any one claiming through him could in equity set up the fraud or mistake. 33 Ark. 119; 24 Am. & Eng. Enc. of L. 655.

WOOD, J., (after stating the facts). Appellant has the record title to the land in controversy. Appellee has an unrecorded deed to the land from the same source. The first question is, did appellant have notice at the time he purchased of appellee's title?

We are of the opinion that the clear preponderance of the evidence shows that he did not have such notice. The testimony of appellant is positive that at the time he purchased the lot from Isaacs Scott Congress, appellee's immediate vendor, had abandoned it. He said that at the date of his purchase, in a conversation with Congress, the latter "told me he had nothing to do with it," that "he had turned the property over to Mr. Isaacs," that "he had left it, had not paid for it, and had nothing to do with it." Again he says that at the time he made the contract with Isaacs he thought "Scott Congress had just moved off of it," and again, "from the time I took the contract from Mr. Isaacs not a soul ever touched it but me." Now, even if Scott Congress was on the lot at the time appellant made his contract of purchase, December 26, 1900, that fact could only have the effect to put appellant upon inquiry as to Congress'

rights. The fact is undisputed that he did make inquiry of Congress, and that Congress told him that he had given up the place. Furthermore, even if Congress was on the place when appellant contracted to buy the lot in 1900, the undisputed evidence is that at the time appellant procured his deed from Mr. Isaacs, in 1907, Congress had been away from the place at least five years, and, although living in a short distance from it, he had wholly abandoned it. These facts are established by Congress himself. "It seems to be a necessary conclusion from the unvarying line of decisions," says Mr. Pomeroy, "that, as against a subsequent grantee whose deed has been duly recorded, no mere constructive possession of a prior or even rightful claimant, consisting only of an original act of taking actual possession, followed by a leaving of the premises entirely vacant and unoccupied, can amount to the constructive notice from possession, as recognized by the American law," 2 Pom. Eq. Jur. § 621.

We are of the opinion that, even if Congress did occupy the premises at the time Allen made his contract to buy, the undisputed evidence warranted him in concluding, at the time the sale was consummated by payment of the last purchase money note and the execution of the deed to him, that Congress had abandoned the lot, "had given it up," and had no further interest therein. The undisputed evidence, in other words, shows that appellant did not have any actual notice of Congress' title. The deed of Isaacs to Congress being unrecorded, appellant, had no constructive notice. Therefore, as between Congress and appellant, the latter's title is perfect.

Appellee, according to his own and the undisputed evidence, purchased from Congress after the institution of this suit by appellant, and of course with full notice of appellant's claim and rights. He is not an innocent purchaser. He stands in the shoes of Congress, and, as Congress under the evidence would have no right against appellant, neither has appellee.

The appellee contends that the evidence shows that Mrs. Isaacs never intended to convey the lot in controversy to appellant, and that the lot was included in his deed through mistake or fraud. But appellee acquired his title through Congress, and has no other or greater rights than Congress would

have. Congress would be estopped from claiming as against appellant; so is appellee estopped. Mrs. Isaacs is not complaining of any mistake. Appellee is in no position to complain.

The judgment is therefore reversed with directions to enter a decree quieting the title of appellant to the lot in controversy.

McKINLEY v. BROOM.

Opinion delivered March 7, 1910.

1. APPEAL AND ERROR—PROVINCE OF BILL OF EXCEPTIONS.—Alleged errors of the trial court in instructing the jury will not be considered on appeal if they are not contained in the bill of exceptions, though they are set out in the transcript. (Page 148.)
2. SAME—PROVINCE OF MOTION FOR NEW TRIAL.—Statements in a motion for new trial that certain rulings were made by the trial court and excepted to by appellant will not be considered on appeal unless it appears from the bill of exceptions that such rulings were made and excepted to; the only province of the motion for new trial being to assign the ruling or action of the court as error. (Page 148.)

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

Rice & Dickson, for appellant.

McGill & Lindsey, for appellee.

There was no error in the instructions given; but they are not before this court for review. It is not sufficient to incorporate the instructions in the motion for new trial, and there allege that certain of them were given and others refused. The instructions must be brought into the bill of exceptions proper, as also the exceptions thereto. 88 Ark. 350; *Id.* 505; 60 Ark. 250; 86 Ark. 486; 85 Ark. 488; *Id.* 326; 87 Ark. 50; 76 Ark. 177.

HART, J. P. McKinley brought this suit in attachment before a justice of the peace in Benton County, against L. Broom. The attachment was sustained, and judgment was rendered in favor of McKinley against Broom for $143.34. Broom appealed to the circuit court, where, in a trial before a

jury, a verdict was returned in his favor, and McKinley has appealed to this court from the judgment rendered.

Counsel for appellant assign as error the action of the court in instructing the jury, but we can not consider the instructions. What purports to be the instructions given by the court are in the transcript; but they are not contained in the bill of exceptions.

In the case of *O'Neal* v. *Barker,* 83 Ark. 133, the court held (quoting from syllabus): "Instructions which were given or refused will not be considered on appeal, though included in the transcript, if they are not included in the bill of exceptions."

It is true that the motion for a new trial sets out the action of the court in giving and refusing certain instructions copied therein, but in the case of *Seifrath* v. *State,* 35 Ark. 412, the court said: "Mere statements in a motion for a new trial that certain rulings were made by the court, and excepted to by a party, amount to nothing unless it is shown by the bill of exceptions that such rulings were made and excepted to. It is the office of a motion for a new trial to state the grounds on which a new trial is asked, but such grounds are not taken as true, unless shown to be so by the bill of exceptions."

On appeal from the circuit court, this court only reviews errors appearing in the record. The complaining party must first make an objection in the trial court, and this calls for a ruling on his objection. An exception must then be taken to an adverse ruling on the objection, which "directs attention to and fastens the objection for a review on appeal."

The matters complained of, together with the objections and the exceptions to the ruling of the court, must be brought into the record by a bill of exceptions; and the motion for a new trial can serve no other purpose than to assign the ruling or action of the court as error. *Werner* v. *State,* 44 Ark. 122; *Meisenheimer* v. *State,* 73 Ark. 407.

It is also objected that there is not sufficient evidence to support the verdict.

Appellant sued appellee for a balance due on account. He testified that there was a balance due him of $185.78. The record shows that an itemized statement of the account taken from the books of appellant was introduced in evidence before

the jury; but this itemized account does not appear in the record. Other evidence was adduced by appellant tending to show that appellee owed him the amount claimed; but the testimony in behalf of appellee tended to show that appellant had furnished him a statement of the account, showing the amount claimed to be due, and that he had paid the same. No useful purpose can be served by making a detailed statement of the evidence. It is sufficient to say that from it the jury might have found in favor of appellee.

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

DONIPHAN LUMBER COMPANY *v.* WENZEL.

Opinion delivered March 7, 1910.

1. MORTGAGES—SALES UNDER POWER—VALIDITY.—Sales under powers in deeds of trust or mortgages are scrutinized with care, and will not be sustained unless conducted with fairness, regularity and scrupulous integrity; they will be set aside upon very slight proof of fraud or unfair conduct or of any departure from the terms of the power. (Page 151.)
2. SAME—WHEN SALE UNDER POWER SET ASIDE.—A sale to a mortgagee under a power in the mortgage will be set aside where the mortgagee in possession had previously collected rents from the mortgaged premises sufficient to extinguish the debt. (Page 152.)
3. EVIDENCE—RES INTER ALIOS ACTA.—The recitals of a conveyance from a mortgagee to a third person are not evidence as against the mortgagor that the conveyance was based on a consideration. (Page 152.)

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

Mitchell & Thompson, for appellant.

1. If, as is alleged in the original complaint, Cravens became by agreement the agent of appellee's ancestor for the sole and only purpose of collecting the rents to become due him, C. A. Wenzel, and apply same to the payment of the note, then appellee's right of action is against Cravens personally, and in no event would it attach against the land.

2. Under the terms of the mortgage, the recitals in the

deed of conveyance under the power of sale clause in the mortgage are to be taken as *prima facie* true. If any fraud was practiced by the trustee, the mortgagee in this case, the action should have been brought and maintained against him, Cravens, while he held and occupied the land, and an innocent purchaser from him for value should be protected in the purchase. 1 Wiltsie on Mortgage Foreclosures, § 812.

3. There is nothing in the pleadings or proof to show that the indebtedness secured by the mortgage is the only indebtedness due from Wenzel, Sr., to Cravens. Fraud is never presumed, but even in equity must be shown by competent proof. The court's finding, therefore, that the mortgage debt was fully paid is not supported by the evidence. 9 Ark. 485; 18 Ark. 141; 22 Ark. 185-6; 20 Ark. 246.

4. Appellant is *bona fide* purchaser for value without notice of any claim, legal or equitable, against the property, and is under the law protected in the purchase. 49 Ark. 216; 71 Ark. 34.

J. N. Rachels, for appellee.

1. The debt was fully paid by use and occupation of the premises before the foreclosure was begun. The chancellor so found, and the evidence sustains him. The lien of the mortgage and all interest of the mortgagee were therefore extinguished. 20 Am. & Eng. Enc. of L. 1058, § 8; 18 Ark. 172; 34 Ark. 346.

2. The purported sale under the mortgage was invalid, not being in compliance with the statute nor with the terms of the mortgage relative to notice, nor with reference to the appraisers. No recital in the deed that appraisers were appointed, or that they were disinterested householders of the county. Kirby's Dig. § 4923; 2 Jones on Mortgages (3 ed.), § § 1822, 1827, 1830; 55 Ark. 326; *Id.* 268; 77 Mich. 273; 84 Ark. 298-304; 70 Ark. 490.

HART, J. On the 16th day of February, 1898, C. A. Wenzel and M. E. Wenzel, his wife, executed a mortgage to J. J. Cravens on certain real estate in Cleburne County, Arkansas, to secure the sum of $125, evidenced by a promissory note due December 24, 1898. C. A. Wenzel rented the land for the year 1898 to Tom Patterson, and then went to the Indian country for the benefit of his health. He died there in a short time, and left surviving him the plaintiff, an infant, as his sole heir at law.

The rental value of the land was $35 per year. Patterson paid the rent for 1898 to Cravens as mortgagee in possession. Cravens continued in possession of the land and rented it out until he sold the land under the power of sale contained in the mortgage. The deed under the power of sale contained in the mortgage was executed by Cravens to J. T. Gay on the 2d day of February, 1903. It recited that the indebtedness was due, and that no part of it had been paid; that notices of sale had been given by written notices posted in ten public places in Cleburne County for more than 30 days before the day of sale; that said land was duly appraised as required by law, and was sold to J. T. Gay for the sum of $190 more than two-thirds of its appraised value. Gay testified that he did not bid for or purchase the land at said sale, but, upon being informed that a deed had been executed to him as the purchaser and upon request of J. J. Cravens, he executed a deed to said Cravens to said land on the 2d day of February, 1903.

John Spradling and James Smith both testified that they and J. T. Gay appraised the land before it was sold, but Gay denied that he was one of the appraisers.

A deed from J. J. Cravens to Doniphan Lumber Company to said land is exhibited. It purports to have been executed on 21st day of February, 1903, and the consideration named in it is $320.

The present suit was instituted by W. F. Wenzel, a minor, by his next friend, M. E. Jacobs, against Doniphan Lumber Company in the Cleburne Chancery Court to cancel the deed from J. J. Cravens to it. J. J. Cravens and J. T. Gay were afterwards made parties defendant, but made default. The Doniphan Lumber Company answered, and denied the allegations of payment of the mortgage debt made in the complaint, and set up the defense that it was a *bona fide* purchaser without notice of the land.

The chancellor found the issues in favor of the plaintiff, and a decree was accordingly entered cancelling the deed from J. J. Cravens to the Doniphan Lumber Company, and quieting plaintiff's title.

The defendant has duly prosecuted an appeal to this court.

In the case of *Littell* v. *Grady,* 38 Ark. 584, the court, in

considering the right of a mortgagor to set aside a sale of the mortgaged property for unfairness and oppression in the sale on the part of the mortgage creditor, quoted with approval from Perry on Trusts, as follows: "Sales under powers in deeds of trust or mortgages are a harsh mode of foreclosing the rights of the mortgagor. They are scrutinized by courts with great care, and will not be sustained unless conducted with all fairness, regularity, and scrupulous integrity. Upon very slight proof of fraud or unfair conduct, or of any departure from the terms of the power, they will be set aside." After further discussion of the question, the court said: "From these considerations it is plain that the chancellor erred in supposing that he could grant no relief in the absence of proof of fraud. Less than fraud will suffice, unless we consider want of fidelity to a trust in all cases a fraud of itself."

The undisputed evidence in this case shows that the mortgagee has collected the rents from the mortgaged premises since the date of the execution of the mortgage, and that the amount of rents so collected was sufficient to extinguish the debt which the mortgage was given to secure. The evidence also shows that the mortgaged premises were purchased at the sale under the power contained in the mortgage by Cravens, the mortgagee, and that the deed was executed to J. T. Gay merely for convenience, and that Gay deeded the premises back to Cravens without any consideration therefor. Under such circumstances the sale of the property was a fraud upon the rights of the mortgagor and his heirs; and it cannot be doubted as between them the sale should be set aside.

There can be no element of estoppel in this case. The mortgagor died soon after the mortgage was executed, and before the mortgagee had collected the first year's rent. He left surviving him the plaintiff, an infant, as his sole heir at law. The suit was brought on the 13th day of May, 1907. The plaintiff at the time was 17 years of age, and is suing by his mother, M. E. Jacobs, as his next friend.

Counsel for appellant insist that, although under the facts of this case, as between mortgagor and mortgagee, the sale should be set aside, yet it is protected as a *bona fide* purchaser for value. No proof was offered to show that there was a

consideration for the conveyance from J. J. Cravens, the mortgagee, to appellant, except that the deed was introduced. The recitals of it as to the consideration are not evidence against the plaintiff, and the conveyance must be treated as voluntary. *Leonhard* v. *Flood,* 68 Ark. 162.

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

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY *v.* BLYTHE.

Opinion delivered March 7, 1910.

CARRIERS—RULE REQUIRING PURCHASE OF TICKETS.—Railroad companies may require passengers to purchase tickets before entering the cars; provided this requirement is duly made known and reasonable opportunities are afforded for complying with it.

Appeal from Crittenden Cricuit Court; *Frank Smith,* Judge; reversed.

STATEMENT BY THE COURT.

Alice Blythe and A. K. Blythe instituted separate suits in the Crittenden Circuit Court against the St. Louis & San Francisco Railroad Company to recover damages for their alleged ejection from one of its passenger trains.

By consent of parties, the cases were ordered consolidated and were tried together. The defendant has appealed to this court from the judgment rendered against it.

The facts necessary to a determination of the issues involved, briefly stated, are as follows: On or about October 1, 1908, A. K. Blythe and Alice Blythe, his wife, went to the station of appellant at Big Creek, Ark., for the purpose of taking passage on one of its passenger trains. The ticket agent was also baggage agent, express agent and mail clerk. Appellees wished to go from Big Creek to Marked Tree. Big Creek is a junction where the main line of appellant's railroad is intersected by its branch line to St. Louis. A large number of passenger trains arrive and depart from this junction daily. Appellees testified that they applied at a reasonable time at the

ticket office in the station to purchase tickets, and that the agent was not there to serve them. They then started to get on the train without tickets. The brakeman demanded their tickets. They explained to him that they were unable to procure tickets because there was no one in the ticket office to sell them. They offered to pay their fares to the brakeman before entering the car. The brakeman informed them that they could not enter without tickets. They again informed him why they had not procured tickets, and the brakeman again told them they could not enter the car without tickets. Mrs. Blythe was on the second step, and the brakeman jerked her back, and said: "You can't go without a ticket," and knocked her back against her husband. They remained in Big Creek from that time, about 5:30 o'clock P. M. to 9 o'clock, P. M., when they took another train for home.

On behalf of appellant, the brakeman testified that he did not use any violence or rough language toward appellees. He said that he told the parties that a rule of the company required passengers to have tickets before entering the cars, and that it was his duty to enforce the rule.

The ticket agent testified that he was in his office before the departure of the train for the purpose of selling tickets, and that he did sell tickets to other persons for passage on the train in question. He also testified that the railroad company had a rule in force at that time requiring passengers to purchase tickets before boarding the train, and that notices to that effect were posted around the station. He stated the rule had been in force for about two months.

W. F. Evans and *W. J. Orr,* for appellant.

1. The relation of passenger and carrier is contractual, and before it is established there must be both an offer and acceptance as passenger. This relation, therefore, did not exist at the time appellees presented themselves at the entrance leading to the coach and were told that the rules of the company required them to provide themselves with tickets before they would be allowed to board the cars. 46 So. 776; 60 S. E. 1079; 84 N. E. 464; *Id.* 844; 105 S. W. 124; Moore on Carriers, 545, § 4; 43 So. 98. The statute, Kirby's Dig., § 6613, plainly refers to actual passengers, and has no application in a case where

parties intend to become passengers. See also 39 S. W. 358; 67 Ark. 53; 58 S. E. 491; 104 S. W. 280.

2. A railway company has the right to make a rule requiring persons who intend to become passengers to purchase tickets before entering its trains; and if one who has notice of such rule, and is afforded reasonable opportunity to purchase a ticket, offers to enter a train without purchasing a ticket, he is not a passenger, nor entitled to be treated as such. 65 Ark. 225; 70 Ark. 114; 26 Am. & Eng. Ry. Cases, 234; 13 *Id.* 49; 3 *Id.* 340.

J. F. Gautney, for appellee.

1. The contention that one who, being ready, able and willing to pay his fare, offers himself as a passenger, does not become a passenger until he is accepted as such by the carrier, has been held to be the law in some States; but in this State the statute fixes a different rule. Kirby's Dig., § § 6592, 6593, 6591, 6613. The relation of passenger and carrier did exist, when appellees presented themselves at the entrance of appellant's passenger coach, ready and willing to pay their fare. 67 Ark. 47, 52-4.

2. The rule requiring all persons to purchase tickets before entering appellant's trains is in contravention of § 6592, Kirby's Digest. But, even if it should be held to be a reasonable rule, notwithstanding the statutes, no reasonable opportunity was afforded in this case to procure tickets.

HART, J., (after stating the facts). Counsel for appellant rely for a reversal upon the action of the court in refusing to give to the jury the following instruction:

"No. 2. The defendant railroad company had the right to establish a rule requiring passengers to purchase tickets before entering trains. If the jury finds that it had established such a rule, and that the passengers were afforded a reasonable opportunity to purchase tickets before the departure of the train on which they wished to take passage, and did not do so, and the brakeman refused politely to allow the passengers to enter for the reason that they had not procured tickets, the jury will find for the defendant."

It is undoubtedly competent for a railroad company, as a means of protection against imposition and to facilitate the transaction of its business, to require passengers to procure tick-

est before entering the car, and where this requirement is duly made known and reasonable opportunities are afforded for complying with it, it may be enforced, either by expulsion from the train regardless of a tender of the fare in money, or, as will be seen in the following section, by requiring the payment of a larger fare upon the train than that for which the ticket might have been procured. 2 Hutchinson on Carriers (3 ed.), § 1032, and cases cited. See also 6 Cyc. 547.

Such rules are reasonable because they not only facilitate the orderly and convenient conduct by the railroad company of its own business, but promote the safety and comfort of its passengers. That railroad companies, unless prohibited by statute, may make and enforce such regulations, provided they also afford to those desiring to become passengers reasonable opportunity to purchase tickets, is not denied by counsel for appellees; but they contend that, under our statutes, the railroad may not enforce such rules by refusing a person without a ticket the right to enter one of its passenger trains for the purpose of transportation. To sustain their position, they rely upon the case of *St. Louis & San Francisco Railroad Co.* v. *Kilpatrick*, 67 Ark. 47, in which section 6613 of Kirby's Digest was construed. It reads as follows:

"All passengers who may fail to procure regular fare tickets shall be transported over all railroads in this State at the same rate and price charged for such tickets for the same service."

The opinion in the Kilpatrick case must be considered with reference to its own facts. There the one intending to be carried, without any intent to defraud or impose upon the carrier, and being ready, able and willing to pay his fare, was ejected from the train after it had been put in motion. The issue thus presented for determination was whether or not, under the facts stated, the carrier had the right to expel him from the train. The court held that it did not have that right because Kilpatrick had become a passenger within the meaning of section 6613 of Kirby's Digest. The court said:

"We are of the opinion, conceding the facts to be as appellee states them and as the jury might have found, that appellee was a passenger. In other words, one who in good faith goes to a railroad station, intending to take passage upon one of

its regular passenger trains, who is able and intends to pay his fare upon the demand of the carrier, and who enters over the steps of a passage way to a car where passengers ride, and through an entrance, unobstructed, which passengers may freely use—we say, one who embarks upon a passenger train under such circumstances is a passenger, although he may not have purchased a ticket, and may not have entered at a place where a porter or brakeman was stationed to inspect tickets, and although he may have passed over to, and may have been found standing temporarily upon, the platform of a coach in which passengers were not permitted to ride. The purchase of a ticket is not a prerequisite to the relationship of passenger and carrier under our statute."

Instead of using the languge quoted, if the court had intended the broad construction now contended for by appellees, it should have said that the word "passenger," as used in section 6613 of Kirby's Digest, meant one going to a train which carried passengers, and being able and willing to pay his fare.

Section 6613, *supra,* is part of the act regulating passenger rates; and, when construed with reference to the evident intent of the Legislature, the section may be said to have been passed for the purpose of preventing railroad companies from enforcing regulations requiring passengers to purchase tickets before entering trains by exacting a greater fare from them than from those who purchase tickets.

To sustain the contention of appellees would be to hold that section 6613 of Kirby's Digest affirmatively confers upon passengers the right to get on trains without tickets, and thereby deny to a railroad company the right to require of an intended passenger the purchase of a ticket as a condition to entering the train. We do not think such was the intention of the Legislature, or that the language used is susceptible of that interpretation, when considered with reference to the legislative intent, but are of the opinion that it only intended to prescribe the fare in case the passenger is on the train and pays the conductor. It follows that the instruction should have been given.

Other assignments of error are pressed upon us for reversal; but as they are in regard to matters that will not likely arise on a new trial, we need not consider them.

For the error in refusing to give instruction No. 2 as requested by appellant the judgment will be reversed, and the cause remanded for a new trial.

Justice BATTLE: I dissent. I think the court lays down a good rule, but the statute ought to govern.

Mr. Justice FRAUENTHAL concurs in the dissent.

BARHAM v. BANK OF DELIGHT.

Opinion delivered March 7, 1910.

1. ACCORD AND SATISFACTION—ACCEPTANCE OF PAYMENT IN FULL—EFFECT.—Where a check is given in satisfaction of a disputed claim, and recites on its face that it is a payment in full, its acceptance constitutes an accord and satisfaction, although the creditor protests at the time that it is not all that is due him. (Page 161.)
2. SAME—EVIDENCE—CORRESPONDENCE BETWEEN PARTIES.—Upon the issue whether the acceptance by a creditor of a check constituted an accord and satisfaction, though for an amount less than claimed, letters between the parties tending to show that there was a dispute as to the amount due were relevant and competent. (Page 164.)
3. EVIDENCE—LETTER.—When a letter is received in due course of mail and purports to be in answer to a letter that was previously duly addressed and mailed, the presumption arises that such letter is the genuine letter of the purported writer. (Page 165.)

Appeal from Pike Circuit Court; *James S. Steel,* Judge; reversed.

M. Rountree and *C. C. Hamby,* for appellants.

Acceptance by appellees of the check purporting to be "in full up to date" was in law an accord and satisfaction, and further recovery is barred. 138 N. Y. 231; 20 L. R. A. 785; 188 Mo. 623; 113 Mo. App. 617; 100 *Id.* 601; 161 Ill. 339; 220 Ill. 106; 104 Ill. App. 268; 129 Ia. 41; 68 Kan. 193; 78 Miss. 912; 85 N. Y. Supp. 1045; 55 *Id.* 648; 36 *Id.* 95; 177 Ala. 561; 85 Hun 470; 53 Hun 392; 84 N. Y. Supp. 857; 80 *Id.* 1102. If appellees were not willing to accept the check in full payment, good faith demanded that they return it. When they accepted it, they did so subject to that condition, and they are now estopped

from claiming that it was not in full satisfaction of the debt. Cases *supra;* 115 N. C. 120; 122 N. C. 635; 119 S. W. 38; *Id.* 765; 114 N. Y. Supp. 840. The evidence clearly shows that the claim was unliquidated, or in dispute. 1 Cyc. 334; 161 Ill. 339; 158 Mich. 58; 119 S. W. 765. When the plaintiff, Walls, took, indorsed and cashed the check, purporting to be payment in full, and knowing that it had been forwarded to him in full satisfaction, he in effect executed a receipt in full to defendants. 148 N. Y. 326; 51 Am. St. Rep. 695; 161 Ill. 339; 115 N. C. 120. And his act was irrevocable. 75 Ark. 354. See also 88 Ark. 363.

2. The court erred in excluding the letters offered by appellants in evidence. They were admissible to show that there was a *bona fide* dispute between the parties as to the amount due. The letter of June 22, 1907, though typewritten, body and signature, is shown to have been in reply to a letter written by appellants to Walls Lumber Company, and should have been submitted to the jury under proper instructions as to its genuineness. 103 Me. 87; 17 L. R. A. (U. S.) 229.

Sam T. Poe, for appellees.

1. This case does not fall within either of the three classes in which the cases relied on by appellant may be divided, *i. e.,* that class where the plaintiff failed to object, but took the money and later brought suit for the balance; where the plaintiff, in reply to a letter written to him by the defendant, was notified either to accept or return the money or check, and where the parties were either together when the check was given or met afterwards before the check was cashed, each insisting that he was right, but the plaintiff keeping and appropriating the check. Here the plaintiff notified the defendant that the check was not accepted in full satisfaction, and the defendant remained silent, and therefore acquiesced in the disposition made of the check. 157 N. Y. 289; 84 N. Y. S. 444. In order to constitute an accord and satisfaction, the debtor and creditor must mutually agree as to the allowance or disallowance of their respective claims. 175 N. Y. 102; 67 N. E. 113; 157 N. Y. 289; 90 N. Y. Supp. 461; 139 Mich. 165; 49 Mo. App. 556; 59 Ill. App. 171; 103 Minn. 150. A check is nothing more than a receipt, and is only *prima facie* evidence of what it recites. 56 Ark. 43;

46 Ark. 217. The letter written by plaintiff stating that the check would not be received in full satisfaction, the said letter being properly addressed, stamped and mailed, required a reply. 157 N. Y. 289; 84 N. Y. Supp. 444.

2. The fourth instruction requested by appellants was abstract, and was properly refused. 76 Ark. 599; *Id.* 348; *Id.* 333; 75 Ark. 251; 63 Ark. 177.

The letter of June 22, 1907, was properly excluded. There was no proof that plaintiff wrote it. All of the letter of May 25, 1907, that was competent, was admitted. There is no copy of the letter of May 14, 1907, preserved in the bill of exceptions, and the presumption is that the court's ruling in excluding it was correct.

FRAUENTHAL, J. This was an action to recover the balance alleged to be due upon an account. The defendants pleaded an accord and satisfaction of the alleged indebtedness. The Wall Lumber Company sold to Charles B. Barham & Company, the defendants, seven carloads of lumber from April 11 to April 27, 1907. The lumber was shipped direct to parties who purchased from defendants, and who were located at different points, and the accounts and bills of lading therefor were sent to defendants. The plaintiffs claimed that the total of the lumber so shipped upon defendants' orders amounted to $1,082.85, and that payments had been made thereon from time to time, amounting to $864.26, the last payment being made in May, 1907. After a few shipments of lumber had been made, the defendants claimed that there was a shortage in each shipment, and a dispute arose between the parties as to the amount of these shortages and as to whether or not defendants should receive credit therefor. The defendants also disputed an item of charge on the account of $100. The parties had some correspondence relative to these disputed items of charge and credits, the defendants claiming that the account was not correct, and the Wall Lumber Company claiming that it was. The defendants were located at Gurdon, Ark., and the Wall Lumber Company at Delight, Ark. Finally the defendants on September 2, 1907, wrote to the Wall Lumber Company, and in the letter stated that they found that they owed to them a balance on the lumber to that date of $22.73, and that they enclosed a check for that

amount to cover same. In the letter was enclosed a check on the Bank of Gurdon for the above amount; and in the check it was written that it was "payment in full to date." Upon receipt of the letter and check the plaintiffs hesitated about accepting same, but at length indorsed the check and collected it; and then wrote to defendants that credit was given for the amount of the check only, and that plaintiffs would expect defendants to pay the remainder of the account. The defendants testified that this letter was not received by their firm.

The defendants requested the court to give to the jury the following instruction, which was refused:

"4. The jury are instructed that where a sum of money is paid in satisfaction of a disputed claim, and the tender is accompanied by such acts and declarations as amount to a condition that if the amount is accepted it is accepted in full satisfaction, or is such that if the party is bound to understand therefrom that if he takes it he takes it subject to such conditions, the acceptance constitutes an accord and satisfaction, although the creditor protests at the time that it is not all that is due him or that he does not accept it in full satisfaction of his claim."

At the request of the plaintiffs and over the objection of the defendants the court gave the following instruction:

"2. You are instructed that the acceptance of a check for a less sum than is due, which shows on its face to be 'payment in full up to date,' is not a complete settlement unless both parties agree that the acceptance of said check should be a full and complete settlement."

The Wall Lumber Company assigned the account to the Bank of Delight, both of whom are joined as plaintiffs.

The jury returned a verdict in favor of the plaintiffs for $218, the amount of the balance of the account as claimed by them.

The defense that is made in this case is that the plaintiffs accepted an offered amount in full payment of a disputed and unliquidated claim, and this operated as an accord and satisfaction of the account sued on. But it is contended by plaintiffs that, before there can be an accord and satisfaction, there must be an agreement thereto by both parties, and that a receipt is

only *prima facie* evidence of what it imports, and can always be explained or contradicted; so that, even if the check should be considered equivalent to a receipt, it can still be shown that the plaintiffs did not actually agree to accept it in full payment of the demand. It is true that, in order to constitute an accord and satisfaction, it is necessary that the offer of the payment should be made by one party in full satisfaction of the demand, and should be accepted as such by the other. But when the claim is disputed and unliquidated, and a less amount than is demanded is offered in full payment, the question as to whether the creditor in such case does so agree to accept the amount offered in full satisfaction of his demand is a mixed question of law and fact. If the offer or tender is accompanied by declarations and acts so as to amount to a condition that if the creditor accepts the amount offered it must be in satisfaction of his demand, and the creditor understands therefrom that if he takes it he takes it subject to that condition, then an acceptance by the creditor will estop him from denying that he has agreed to accept the amount in full payment of his demand. His action in accepting the tender under such conditions will speak, and his words of protest only will not avail him. In the case of *Springfield & Memphis Railroad Co.* v. *Allen,* 46 Ark. 217, this court held that when a settlement and receipt in full of an unliquidated demand is made with a complete knowledge of all the circumstances, it is a bar to a subsequent action upon the demand, although the creditor accepts the amount paid under protest and threats of suit for a balance claimed to be due him. In such case there is an adjustment of a controversy, and the creditor by accepting a smaller sum which is tendered upon condition that he agrees to receive it in satisfaction of the demand is estopped by his act from denying such agreement. *Greer* v. *Laws,* 56 Ark. 37.

And the effect is the same where the tender or offer is made by check through the mails. In the case of *Nassoiy* v. *Tomlinson,* 148 N. Y. 326, this question was under consideration, and the court said: "The plaintiff could only accept the money as it was offered, which was in satisfaction of his demand. He could not accept the benefit and reject the condition; for, if he accepted at all, it was *cum onere.* When he indorsed and col-

lected the check referred to in the letter asking him to sign the inclosed receipt in full, it was the same in legal effect as if he had signed and returned the receipt because acceptance of the check was a conclusive election to be bound by the condition upon which the check was offered. The use of the check was *ipso facto* an acceptance of the condition. The minds of the parties then met, so as to constitute an accord."

In the case of *Ostrander* v. *Scott,* 161 Ill. 339, the debtor sent a check to his creditor which stated that it was in full payment of his indebtedness, the amount of which was in dispute. The creditor indorsed the check, and collected same, and wrote to the debtor that he only applied the amount to his credit, and did not accept it in full payment of his indebtedness. In that case the court said: "The check was made on its face a payment in full of all demands to date, and the effect, when it was received, indorsed and collected, was the same as if it had been tendered accompanied with a receipt to be signed in full of all demands to date, and the plaintiff had received the check and signed the receipt. * * * It was the right of plaintiff to accept the check upon the terms proposed or to reject it; but there could be no modification of the terms by his will alone, without the concurrence of the defendant. * * * If there was a controversy over a setoff, and the balance due the plaintiff was fairly in dispute, the claim could not be treated as liquidated."

In the case of *McGregor* v. *Construction Co.,* 188 Mo. 623, the debtor mailed to the creditor a check, and stated that it was in full payment of his indebtedness, and sent a receipt to that effect to be signed by the creditor. The creditor collected the check, but did not sign the receipt, and thereupon brought suit for the balance which he claimed was due him. In that case the court said:

"When he took the money knowing that the defendant transmitted it to him as payment in full for all work done under his contract, he estopped himself from thereafter claiming that such payment did not constitute a payment in full under his contract. It was not competent, proper or legal for the plaintiff to take the amount thus transmitted to him under such circumstances, and apply it as only part payment of what he claimed the defendant owed him. If he was not satisfied with the sum thus

paid, good faith required him to refuse to accept the money, to return it to the plaintiff, and to bring his suit for the amount he claimed to be due him. His conduct in retaining the money clearly estopped him from now claiming that the amount was not the true amount due him under his contract." See also *Fuller* v. *Kemp,* 138 N. Y. 231; *Preston* v. *Grant,* 34 Vt. 203; *Snow* v. *Griesheimer,* 220 Ill. 106; *Beaver* v. *Porter,* 129 Iowa 41; *Neely* v. *Thompson,* 68 Kan. 193; *Darrill* v. *Dodds,* 78 Miss. 912; *Cunningham* v. *Standard Construction Co.,* 119 S. W. 765.

It is urged by counsel for plaintiffs that, inasmuch as plaintiffs immediately wrote to the defendants that the check was accepted only in part payment of the account, this was conclusive evidence that the plaintiff did not agree to the accord and satisfaction of the demand. But, if the offer of payment was made upon condition and the plaintiffs so understood it, there was but one of two courses open to them, either to decline the offer and return the check or to accept it with the condition attached. The moment the plaintiffs indorsed the check and collected it, knowing that it was offered only upon a condition, they thereby agreed to the condition, and were estopped from denying such agreement. It was then that the minds of the parties met, and the contract of accord and satisfaction was complete in law. *Springfield & Memphis Rd. Co.* v. *Allen,* 46 Ark. 217; *George Knapp & Co.* v. *Pepsin Syrup Co.,* 119 S. W. 38; *Cunningham* v. *Standard Const. Co., supra.*

We are of the opinion, therefore, that the court erred in refusing to give the above instruction requested by the defendants; and the above instruction given on the part of plaintiffs should have been modified so as to conform therewith.

In the trial of the cause the defendants offered in evidence certain letters purporting to have been written by plaintiffs, and which defendants claimed to have received through the mails. These letters referred to the account in litigation, and tended to show that there was a dispute relative thereto between the parties. They were written before September 2, when the defendants sent the above check to plaintiffs, and therefore tended to prove that defendants sent the check in settlement of a disputed demand. We think therefore that these letters were revelant, and, if authenticated, were competent as evidence

in the case. One of these letters was typewritten as to the body and signature, and the plaintiffs testified that they did not recollect writing or dictating same. This letter referred to the dispute as to the shortages claimed by defendants. The defendants testified that it was inclosed in an envelope with the address of plaintiffs printed thereon, and that it was in answer to a letter which they had addressed and mailed to plaintiffs. The court refused to permit the letter to be introduced. As a general rule, a letter that is offered in evidence must be authenticated by proving the genuineness of the signature of the writer. But when a letter is received in the due course of mail and purports to be in answer to a letter that was previously duly addressed and mailed, the presumption arises that such letter is the genuine instrument of the purported writer. It is then sufficiently authenticated to go to the jury; and, upon its genuineness being denied, it then becomes a question of fact for the jury to determine as to whether the letter is genuine or not. 3 Wigmore on Ev. 2153; *Lancaster* v. *Ames,* 103 Me. 87.

The letters were admissible, and the court erred in refusing to allow the introduction of them in evidence.

For the above errors the judgment is reversed, and the cause remanded for a new trial.

FINCHER v. BENNETT.

Opinion delivered March 7, 1910.

MORTGAGEES—PAROL RELEASE.—Where a mortgagee verbally authorizes the mortgagor to sell the mortgaged property, and the property is sold to a *bona fide* purchaser for value, he acquires a good title, whether he knew of the existence of the mortgage or not.

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

H. S. Powell and *W. H. Askew,* for appellant.

The burden was on the defendant to prove the release of Parker on the part of the bank. Even acceptance by a creditor of the note or bill of a third party for the debt does not dis-

charge the debtor unless especially so agreed by the parties. 45 Ark. 313, 317; 46 Ark. 163, 166. No express release of Parker by the bank is proved.

Stevens & Stevens, for appellee.

FRAUENTHAL, J. This was an action of replevin instituted by the appellant against the appellee for the recovery of a mule. On May 7, 1907, one J. W. Parker, being indebted to the Bank of Waldo, executed to said bank a note for $250 due four months after date with J. C. Love as surety thereon, and on the same day, in order to secure the payment of the note, said Parker executed to the bank a deed of trust on two mules. On May 18, 1907, Parker became indebted to said bank in the additional sum of $395, and on that day executed a second note for that sum to the bank with said Love as surety thereon, payable three months after date, and on the same day, in order to secure this second note Parker executed to the bank a deed of trust on two additional mules and a wagon; and one of the mules conveyed by this second deed of trust is involved in this suit. J. C. Love was a merchant at Waldo, solvent and in good financial condition, and with a good credit with said bank. Parker was doing business with said Love; and about September 28, 1907, Love was indebted to him in the sum of $218. At that date, through the active assistance of said Love, Parker contracted to sell to one Flaherty two of the above mules and the wagon for $460. The evidence on the part of the appellee tended to prove that Parker then made the following agreement with the cashier of the bank relative to his notes and deeds of trust to the bank: that the bank would accept the notes of Flaherty for $460, which should go in payment on the notes of Parker to the bank; and Parker further testified that he told said cashier that he had to his credit with said Love $218, and that he would also apply that sum to the credit of his notes, and that these two sums were enough in amount to pay off his two notes to the bank; that the said cashier agreed to accept the notes of Flaherty and the amount on deposit with Love in full payment of the Parker notes to the bank, and that he would send these notes to Parker upon receiving the Flaherty notes. He also testified that he spoke to the cashier relative to selling the property covered by the deeds of trust, and that the cashier stated

that he would release the property from the deeds of trust when the bank should receive the notes executed by Flaherty, and told him to go ahead and sell the property. Thereupon Parker sold to Flaherty the wagon and two mules, one of which was included in each deed of trust; and Flaherty executed his notes for the $460, which were received and accepted by the bank; and after this Parker sold the remaining mule, covered by the deed of trust dated May 18, 1907, to one J. B. Bass, who paid him full value therefor; and thereafter Bass sold this mule to appellee; and it is this mule only that is involved in this litigation. There was a conflict in the evidence as to what occurred between the cashier of the bank and Parker at the time of said alleged agreement relative to the release of the property. The cashier testified that, while he agreed to accept the Flaherty notes and the deposit with Love in payment of the notes given by Parker, he only agreed to do so when he should receive the notes and also the payment from Love.

The appellant's testimony tended to show that Love did not make the payment to the bank, and that the bank, upon advice of its attorney, credited parts of the Flaherty notes on each of the Parker notes, and thus left a balance unpaid on each of those notes. But the uncontradicted evidence shows that at the time of the alleged agreement of release the said Love did owe to Parker said sum of $218, that Love was surety on the Parker notes to the bank, and that Love had sufficient financial credit with the bank for it to accept him as payer of the amount which he owed Parker; and we think that there is some evidence tending to prove that the cashier did accept these Flaherty notes and the indebtedness of Love to Parker in settlement of the notes of Parker to the bank, and did release the property from the deeds of trust, and did authorize Parker to sell the property covered by these deeds of trust; and that this evidence was sufficient to sustain a finding of a jury to that effect.

The court instructed the jury relative to this issue as follows:

"The jury are instructed that, before they can find for the defendant, Bennett, you must believe, by a preponderance of the evidence, that Ivie Howell, as cashier of the Bank of Waldo, unconditionally released the lien of the deed of trust from Parker to the bank. It is not sufficient that said cashier agreed to

release the property from the lien and forward the notes held by the bank to Parker within a few days if Love paid the bank. This would not amount to a release of the lien held by the bank.

"The jury are instructed that one of the elements of a binding contract is that the minds of the contracting parties shall meet as to the terms thereof. And so, in this case, the burden is on the defendant to show that the bank released unconditionally the lien of the deed of trust, and it is not sufficient that Parker understood that the lien was released, but it must also be shown by a preponderance of the evidence that Ivie Howell, cashier of the Bank of Waldo, so understood it at the time.

"The court instructs the jury that if they believe from the evidence that at the time J. C. Love and Clay Flaherty bought the team from J. W. Parker for $460 the said J. W. Parker had on deposit at J. C. Love's store the sum of $218, and if they believe from the evidence that J. W. Parker notified Ivie Howell, the cashier of the Waldo Bank, of the sale of the team for $460 and of the deposit at Love's store, and that the said cashier accepted these amounts at the places named, they will find for the defendant."

The question involved in this case is essentially one of fact. The title to personal property may be transferred by a parol agreement. The conveyance of the title to personal property by a mortgage or deed of trust is in effect only a security for a debt. Such property may be released from the mortgage or deed of trust by a sufficient parol agreement. And where the mortgagee authorizes or gives consent to the mortgagor to sell the mortgaged property, the mortgage lien thereon is discharged. Under such circumstances, a *bona fide* purchaser for value from the mortgagor obtains a good title to the property, whether he knew of the existence of the mortgage or not. Jones on Chattel Mortgages (5 ed.), § § 660, 661, 465; *Wallis* v. *Long,* 16 Ala. 738; *Acker* v. *Bender,* 33 Ala. 230; *Conkling* v. *Shelley,* 28 N. Y. 360; *Hicks* v. *Ross,* 71 Tex. 358.

Whether or not the evidence is sufficient to sustain such an agreement of release or discharge or authorization to sell the property covered by the deed of trust is a matter purely for the jury to determine. If there is some evidence to sustain the

finding of the jury to that effect, under the repeated rulings of this court, the verdict of the jury should not be disturbed.

The judgment is affirmed.

JACKSON v. STATE.

Opinion delivered February 28, 1910.

1. CONTINUANCES—DISCRETION OF COURT.—Motions for continuance are addressed to the sound discretion of the trial court, and the failure to grant a continuance will not be ground for reversal unless there has been a manifest abuse of discretion. (Page 172.)
2. SAME—BURDEN OF PROOF.—The burden is upon one who applies for a continuance for an absent witness to show that he used due diligence to procure such witness. (Page 172.)
3. INSTRUCTION—CREDIBILITY OF WITNESS.—An instruction in a felony case that the jury "cannot arbitrarily disregard the evidence of any witness, but if you believe that a witness has sworn falsely in this case it is your duty to disregard the testimony of such witness, and if you believe that a witness has sworn falsely in part and truthfully in part in this case you should disregard the part which you believe to be false and accept that part which you believe to be true," is not objectionable as directing the jury to disregard the entire testimony of a witness who is found to have sworn falsely to any material fact. (Page 174.)
4. SAME—SUFFICIENCY OF GENERAL OBJECTION.—A general objection to an instruction upon the credibility of witnesses is insufficient to call attention to the objection that it directs the jury to disregard the entire testimony of a witness who is found to have sworn falsely as to any material fact. (Page 174.)
5. SAME—PROVINCE OF JURY.—The court charged the jury in a felony case as follows: "This is an important case; * * * and if you can get together and render a verdict in this case, it is the desire of the court that you do so. Gentlemen, you ought to be able to decide this case. It is just like any other business proposition that you might be called upon as citizens to decide. It sometimes happens that jurors who take opposite views become arbitrary and unreasonable, and fail to respect the opinion of the other members of the jury, but I hope this is not true of this jury, and I have no reason to believe that it is true. So I want you to get together, if possible, and render a verdict in this case. It will be a considerable amount of trouble and expense to have to try this case over again; a considerable amount of trouble and expense to this county and a considerable amount of trouble and

expense to this defendant, and I do hope you will get together and reach a verdict in this case. But what the court has said to you will not influence your verdict one way or the other." *Held,* not prejudicial error, in the absence of any specific objection to any part of the instruction. (Page 175.)

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

H. S. Powell and *Daniel Taylor,* for appellant.

1. Under the circumstances of this case there has been an abuse of that discretion vested in trial courts with reference to continuances. The testimony of the absent witness was material in the identification of the hog. A continuance had been granted to the State to procure the attendance of a witness to identify the animal, and, considering the age and ignorance of the defendant, and the distance he lived from the town where his counsel resided, due diligence is shown in the efforts put forth to procure the attendance of defendant's witness. 71 Ark. 180; 22 Ark. 164; 21 Ark. 460; 50 Ark. 161.

2. The verdict is contrary to the evidence. The burden is on the State, not only to overcome the presumption of innocence, but also to establish the defendant's guilt in each material element beyond a reasonable doubt. It is in proof that appellant owned "a big bunch" of hogs, some of which were of the same general description as those of McAnulty; therefore a motive for theft is not shown. Seth McAnulty says the hog he lost was a *deep red* sow, about eleven months old, which might have had a few black spots over her about the size of a dime, while J. W. McAnulty says it was a *blood red* sow, ten or eleven months old. The State's other witness, Lula Banks, says that the hog killed was "a sandy red hog, that had nearly as much white on it as red." She also states that he cut off the ears and burned the hair. Defendant states that the hog he killed was one of his own, that it was a "reddish hog with white spots over it; that he did not cut off the ears nor burn the hair, but on the contrary that he showed the hair to the officer who arrested him and to Mr. McAnulty, the owner of the missing animal, and this statement was not contradicted, although made in McAnulty's presence. 70 Ark. 386; 148 N. Y. 648; 34 Ark. 632; 13 Ark. 105; 67 Ark. 155; 67 Ark. 163; 70 Ark. 30; 41 N. E. 588; 74 Ark. 491; 153 N. Y. 10.

3. The instruction No. 3 is erroneous in not requiring the false testimony to be with reference to some material fact, before the jury would be authorized to disregard it, and in making it their positive duty to disregard it. 68 Ark. 336; 56 Ark. 244; 72 Ark. 436.

4. The court erred in his exhortation to the jury to agree upon a verdict, after they had twice reported that they were unable to agree, the same having the effect of coercing the jury into returning a verdict. 74 Ark. 431; 60 Ark. 45; 58 Ark. 277; 46 Mich. 623; 10 N. W. 44; 14 S. W. 538.

Hal L. Norwood, Attorney General, and *William H. Rector,* Assistant, for appellee.

1. A defendant is not entitled to a continuance as a matter of right upon the filing of an application in proper form. Such an application is addressed to the sound discretion of the trial judge; and when he denies the motion, this court will not reverse his judgment unless there has been a manifest abuse of that discretion, amounting to a palpable denial of justice and an arbitrary and capricious exercise of power. 26 Ark. 323; 54 Ark. 243; 41 Ark. 153; 51 Ark. 167; 67 Ark. 543; 34 Ark. 26; 76 Ark. 290; 70 Ark. 521; 71 Ark. 62.

2. While it may be conceded that the State's testimony was not as strong, convincing and conclusive as it might have been, yet there is evidence to support the verdict, and this court will not reverse where there is any evidence to support the verdict. 13 Ark. 236; 17 Ark. 327; 19 Ark. 671; 24 Ark. 251; 23 Ark. 131; 33 Ark. 196; 46 Ark. 141.

3. There is no error in the third instruction. It does not come within the rule announced in the cases cited by appellant.

4. There is no error in the judge's admonitions to the jury with reference to trying to reach a verdict; no element of coercion. He made it plain to them that what he had said should not influence their verdict one way or another. 70 Wis. 448; Thompson on Charging Juries, § 58; 35 Mich. 56; 55 Ga. 53; 60 N. H. 472.

McCULLOCH, C. J. This is an appeal from a judgment of the circuit court of Ouachita County, convicting John Jackson of the crime of grand larceny, alleged to have been committed by stealing a hog, the property of one McAnulty. The first ground

for reversal urged is that the court erred in overruling defendant's motion for continuance. He moved the court to grant a continuance in order to procure the attendance of a Mrs. Massey, who would have testified, if present, that she knew the hog which was killed by defendant, and knew that it was defendant's hog, and that she purchased from him a part of the meat. Defendant was indicted and arrested during the spring term, 1909, of the court, and by agreement of the prosecuting attorney the case was continued until the fall term of the court. It came up for trial during the first week of the October term, and on motion of the prosecuting attorney it was postponed until the second week, and it was then that defendant presented his motion for continuance. He stated therein that he first caused to be issued a subpoena to the sheriff of Ouachita County, which was returned *non est*; that he then learned that the witness was in Saline County, and on October 29, 1909, sent a subpoena to Saline County, which was also returned *non est*; that he had since learned that she was in Jefferson County, to which county he had also sent a subpoena on October 29, which has not been returned. The subpoena to the sheriff of Ouachita County was issued on October 25, 1909.

In an unbroken line of cases it has been held by this court that motions for continuance in both civil and criminal cases are addressed to the sound discretion of trial courts, and that the court will not reverse a case on account of a failure to grant a continuance unless there has been a manifest abuse of discretion. The defendant was under indictment and arrest for six months before the trial, yet he showed no excuse for not ascertaining the whereabouts of the absent witness. No diligence at all is shown, and we can not say that the trial court abused its discretion. It does not appear why the subpoena was not issued for Mrs. Massey at an earlier date, nor what effort defendant had made during the time he was under indictment to ascertain the whereabouts of the witness and procure her attendance. The burden was on him to show those things, in order to obtain a postponement of the trial.

It is earnestly argued that the testimony is insufficient to sustain the verdict, in that the hog alleged to have been stolen is not fully identified as the hog which defendant killed. De-

fendant admits killing a hog at the time alleged, and selling a portion of the meat, and using the rest of it, but claims that it was his own hog. The question in dispute is whether or not the hog killed by defendant was the property of the prosecuting witness, McAnulty. McAnulty testified that he had two Jersey sows, one a large red, sandy colored sow, and the other a small red sow, that ranged around Benson's mill in Ouachita County, and that the smaller one failed to come up about the last of November and disappeared suddenly from the range at that time. He lived about one mile from Benson's mill, and defendant lived at or near the mill. McAnulty described the animal as being a red Jersey sow with black spots on her about the size of a dime, was about eleven months old and was pregnant, would weigh about 75 or 100 pounds when dressed, and was marked with a swallow fork in the right ear and split in the left ear.

Lula Banks, a young negro woman, who lived in the house with defendant at the time and cooked for him, testified that defendant killed a hog about that time which she described as "a kind o' reddish or sandy sow" with spots on it, and that she helped dress the hog, and saw that it was a pregnant sow. She testified that defendant tolled the sow into the yard, and then shot it, and, after dressing it, put the hair into a small tin bucket and took it to the fireplace and burned it, cut off the ears and had the head cooked first, sold a part of the meat to Mrs. Massey, and put the rest of it in a box under the table. She said also that the hog which defendant killed ranged around Benson's mill with a larger red one, and in another part of her testimony she said that another little red hog ranged there with them.

Now, the two witnesses, McAnulty and Lula Banks, give the same general description of the sow except that they differ to some extent as to the exact shade of red, and one says that the sow had a few black spots on her, and the other said that she had white spots on her. They both identify the hog as a small red, sandy sow, pregnant, and that she ranged around Benson's mill with another larger sow. McAnulty's sow disappeared from the range at the time defendant killed a sow of the same general description. The conduct of defendant, as related by the witness Lula Banks, shows that he was trying to destroy proof of identity of the sow and secrete the meat. He immediately burned the hair and cut off the ears before

he called the woman to assist in dressing the hog. She testifies that she never saw the ears. The jury were warranted in believing from the testimony that it was McAnulty's sow, but that one of the witnesses was mistaken as to the color of the spots on it. We think that this evidence was sufficient to identify the hog as the property of McAnulty, and to sustain a finding that the defendant killed it with intent to steal.

Defendant attempted to prove by his own testimony and that of another witness that the hog was his own property; but that question was fairly submitted to the jury, and, as the evidence is sufficient to sustain the verdict, it is not within our province to disturb it.

The court gave the following instruction over the general objection of defendant:

"3. You are the judges of the weight of the evidence and the credibility of the witnesses. You can not arbitrarily disregard the evidence of any witness; but if you believe that a witness has sworn falsely in this case, it is your duty to disregard the testimony of such witness; and if you believe that a witness has sworn falsely in part and truthfully in part in this case, you should disregard that part which you believe to be false and accept that part which you believe to be true."

Defendant insists that the instruction is open to the objection that it directs the jury to disregard the entire testimony of a witness who is found to have sworn falsely to any material fact. *Bloom* v. *State,* 68 Ark. 336; *Frazier* v. *State,* 56 Ark. 242; *Lee* v. *State,* 72 Ark. 436. We do not think the instruction, when read in its entirety, can be so construed, for in the latter part it says to the jury that "if you believe that a witness has sworn falsely in part and truthfully in part in this case, you should disregard that part which you believe to be false and accept that part which you believe to be true." If defendant feared that the first part of the instruction would be construed to authorize the rejection of the entire testimony of a witness, he should have called the attention of the court to it by specific objection. A general objection was not sufficient to call attention to the alleged defect.

After the jury had deliberated for a time and failed to agree, they returned into court, and the court delivered to them

the following charge or statement, which, it is argued by defendant's counsel, was in effect an improper exhortation to them to agree on a verdict, and really coerced them into rendering the verdict:

"Gentlemen of the jury, this is an important case. It is important to the people of this county, it is important to the people of the State of Arkansas, and it is important to this defendant; and if you can get together and render a verdict in this case, it is the desire of the court that you do so. Gentlemen, you ought to be able to decide this case. It is just like any other business proposition that you might be called upon as citizens to decide. It sometimes happens that jurors who take opposite views become arbitrary and unreasonable, and fail to respect the opinion of the other members of the jury, but I hope this is not true of this jury, and I have no reason to believe that it is true. So I want you to get together, if possible, and render a verdict in this case. It will be a considerable amount of trouble and expense to have to try this case over again; a considerable amount of trouble and expense to this county, and a considerable amount of trouble and expense to this defendant, and I do hope you will get together and reach a verdict in this case. But what the court has said to you will not influence your verdict one way or the other."

It will be observed that the court did not express any opinion as to the weight of the evidence, nor change in any manner the instructions already given; nor did the court urge the jurors to yield their individual convictions as to the result of the case. The statement amounted to no more than an admonition to the jury as to their duty to return a verdict, and this was guarded by the concluding remark that nothing that was said should influence the verdict. We find no prejudice in the remarks. *Johnson* v. *State,* 60 Ark. 45.

There is one expression in the statement, which had better have been omitted, for it might have been understood to mean that a preponderance of the testimony was sufficient to warrant a verdict. We refer to the remark that "it is just like any other business proposition that you might be called upon as citizens to decide." But, as the court had, in all of its instructions, told the jury that before they could convict they must believe be-

yond a reasonable doubt that defendant was guilty, we assume that there was no intention to give a contradictory instruction, and the attention of the court ought to have been called to this remark by a specific objection, otherwise it was waived.

We find no error in the record, and, while the evidence does not entirely satisfy us of defendant's guilt, there was sufficient to warrant the verdict, and we do not feel justified in disturbing it.

Affirmed.

WOOD and HART, JJ., dissent.

MILLER v. CARR.

Opinion delivered February 28, 1910.

1. WILLS—CONTEST—BURDEN OF PROOF.—In a will contest the burden is upon the contestant to prove that the will was obtained by undue influence. (Page 178.)
2. SAME—UNDUE INFLUENCE.—The undue influence that will avoid a will must be directly connected with its execution, and must be its procuring cause. (Page 178.)

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

J. W. Blackwood and *Riddick & Dobyns,* for appellant.

1. During the time preceding the execution of the will, there is no influence on the part of the proponent over the testatrix shown, except that influence which would naturally arise from the affectionate relationship between a mother and son, which is not unlawful. 13 Ark. 475; 19 Ark. 551, 49 Ark. 371.

To establish fraud or undue influence in the making of a will, the evidence must show the fact of deception practiced, and that such fraud or undue influence was effectual to destroy the testator's free agency and produce the will. 99 Mass. 121; 49 Ark. 371.

W. H. Pemberton, for appellees.

There is ample evidence to sustain the verdict on the question of undue influence. This court will not interfere with the

verdict of a jury where there is evidence to support it. 25 Ark. 474; 31 Ark. 163; 22 Ark. 213; 23 Ark. 131; 40 Ark. 168; 46 Ark. 411; 51 Ark. 567; 67 Ark. 399; 74 Ark. 478; 76 Ark. 115.

BATTLE, J. Minnie Miller died, leaving a last will and testament, and thereby bequeathed to each of her children, except W. F. Miller, ten dollars, and bequeathed and devised to him, W. F. Miller, the remainder of her property, and appointed him executor of the same. Minnie Carr, Amanda Chittenden and Henry J. Miller, her children, contest the validity of the will on the ground that W. F. Miller procured it by the exercise of undue influence over her.

The only witnesses present at the execution of the will were W. F. Miller and Gus Fulk. Miller testified that he and testatrix were witnesses in a trial before a justice of the peace, on the day the will was executed; that, after the trial, his mother, the testatrix, said to him that she wanted to make a will, and said: "Let's go now, and get Mr. Fulk to make a will," and they went to the office of Gus Fulk, he being a lawyer, and she told him that she wanted him to write her will and how she wanted it written—how she wanted to dispose of her property, and he drew the will as she directed, and she signed the same and caused it to be attested, and she took the will home with her and put it in her box and kept it in her exclusive possession for some time. He, witness, did not know that it was the intention of his mother to make a will until she suggested it as before stated, and made no suggestion as to how it should be made.

Gus Fulk testified: "I know W. F. Miller, and knew Mrs. Miller. I drew a will for her. She came in with her son, and requested me to draw her will. I did so at once, witnessed it, and asked the stenographer to do the same. I wrote it just as she told it. She signed it. Her son did not say anything at all about how she was to make it, or make any suggestions to her. She paid for it."

Much evidence was adduced in the trial in the case that tended to prove that W. F. Miller, the contestee had considerable influence over his mother, the testatrix, and that he often exercised it, but none to prove that he exercised it in the procurement of the will.

The jury in the case returned a verdict in favor of the contestants and against the will, and judgment was rendered declaring accordingly; and contestee appealed.

The burden was upon the contestants to prove that the will was procured by undue influence. *Guthrie* v. *Price,* 23 Ark. 396; *Jenkins* v. *Tobin,* 31 Ark. 306, 309; *Smith* v. *Boswell,* 93 Ark. 66. It was necessary for them to show that the will was procured by undue influence, that is to say, the undue influence that will avoid a will must be directly connected with its execution, must be the procuring cause. *McCulloch* v. *Campbell,* 49 Ark. 367; *Smith* v. *Boswell,* 93 Ark. 66. We fail to find any evidence to that effect in this case. The verdict was without evidence to sustain it.

Reverse and remand for a new trial.

LAUR v. STATE.

Opinion delivered February 28, 1910.

1. APPEAL AND ERROR—HARMLESS ERROR.—Where the defendant in a misdemeanor case was tried before a mayor and moved to require the prosecuting witness to give a bond for costs, and his motion was overruled, and, on being convicted, he appealed to the circuit court, where he renewed his motion, and it was sustained, he cannot complain on appeal to the Supreme Court because the mayor refused to require the bond for costs. (Page 179.)
2. MUNICIPAL CORPORATION—JURISDICTION OF MAYOR IN MISDEMEANORS.—It is immaterial in a misdemeanor case that the ordinance under which a mayor of a town undertook to fine the accused was void if the crime for which he was tried constituted a misdemeanor under the criminal laws of the State. (Page 180.)
3. BREACH OF PEACE—WHAT CONSTITUTES.—One who approaches another in front of his place of business, and begins to curse and abuse him and makes demonstrations as if to strike him, is guilty of a breach of the peace. (Page 180.)

Appeal from Arkansas Circuit Court; *Eugene Lankford,* Judge; affirmed.

C. M. Brice, for appellant.

1. Defendant having been tried for an offense in the mayor's court, it was error to place him on trial for a distinct

offense in the circuit court on appeal. 53 Ark. 368; 63 *Id.* 307; 77 *Id.* 234; 84 *Id.* 352; 4 A. & E. Ann. Cas. 1.

2. There is no testimony to support the verdict of conviction.

3. A cost bond being necessary to give jurisdiction to the mayor's court, the circuit court acquired none on appeal. 84 Ark. 352; § 2476 Kirby's Dig.

Hal L. Norwood, Attorney General, and *Pettit & Pettit,* for appellee.

1. Appellant's offense was properly tried as a violation of a State statute. 68 Ark. 247; 86 *Id.* 442; 88 *Id.* 210.

2. The circuit court had jurisdiction, and the cost bond was properly filed in that court on appeal, without objection by appellant. 2 Ark. 332; 3 *Id.* 474; 5 *Id.* 703; 37 *Id.* 405; 49 *Id.* 143; 11 Cyc. 187.

3. The undisputed evidence sustains the verdict of conviction.

HART, J. J. W. Allen made affidavit before H. D. Sebree, mayor of the town of Almyra, in Arkansas County, that C. T. Laur had committed a breach of the peace within the corporate limits of said town by cursing him and threatening to fight. Laur was duly arrested and brought before the mayor for trial. He made a motion that Allen be required to give a bond for costs, which was overruled by the mayor. Laur was tried and convicted. He appealed to the circuit court, where he renewed his motion for a bond for costs. His motion was sustained, and Allen filed a cost bond. Laur was tried and found guilty before a jury, his punishment being assessed at a fine of $25. From the judgment rendered upon the verdict he has appealed to this court.

Counsel for appellant assigns as error the action of the court in regard to the cost bond. Appellant renewed his motion in the circuit court to require the prosecuting witness to give a bond for costs. His motion was sustained, and the bond was filed. The ruling of the circuit judge was right because there was a trial *de novo* in the circuit court, and the case should not have been dismissed for any mistake of law or irregularity committed in the mayor's court. This is in accord with the practice suggested in *Mann* v. *State,* 37 Ark. 407.

Again, counsel for appellant objects that the ordinance under which Laur was tried in the mayor's court was invalid. As we have already seen, the trial in the circuit court was a trial *de novo,* and, the crime for which he was arrested being a violation of the criminal laws of the State, appellant was properly tried and convicted thereunder. This has been expressly decided in the following cases: *Barnett* v. *Malvern,* 62 Ark. 483; *Walker* v. *Fayetteville,* 63 Ark. 443; *McCall* v. *Helena,* 86 Ark. 442; *Searcy* v. *Turner,* 88 Ark. 210, and *Marianna* v. *Vincent,* 68 Ark. 247.

Counsel for appellant also insists that there was not sufficient evidence to support the verdict. It is sufficient answer to this to say that J. W. Allen testified that Laur approached him in front of his place of business in the town of Almyra and began to curse and abuse him and made demonstrations as if to strike him. This testimony was not even contradicted, and is sufficient to sustain the verdict.

The judgment will therefore be affirmed.

MORRIS v. EAGLE.

Opinion delivered March 7, 1910.

1. TAXATION—TAX DEED—SUFFICIENCY OF DESCRIPTION.—A tax deed which describes the land sold for taxes as part of a certain quarter section, without otherwise describing it, is void. (Page 183.)
2. REMOVAL OF CLOUD—IMPROVEMENTS BY STRANGER.—In a suit to remove a cloud upon a title, it is not admissible for the plaintiff to show that a stranger made improvements on the land and paid taxes on it, relying not upon a claim in favor of plaintiff but in favor of himself. (Page 183.)

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

W. E. Atkinson, for appellant.

If Bus Fleming and his sons were Mrs. Morris's tenants, they cannot question her title or right of possession. 43 Ark. 28. And if he was her tenant since 1894, and paid rent to her through her husband, her possession of the land for that period is established, and she acquires title under the statute of limita-

tions. 38 Ark. 193; 77 Ark. 324; 75 Ark. 395; 2 Taylor on Landlord & Tenant (8 ed.), § 705 and note 3.

James B. Gray, for appellee.

1. W. N. Morris is not a party to this action in his individual capacity, and the allegation in Mrs. Morris's answer to the intervener's cross-complaint that W. N. Morris had purchased the land at a trustee's sale under foreclosure of a mortgage executed by Anthony Fleming to secure a debt due A. G. England & Company was no defense.

2. The question whether Mrs. Morris held the land in open, notorious, adverse and peaceable possession for the statutory period was decided adversely to such claim by the chancery court, after hearing all the evidence, and that court's finding will not be disturbed, unless clearly against the preponderance of the evidence. 85 Ark. 83; 71 Ark. 605; 68 Ark. 314; 77 Ark. 216; 78 Ark. 420; 91 Ark. 246.

BATTLE, J. Mrs. K. L. Morris commenced suit against R. E. L. Eagle in the Lonoke Chancery Court to quiet her title to the northwest quarter of the northwest quarter of section six in township two south, and in range nine west in Lonoke County, in this State. She alleged in her complaint that she acquired title to the land under a sale for taxes made on the 12th day of June, 1893, at which J. D. Shute became the purchaser; that thereafter, on the 26th day of June, 1893, she purchased the same from Shute, and he assigned the certificate of sale to her; and that thereafter, on the 4th day of August, 1898, H. T. Bradford, county clerk of Lonoke County, made her a deed to the land, describing it as part of the N. W. quarter of section 6, T. 2 S., R. 9 W., 57.36 acres; that she was in possession of the land under her purchase from and after the first day of January, 1894; that Anthony Fleming was her tenant, and held possession for her in that capacity, paying her rent therefor. from the time aforesaid until some time in July, 1906, when he died.

The defendant demurred to the complaint because the facts stated therein were not sufficient to constitute an equitable cause of action.

William Fleming, Mary Gibson, James Fleming, Jackson Fleming and Nettie Harris intervened, and for their cause of

intervention and cross complaint alleged that their father, Anthony Fleming, deceased, was the owner of the land described in plaintiff's complaint, having received deed for the same from the State of Arkansas on the 5th day of March, 1883; that Anthony Fleming departed this life in the year 1906, and left interveners his only heirs him surviving; that Anthony Fleming, after October, 1881, resided on the land as his homestead until he died; and that since his death interveners resided on the land, and now hold possession of the same as their homestead and by right of inheritance from their father, the said Anthony Fleming, deceased. They denied that plaintiff is the owner of the land, and is now or ever was in possession of it; and they asked that their title to the land be quieted.

The plaintiff answered the cross complaint, and among other things alleged that Anthony Fleming, in the year 1885, executed a deed of trust, conveying the land in controversy to J. H. Bilheimer as trustee to secure a debt due A. G. England & Company, that said debt was never paid, and the land was sold under and in accordance with the terms of said deed of trust, and W. N. Morris became the purchaser, and that thereafter said Anthony Fleming never had nor claimed title to said lands.

The interveners demurred to and answered this paragraph of plaintiff's answer to their complaint, and admitted that in the year 1885 their father executed a deed of trust to secure a debt due to A. G. England & Company, but denied that the same was never paid, and alleged that W. N. Morris at the instance of their father purchased the debt from A. G. England & Company, and that afterwards their father paid the debt in full to W. N. Morris, and denied that the land was sold under the deed of trust.

Thereafter the death of the plaintiff was suggested and admitted, and by consent of all parties the cause was revived and proceeded in the name of Edward E. Morris, Lewis Morris, William Morris and Anna L. Morris, who are minors and the only heirs of the plaintiff, by W. N. Morris as their next friend, as plaintiffs.

This cause came on for hearing, and the parties appeared, and the court heard the evidence and found that the tax deed executed by the county clerk of Lonoke County to Mrs. K. L.

Morris on the 4th day of August, 1898, for the land in controversy was illegal and void for uncertainty in description, and passed and conveyed no title to the land to Mrs. K. L. Morris, the land being sold for the taxes of 1892, and described in the deed as part of the northwest quarter of section 6, township 2 south, range 9 west, Lonoke County, Arkansas, containing 57.36 acres; and further found that Mrs. K. L. Morris never held continuous, open, adverse, notorious and peaceable possession of the lands for any period of time. And ordered, adjudged and decreed that the tax deed be cancelled, set aside and held for naught, and that the interveners' title to the land be forever quieted, in so far as said deed affects the same, and the plaintiffs in original complaint and defendants in cross complaint appealed.

The deed executed by county clerk of Lonoke County to Mrs. K. L. Morris for land in controversy is null and void on account of the defective description of the land. *Hershey* v. *Thompson,* 50 Ark. 484; *Schattler* v. *Cassinelli,* 56 Ark. 172; *Rhodes* v. *Covington,* 69 Ark. 357; *Dickinson* v. *Arkansas City Improvement Co.,* 77 Ark. 570; *Cooper* v. *Lee,* 59 Ark. 460; *Little Rock & Fort Smith Ry. Co.* v. *Huggins,* 64 Ark. 432.

Mrs. Morris, the plaintiff, did not hold adverse possession of the land for any period of time. But there was evidence that W. N. Morris made improvements on the land, paid taxes on, and collected rents for, the same, but he claimed to have purchased the land at a sale under the deed of trust conveying the land to J. H. Bilheimer as trustee to secure a debt due A. G. England & Company, which is mentioned in the pleadings, but these acts are referable to his own claim. *Fee* v. *Cowdry,* 45 Ark. 410. He was not a party to this suit, and such evidence was not admissible.

Decree affirmed.

CHICAGO MILL & LUMBER COMPANY *v.* OSCEOLA LAND COMPANY.

Opinion delivered March 7, 1910.

1. APPEAL AND ERROR—CONCLUSIVENESS OF DECREE.—A decree in the Supreme Court in favor of the plaintiffs in a suit to quiet the title to land will not preclude the plaintiffs from filing a supplemental bill to

recover the value of timber cut by defendant since the original suit was instituted, such matter not being concluded by the decree. (Page 187.)

2. SAME—MASTER'S REPORT—CONCLUSIVENESS.—While the report of a master in chancery appointed by the court on its own motion has not the weight of the verdict of a jury, such report is advisory, and will not be arbitrarily set aside. (Page 189.)

3. EVIDENCE—BOOK ENTRIES.—A party, sued for the value of timber unlawfully cut by him, cannot offer his books showing the number of logs removed from the land and the number of feet therein if it is not shown who kept the books or that they were kept at the time the timber was cut and in the regular course of business or that the person who kept them could not be produced to testify as to their accuracy. (Page 189.)

Appeal from Mississippi Chancery Court, Chickasawba District; *Edward D. Robertson,* Chancellor; modified and affirmed.

W. J. Lamb, for appellant.

1. The rights of the parties were settled on former appeal, by the opinion delivered May 13, 1907. 84 Ark. 14. The only power of the chancery court was to enter a decree as directed by this court. 74 Ark. 81-87; 82 Ark. 1; 85 Ark. 414.

2. The court erred in sustaining the report of the master, which was unjust and unconscionable, placed an excessive valuation on the timber cut, and was based upon testimony much of which was mere hearsay and much of which was immaterial, irrelevant and incompetent. The master erred also in refusing to accept the positive record as to the amount of timber cut submitted to him by the appellant.

3. The fee allowed the master for his services is grossly excessive. Kirby's Dig., § 3497.

Murphy, Coleman & Lewis and *J. T. Coston,* for appellee.

1. When the action to quiet title was commenced, the timber in question was then standing upon and was a part of the real estate. Its removal by appellant, pending the litigation, did not oust the jurisdiction of the court to the extent of the timber. When this court reversed the decree of the lower court and remanded the case with directions to render a decree quieting the title of appellee to the land, and for further proceedings "not inconsistent with the opinion," the lower court not only had the right, but it was its plain duty, to make such decree *effectual* by forcing appellant to make restitution to appellee

for the stolen timber, or account for its value. The case relied upon by appellant is not in point. 2 Black on Judgments, § 683; 3 Cyc. 460, 462; 92 S. W. (Ark.) 770; 23 Wall. 465; 16 Ark. 181; 98 S. W. (Ark.) 969; 36 Ark. 22, 26-7; 2 S. W. 503; 83 S. W. 77-8; 26 S. E. 439; 62 Pac. 12; 139 U. S. 220; 76 Am. Dec. 464-5; 50 *Id.* 119; 30 N. E. 964.

2. The master properly refused to accept the record submitted by appellant. It was made pending the litigation, and the witness who introduced it had no knowledge concerning it, and could not testify to its accuracy. The party who made the record was not produced as a witness, and his absence was not accounted for. 1 Greenleaf, Ev. (16 ed.), § 120a; 57 Ark. 415-16; 2 Wigmore, Ev., § § 1521, 1523, 1525, 1526, 1527. The values fixed by the master are less than the *average* values fixed by the witnesses. Moreover, no exceptions were filed to the finding of the master as to the values except as to the value of cottonwood, oak, ash and cypress, and no exceptions were taken on the ground that the master was influenced by incompetent evidence. 93 S. W. 61. The master's report is conclusive. 122 S. W. 661; Kirby's Dig., § 6340; 22 S. E. 792; 22 Atl. 1111; 23 Pac. 671; 17 N. E. 752; 27 N. E. 184; 37 Vt. 486; 9 Ala. 179; 108 S. W. 513.

BATTLE, J. On the 4th day of August, 1904, the Osceola Land Company instituted a suit against the Chicago Mill & Lumber Company to quiet its title to certain lands. The defendant answered, and filed a cross bill to quiet its title to the same lands against the plaintiff. The Osceola Land Company answered the cross bill, and evidence was taken on the issues presented. The chancery court rendered a decree, dismissing the complaint of the plaintiff, and quieting the title of the Chicago Mill & Lumber Company. Plaintiff appealed, and this court reversed the decree, and remanded the cause, "with an order that a decree be entered cancelling the tax deed under which the defendant holds and quieting the title of the plaintiff." *Osceola Land Company* v. *Chicago Mill & Lumber Company,* 84 Ark. 1.

After the cause was remanded the Osceola Land Company filed a supplemental complaint in the chancery court, and therein alleged that since the suit was commenced the defendant had

entered upon the land and cut and removed therefrom timber of a certain description, of the value at the time and place it was cut of the sum of $22,888.95, and asked for judgment for that sum with interest. The defendant answered and admitted that, since the original suit was commenced, it had entered upon the land and cut and removed timber therefrom, "but denied that it cut the amounts and kind of timber specified in the complaint," and the value as alleged in the complaint; and, further answering, said:

"Defendant states that since the institution of this suit, but prior to the date of the rendition of the original decree herein, towit: on the 12th day of October, 1905, it has cut and removed from said land timber of the value of $5,000, but alleges that this court has no jurisdiction to render a decree for the value of said timber or to adjudicate the rights of the parties thereto, and states further that this court has no authority in this cause to render a decree except that directed by the mandate of the Supreme Court and in conformity to the opinion.

"And further states that the decree of this court heretofore rendered in this cause, towit, on the 12th day of October, 1905, of record in chancery record 1, page 178, is between the same parties hereto and involves the property in question herein as described in plaintiff's supplemental complaint, and said decree and the decree of the Supreme Court on appeal therefrom are *res judicata* as to the relief prayed herein by plaintiffs.

"Wherefore, having fully answered, defendant prays that it be discharged with costs and all other proper relief."

At the next term of the court, after the filing of the supplemental complaint and answer, the chancellor appointed Clyde Robinson special master, with directions to ascertain the amount of timber cut by the Chicago Mill & Lumber Company on the land in controversy and the value thereof and the amount of taxes paid by the Chicago Mill & Lumber Company, and to state an account between the parties. The master, after taking the testimony of witnesses, reported that a fair and equitable price for the timber cut is as follows: "Six dollars per thousand for cottonwood, cypress, oak and ash; $1.50 per thousand for elm, gum, sycamore and maple; and 10 cents each for cypress ties, which, according to the total amount of timber cut, would amount

to $12,451.87, which, with six per cent. per annum interest thereon from March 1, 1905, to March 1, 1909, amounts to $15,440.32. The defendant excepted to the report for the following reasons:

"That in the evidence, as submitted in said cause, the exact number of logs and the exact number of feet in said logs of various kinds and quality removed from the land in controversy is shown by an accurate record and statement filed therein, while the evidence of the plaintiff as to the amount of timber so cut was uncertain, indefinite and admittedly unreliable, but the master in his report has accepted the vague and indefinite estimate of plaintiff and has ignored the exact statement and finding by defendant, and has unjustly thereby charged defendant with a greater amount of timber than it removed from the said land.

"Defendant also charges that the master has fixed the value of ash, cypress, cottonwood and oak logs removed from the land in controversy by defendant at a price greater than is warranted by the evidence, and more than the market value of said logs at the time of their removal from said land."

The chancellor overruled the exceptions to the report and rendered a decree for the amount found due by the master, principal and interest, amounting to $15,461, and allowed the master a fee of $500, and directed that the judgment be credited with the sum of $1,060.83, it being the amount of taxes paid by the defendant on the lands as found by the master. From this decree the defendant appealed.

Appellant contends that when this cause was remanded after reversal the chancery court had only the power to enter a decree as directed by this court, which was to cancel the tax deed under which appellant held, and to quiet the title of appellee. It cites *Collins* v. *Paepcke-Leicht Lumber Company,* 82 Ark. 1, to support its contention. That was a suit instituted by Collins and others against Paepcke-Leicht Lumber Company, in the Chicot Chancery Court, to recover certain lands and $10,000 damages for timber cut and removed therefrom. On the 4th day of June, 1901, upon final hearing, the trial court dismissed the complaint for want of equity, and plaintiffs appealed to this court. On appeal this court reversed the decree appealed from as to half interest in the lands, and affirmed as to the other, and remanded the cause with directions to the court to enter a decree for appellants

for one undivided half of the lands in controversy and for further proceedings to be therein had in accordance with the opinion of this court. After the cause was remanded plaintiffs filed a motion in the chancery court, in which they stated that the defendant had before and since the institution of that action wrongfully cut and removed timber from the lands in controversy, of great value, and asked that a master be appointed to ascertain the amount and value of such timber, and for other relief; but it did not state that any of the timber was cut after the 4th day of June, 1901, when the final decree was rendered by the trial court. The chancery court refused to entertain the motion, and plaintiffs applied to this court for a writ of mandamus to compel it to do so. This court denied the writ. Plaintiffs then appealed from the refusal of the chancery court to appoint a master as requested, and from a judgment for costs. Upon the last appeal this court said: "The cause was submitted to the chancery court on the 4th day of June, 1901, upon the issue as to the title to the lands. The court decided that against the plaintiffs, and they appealed to this court with the result stated. The whole case before both courts at the time of decree was disposed of; and, the term of this court at which the decree of the chancery court was reversed in part having passed, no further relief by it could be granted. But when the cause was remanded to the chancery court, it was not wholly determined, and the court could have granted relief as to timber cut since the 4th of June, 1901, the date of its final decree. So much of their cause was unadjudicated, and they were entitled to damages sustained by them from waste." The decree of the chancery court was reversed, and the cause was remanded with directions to the court to allow plaintiffs to amend their motion or supplemental complaint so as to show that timber was cut since the 4th day of June, 1901, if they are so advised, and, when properly amended, to take such proceedings as may be proper to ascertain the damages sustained by them from the cutting of timber on the land since the 4th of June, 1901, and to render judgment therefor.

In the case cited the suit was brought to recover lands and for $10,000 for timber wrongfully cut thereon. It was alleged in the complaint that the defendant had cut a large quantity of timber. The defendant denied that allegation, but no evi-

dence on that issue was adduced by either party. Neither lower court nor this court made any express finding as to timber cut. But this court held that the whole case was before the court at the time of the final decree, which included damages for timber cut, and was disposed of and adjudicated, but that the right to damages for timber cut after the rendition of the decree was not, and plaintiff was entitled to relief for such damages, and that the same could be recovered upon supplemental complaint filed in the action determined.

In the case at bar no relief for damages for timber cut was sought in the original complaint. No timber was cut on the land before its commencement. No issue as to timber cut was involved or determined. As to such timber this case was like the case cited as to the timber cut after final judgment. So much of plaintiff's cause was unadjudicated, and it was entitled to relief. The decree finally rendered entitled it to the relief, and it (decree) was not rendered until after the supplemental complaint was filed, and was no bar to the relief thereby sought.

Should the exceptions of appellant to master's report have been sustained? Appellee insists that the findings of the master are as conclusive as the verdict of a jury, and cites *Paepcke-Leicht Lumber Company* v. *Collins,* 85 Ark. 414, 419, to sustain its contention. In that case the master was appointed by consent of all parties. The court undertook only to state the rule in such cases, and cited *Greenhaw* v. *Combs,* 74 Ark. 338, which says: "The findings of fact by a *consent* referee have the same conclusiveness as the verdict of a jury or the findings by a court sitting as a jury." The same was held in *Griffin* v. *Anderson-Tully Co.,* 91 Ark. 292.

In *Claypool* v. *Johnston,* 91 Ark. 549, and in *Carr* v. *Fair,* 92 Ark. 359, this court held that "when a master is appointed by consent of parties, his findings have the weight of a verdict; and when he is appointed by the court on its own motion, his report upon the evidence taken is largely advisory, but the court's discretion in passing on the report must be exercised under and controlled by the rules of law and the evidence of the case, and it cannot arbitrarily set aside the findings;" and so we hold now.

Appellant contends that the master erred in rejecting and refusing to accept as correct its record of the number of the

various kinds of logs removed from the land by it, and the number of feet therein, which was offered as evidence. He committed no error in so doing. It was not competent, because the foundation for its introduction was not sufficient. It was not shown by whom the record was made or kept, and that it was made at or near the time the timber was cut and in the regular course of business, and that the party who made it cannot be produced as a witness to testify as to its accuracy. *Railway Company* v. *Henderson,* 57 Ark. 402, 415, 416; 1 Greenleaf on Evidence (16 ed.), § 120a; 2 Wigmore on Evidence, § § 1521, 1523, 1525, 1526.

It would consume too much time and space to set out all the evidence relating to the master's report. It is sufficient to say that it sustains the master's report and the court in approving it.

The fee of $500 allowed the master for his services was too large. Two hundred and fifty dollars are sufficient to compensate him. That amount ought to be allowed.

The decree is affirmed, except as to the fee allowed the master, and in this respect it is modified to conform to this opinion.

FINLEY v. SHEMWELL.

Opinion delivered March 14, 1910.

1. FERRIES—RIGHT TO OPERATE.—While ownership of lands on one or both sides of a navigable stream entitles the owner to the privilege of keeping a public ferry, the right cannot be exercised without procuring a license from the county court. (Page 193.)
2. SAME—EXCLUSIVENESS OF PRIVILEGE.—When the county court has once granted the privilege of keeping a public ferry, the privilege is exclusive within the distance, so long as it is exercised under the annual grant of license provided for. (Page 193.)
3. SAME—ABANDONMENT.—A ferry privilege may be abandoned by failure to procure a renewal of the license from the county court, and the county court may, by proper order, discontinue a ferry once established. (Page 193.)
4. SAME—INFRINGEMENT—REMEDY.—One whose ferry privileges have been infringed by the grant of a ferry license to another is not bound

by the order of the county court granting such license, but may invoke the aid of a court of equity for redress. (Page 194.)

5. SAME—HOW ESTABLISHMENT PROVED.—The repeated issuance of annual licenses to the keeper of a ferry by the clerk of the county court makes out a *prima facie* case of establishment of the ferry by the county court. (Page 194.)

6. SAME—INJUNCTION AGAINST INFRINGEMENT— CONSTRUCTION.—A decree enjoining defendant from operating a ferry within one mile of plaintiff's ferry does not enjoin the operation of such a ferry after plaintiff's ferry is abandoned or discontinued by order of the county court. (Page 194.)

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

F. G. Taylor, for appellant.

1. Appellee had no legally established ferry or ferry privilege. A license from the county court is a prerequisite. Kirby's Digest, § § 3555, 3561, 3575; 20 Ark. 561; 25 Ark. 26.

2. Pierce could not transfer his ferry franchise without transferring his land or an interest therein. 26 Ark. 464; 41 Ark. 202.

3. No notice was given to parties interested. 19 Cyc. 498; 84 Ark. 21; 20 Ark. 21.

4. The remedy at law was adequate, and no irreparable injury was proved. 65 Ark. 413.

5. It was error to make the injunction *perpetual,* for ferry franchises may be discontinued by the county court at the expiration of one year.

G. B. Oliver, for appellee.

1. The granting of a license is proof of a ferry franchise. Kirby's Dig., § 3561; 1 Greenl. on Ev., § 79; 19 Cyc. 499g. No one except the State can question the license. 19 Cyc. 505 (2); *Id.* 493 (2); 48 Ark. 321. The privilege is exclusive. Kirby's Dig., § 3575; 20 Ark. 561; 19 Cyc. 495b.

2. The license to appellant was void, and the injunction proper. 20 Ark. 561. The decree for damages is amply sustained by the evidence.

F. G. Taylor, in reply, for appellant.

The failure to procure a license from the county court, authorizing appellee to remove the ferry or establish one at the

present site, renders the license void. 66 Ark. 535. The record of any court can be contradicted and made to speak the truth. 86 Ark. 591.

McCULLOCH, C. J. This appeal involves a controversy between two rival ferry keepers, operating ferries within a mile of each other on Current River, in Clay County. Shemwell, the plaintiff, instituted this suit in the chancery court of Clay County to restrain Finley from infringing upon his (plaintiff's) ferry rights by wrongfully operating a ferry within one mile of his ferry, and to recover damages for the infringement. Upon final hearing of the case, the chancery court granted the relief prayed for and rendered a decree perpetually enjoining defendant Finley from operating a public ferry within one mile of plaintiff's ferry, and for the recovery of $60 damages.

The facts established by a preponderance of the evidence are as follows: About fifteen years ago, or longer, one John Williams, who owned land on both sides of Current River, began the operation of a ferry and procured a license from the county court permitting him to do so. This was continued for several years, but finally he ceased operating the ferry, and did not do so for five or six years, or perhaps longer. Another public ferry was operated by one Pierce several miles down the river, and after Williams ceased the operation of his ferry Pierce moved his ferry up the river to a point about three-quarters of a mile above the old Williams ferry. He operated the ferry there under a license issued to him by the county court of Clay County, and continued to do so until he sold it to a man named Stackhouse, who in turn sold to the plaintiff Shemwell, who owned land on one side of the river. Shemwell purchased the ferry in the fall of 1901, after the operation of the Williams ferry had been abandoned, and has continued to operate the same under licenses issued to him annually by the county court, up to the trial of this cause. While so operating this ferry, Williams, who still owned land on both sides of the river a short distance below Shemwell's ferry, undertook to put his ferry in operation again, and Shemwell brought some kind of an action against him, which was settled by compromise, and Williams ceased operation. He then sold his land to Finley, who, in December, 1906, without the knowledge or consent of Shemwell, obtained a ferry license from the county court of

Clay County and began operating his ferry, which, as already shown, was within a mile of Shemwell's ferry.

The statutes of this State provide that "all ferries upon or over any public navigable stream shall be deemed public ferries," and that "every person owning the land fronting on any public navigable stream shall be entitled to the privilege of keeping a public ferry over or across such navigable stream." Kirby's Dig., § § 3555, 3556. The statute further provides that "any person wishing to establish a ferry across any navigable stream shall apply to the county court of the county in which such ferry site may be; and, on the applicant showing that he is lawfully in possession of such land as the ferry is sought to be established on, and also satisfying the court that the public convenience will be promoted thereby, such court shall grant such license." (Sec. 3561). Another provision of the statute bearing on the present controversy reads as follows: "The county court shall not permit any ferry to be established within one mile above or below any ferry previously established, except at or near cities and towns, where the public convenience may require it, and satisfactory proof of the same shall be first adduced." (Sec. 3575).

It is settled by the decisions of this court that, while ownership of lands on one or both sides of a navigable stream entitles the owner to the privilege of keeping a public ferry, the right can not be exercised without procuring a license from the county court. *Murray* v. *Menefee,* 20 Ark. 561; *Bell* v. *Clegg,* 25 Ark. 26; *Haynes* v. *Wells,* 26 Ark. 464; *Little Rock & Fort Smith Ry. Co.* v. *McGehee,* 41 Ark. 202.

It has also been decided by this court that when the county court has once granted the privilege of keeping a public ferry the privilege is exclusive within the distance, so long as it is exercised under the annual grant of license provided for. *Murray* v. *Menefee, supra; Lindsay* v. *Lindley,* 20 Ark. 573. There may, however, be an abandonment of the ferry privilege by failure to procure the license prescribed by statute; or the county court may, by proper order, discontinue a ferry once established. *Brearly* v. *Norris,* 23 Ark. 514; *Bell* v. *Clegg, supra.*

The Williams ferry was the first one established, but, according to the evidence in this case, Williams abandoned it, and the field was then open for any other owner of land fronting on

the river to establish his ferry by obtaining a license. This was done by Shemwell's predecessors, and his rights were preserved from year to year by procuring the license from the county court. Any attempt thereafter on the part of Williams or his grantees to exercise ferry rights was an infringement upon the rights of Shemwell; and it has been held by this court that under such circumstances the one whose ferry privileges have been infringed is not bound by the order of the county court granting a license to another, but may invoke the aid of a court of chancery for redress. *Murray* v. *Menefee, supra; Brearly* v. *Norris, supra.*

As this place was not at or near a city or town, it was beyond the power of the county court to license another ferry within a mile of one which had already been established and licensed.

It is insisted that plaintiff failed to prove that his ferry had been established by an order of the county court. The repeated issuance of annual licenses to plaintiff by the clerk of the county court, as is proved in this case, is sufficient to make out a *prima facie* case of establishment by the county court of a ferry.

It is also contended that the decree is too broad, in perpetually enjoining defendant from operating a ferry within one mile of appellee's ferry. If this decree should be construed to mean that defendant is enjoined from operating his ferry even after the plaintiff's ferry should be abandoned by the owner, or discontinued by order of the county court, then indeed it would be too broad. But we do not so construe the decree, which we understand to mean that defendant is merely enjoined from infringing upon plaintiff's exclusive ferry privileges, so long as he exercises it under authority from the county court. So construing the decree, it is correct.

We find that the decree of the chancellor, both as to the plaintiff's rights and the amount of damages to which he is entitled, is correct, and the same is in all things affirmed.

WEIL v. LESTER.

Opinion delivered March 14, 1910.

1. EVIDENCE—PAROL EVIDENCE TO EXPLAIN WRITING.—Where plaintiff undertook by written contract to furnish a credit guide for "the Hot Springs district," it is competent to prove by parol evidence what territory was to be included in that district. (Page 196.)

2. CONTRACT—TO FURNISH CREDIT GUIDE—DEFENSE.—Where plaintiffs seek to recover for a credit guide which it was agreed should contain "the names, addresses and general credit standing of all who purchased goods" within a certain territory, it was admissible, for the purpose of showing the incompleteness of the guide furnished, to show the percentage of people whose credit rating appeared in the published guide, as compared with those doing business in a certain city in such territory. (Page 197.)

3. SAME.—In a suit to recover the purchase price of a credit guide, which plaintiffs agreed should contain the names and addresses and general credit standing of all who purchased goods within a certain territory, it is a good defense that the guide does not contain the names of such persons, and that plaintiff made no reasonable effort to obtain such information for the benefit of its subscribers. (Page 197.)

Appeal from Garland Circuit Court; *W. H. Evans,* Judge; affirmed.

Wm. G. Bouic, for appellant.

1. Ignorance of some stipulation in the contract is no ground for setting it aside. The mistake of the party, being due to his own carelessness or inattention, is no defense. Lawson on Cont., p. 234; 11 Tex. 211; 60 Am. Dec. 234.

2. Parol testimony to vary a written contract is inadmissible. 4 Ark. 179; 5 Ark. 651-672; 15 *Id.* 543; 24 *Id.* 210, 251; 21 *Id.* 69; 66 *Id.* 445; 67 *Id.* 62; 71 *Id.* 185, 289; 1 Greenl. on Ev., § § 275-9.

C. V. Teague, for appellee.

1. No sufficient abstract was filed herein. 57 Ark. 304; 59 Ark. 547; 82 Ark. 1.

2. The instructions are not set out in full. 85 Ark. 123; 84 Ark. 552; 86 Ark. 570.

3. No motion for new trial is mentioned in the abstract or brief. 78 Ark. 374; 55 Ark. 547.

McCULLOCH, C. J. This is an action instituted by Weil and Hankins, as partners under the firm name and style of Arkansas

Retail Credit Men's Association, to recover from appellee, Lester, the sum of $25, alleged to be due on a contract for the subscription price of a publication called the "Credit Guide" for 1908. A trial in the circuit court on appeal from a justice of the peace resulted in a verdict and judgment for appellee. There was a written contract between the parties in which two clauses material to the disposition of this case appear, as follows:

"The party of the first part, conducting a general mercantile agency business, agrees as follows, towit: First, to furnish its subscribers with what will be known as the Hot Springs District Credit Guide, which shall contain the names, addresses and general credit standing of all those who purchase goods in said district, as furnished by its subscribers * * *

"In consideration of the foregoing, the party of the second part agrees also as follows: First, to furnish to the party of the first part, within thirty days, a full and complete list of all his customers, rated as indicated by a cipher key furnished him by the said association. Second, to report promptly on all payments made to him direct. Third, for and in consideration of the conditions specified in the above contract, the party of the second part obligates himself or themselves to pay to the first party, known as the Arkansas Retail Credit Men's Association, the sum of $25, payable as follows: upon the delivery of the Credit Guide for 1908."

The first assignment of error is as to the ruling of the court in allowing a witness named Bradfield to testify concerning representations made, in the absence of appellee, by the agent of appellants as to what territory was to be included in the Hot Springs District mentioned in the contract. This was competent evidence. The term "Hot Springs District," used in the contract is indefinite, and it was necessary to show what territory it was understood to cover. Appellee gave testimony himself as to what territory was considered to be embraced in the term "Hot Springs District"—that it was to include the people of Montgomery, Saline and Hot Spring counties who traded in the city of Hot Springs. It was not erroneous to prove the same thing by witness Bradfield, even though the testimony included statements made in appellee's absence. The question was, what territory was included in the contract; and, the language of the

contract being indefinite, it was competent to show by the statements of appellant's agents to their subscribers what territory was to be included. The contract was evidenced by a joint subscription list, signed by a large number of merchants in the city of Hot Springs, wherein it was agreed that all should contribute information for publication as to the rating of customers in the specified district. In order to ascertain whether or not the contract had been complied with, it was necessary to show what territory was to be included, and the statement of appellant's agents made at the time to any of the subscribers was competent for that purpose. Such testimony did not vary nor contradict the terms of the written contract, and the statements made in the absence of appellee were not objectionable as hearsay.

Another assignment of error is that of admitting evidence as to the percentage of people whose credit rating appeared in the published guide, as compared with those doing business in the city of Hot Springs. This evidence was competent for the purpose of showing whether or not appellants had complied with the contract by publishing a credit guide which contained "the names, addresses and general credit standing of all those who purchase goods in said district, as furnished by its subscribers."

The following instruction was objected to, and the ruling of the court in giving it is assigned as error: "3. You are instructed that if the plaintiff agreed with the defendant and others to include in the Hot Springs District Credit Guide the names of the persons residing in Montgomery and Saline counties who traded with the merchants in Hot Springs, and the said book does not contain the names of such persons, and the evidence fails to show that plaintiffs made any reasonable effort to secure such information for the benefit of its subscribers, then you will find for the defendant."

This was a correct instruction, and is in line with the views we have already expressed. If appellants undertook to publish a guide including the names of persons in the territory specified in the contract, and failed to do so, they cannot recover.

Judgment affirmed.

JOINER v. STATE.

Opinion delivered March 14, 1910.

1. CRIMINAL LAW—PLEA OF GUILTY—ENTRY OF JUDGMENT AT SUBSEQUENT TERM.—Upon a plea of guilty entered at one term of court judgment may be entered at a subsequent term. (Page 199.)
2. SAME—CONDITIONAL PLEA.—There is no statutory authority for a plea of guilty to be entered and received on any kind of condition, or for judgment to be suspended on condition. (Page 199.)
3. SAME—RIGHT TO WITHDRAW PLEA.—Whether a plea of guilty in a criminal case can be withdrawn and a plea of not guilty entered is within the discretion of the trial court, the exercise of which will not be disturbed on appeal unless it clearly appears to have been abused. (Page 199.)

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

Going & Brinkerhoff, for appellant.

Hal L. Norwood, Attorney General, for appellee.

McCULLOCH, C. J. Four indictments were returned by the grand jury of Mississippi County against appellant for violation of the laws against the clandestine sale of intoxicating liquors. He entered a plea of guilty in each case at the May term, 1908, of the circuit court, and the court, without rendering judgment on said pleas of guilty, made an order continuing each case for the term. In each case the order of the court reads as follows: "Comes the State of Arkansas by her attorney, L. C. Going, and the defendant in person and by his attorney, and, after having the nature of the indictment, plea and effect thereof explained to him by the court, defendant elects to enter a plea of guilty to selling liquor without license as charged in the indictment, and this cause is continued."

At the December term, 1909, judgment still not having been rendered in said cases, the prosecuting attorney moved the court to render judgments in accordance with the pleas of guilty, which motion appellant resisted on the alleged ground that "he entered pleas of guilty thereto with the understanding that sentence should not be pronounced against him unless after the date at which said adjustment was made he should engage in the sale of intoxicating liquors without license, or unlawfully sell or give away, or be interested in the sale of ardent, vinous, malt, fermented and intoxicating liquors in Mississippi County,

Arkansas," and that "since the date of said compromise and adjustment he has not sold or given away or been interested in the sale or giving away of ardent, vinous, malt, fermented and intoxicating liquors in the county."

The trial judge heard testimony on the question whether or not appellant had violated the law with reference to the sale of intoxicating liquors since he entered the pleas of guilty, and announced his conclusion that he was convinced that appellant had again violated the law in that respect, and the court then rendered judgment on each of the pleas of guilty, assessing penalties, etc. Appellant brings the case here by appeal. He insists that the pleas of guilty were entered on the conditions named above, and that the court erred in finding that the pleas were not entered on condition and in finding that he had violated the law since he entered the pleas.

The judgment could be rendered at a term of court subsequent to that at which the pleas of guilty were entered. *Thurman* v. *State,* 54 Ark. 120; *Greene* v. *State,* 88 Ark. 290.

The record made by the clerk at the time showed that the pleas of guilty were entered unconditionally. There is no statutory authority for a plea of guilty to be entered and received on any kind of condition, or for judgment to be suspended on condition; but the court may at any time before judgment permit a plea of guilty to be withdrawn. Kirby's Dig., § 2296. Whether or not the plea could be withdrawn and a plea of not guilty substituted is a matter of discretion with the trial judge, and the exercise of that discretion will not be disturbed unless it clearly appears to have been abused. *Greene* v. *State, supra.* If he had found that appellant's pleas of guilty were entered on conditions which had not been violated, it would have been the duty of the learned trial judge either to further postpone rendering judgment or permit appellant to withdraw his pleas of guilty; and, judging from his remarks at the time he rendered the judgments, this is the view of the matter which he doubtless entertained. He stated that, while the pleas of guilty were entered without condition, there was an implied understanding that the court, in the exercise of its discretion, would not render judgments thereon unless appellant subsequently violated the liquor laws, but that he was satisfied beyond a doubt that ap-

pellant had again violated the law in that respect. We are of the opinion that the evidence justified the conclusion reached by the trial judge that appellant had again violated the liquor law. At least, we are unable to say from the evidence in the record that there has been an abuse of discretion which would justify us in disturbing the finding of the lower court.

Affirmed.

WILSON-WARD COMPANY v. FARMERS' UNION GIN COMPANY.

Opinion delivered March 14, 1910.

REFORMATION OF INSTRUMENT—EVIDENCE.—In order to reform a written instrument, on the ground of fraud or mistake, the evidence of such fraud or mistake must be clear, unequivocal and decisive.

Appeal from Craighead Chancery Court, Lake City District; *Edward D. Robertson,* Chancellor; reversed.

Murphy, Coleman & Lewis, for appellant.

In order to reform a written contract or instrument, the evidence must be clear, unequivocal and decisive; a mere preponderance is not sufficient. 71 Ark. 616; 5 Mason, 577; 72 Ark. 546; 75 Ark. 75; 79 Ark. 256; 81 Ark. 166; *Id.* 420; 83 Ark. 131; 84 Ark. 349; 85 Ark. 62; 89 Ark. 309.

Lamb & Caraway, for appellees.

1. The evidence in this case proves a clear case of fraud and is convincing. 75 Ark. 382; 73 Fed. 574.

2. Oral evidence was admissible to show that appellees signed as directors to bind the Gin Company, and not themselves individually. 91 N. W. 473; 75 Ark. 240.

3. Courts of equity always relieve where there is a mistake induced by the fraudulent conduct of the other party. 42 Ark. 240; 75 Ark. 382; 41 Ark. 494; 89 Ark. 309; 28 Wis. 637; 60 Minn. 491; 64 S. W. 403; 146 Ind. 322; 21 Mont. 277; 24 Ore. 341; 13 Minn. 246; 93 Tex. 334; 10 Vt. 185; 98 Ga. 413; 8 Wheat. (U. S.) 174; 102 U. S. 564; 123 Cal. 681; 21 N. E. 354; 28 N. W. 471.

McCULLOCH, C. J. This action was instituted at law by the Wilson-Ward Company, a Tennessee corporation, against the Farmers' Union Gin Company, a domestic corporation, and nine other defendants, as joint makers of a promissory note, executed to plaintiff for the sum of $5,750, dated April 21, 1906, and payable January 1, 1907, with interest from date. The note, which was exhibited with the complaint, is in the following form, and the signatures appear in the following order: "$5,750.00. Lake City, Ark., April 21, 1906.

"January 1, 1907, after date, we promise to pay to the order of Wilson-Ward Company fifty-seven hundred fifty and no-100 dollars, for value received, negotiable and payable without defalcation or discount, and with interest from date at the rate of 8 per cent. per annum until paid, payable at the office of the Wilson-Ward Company, Memphis, Tenn.

"Farmers' Union Gin Company,
"A. E. Thompson, President."

The following names were indorsed on the back of the note: A. E. Thompson, W. H. Vinson, James E. Bebb, G. W. Clements, Jr., S. R. Bibb, J. P. Thorne, T. Stotts, H. Chamberlain, F. H. Varner.

The defendants, other than the gin company, filed their joint answer and cross complaint, and moved to transfer the case to the chancery court, which was done. In the answer and cross complaint the defendants deny that they executed the writing set forth in the complaint, either as makers, sureties or indorsers, but admit that they did join in the execution of another note to plaintiff for that amount, and they set forth the following state of facts with reference to the transaction:

"On said April 21, 1906, said gin company was, and for a long time prior thereto had been, insolvent and execution-proof, which fact was well known to the plaintiff and these defendants, and these defendants say that upon the face of said note, and after the same had been signed by said gin company, and below said signature, they subscribed their names to said note, but say that they did not sign the same as indorsers, principals, or sureties, and at the date of the execution of said note, and at and prior to the time of subscribing their names thereto they positively refused to become liable upon said note in any manner; that it was then and there agreed and understood by and

between the plaintiff and these defendants that by subscribing their names to said note they should not become personally, severally or jointly, or in any manner liable for the payment of said note. That they were directors and officers of said gin company; that each and all of them were farmers and inexperienced in the transaction of commercial business, and ignorant of the rules, laws and regulations applicable thereto; that, after said note had been signed by said gin company, the plaintiff, through its agent, officer and representative, Ward, stated and represented to these defendants that the said note signed by said gin company without their signature or signatures would not be a valid and binding obligation, even as against said gin company; that the only manner in which said note could be made a valid and binding note and obligation against said gin company was for each of these defendants as officers and directors of said gin company to subscribe their names to said note, following the signature or name of said gin company thereto; that to so sign said note would and should not to any extent or for any purpose make them personally, severally or jointly liable upon said note in any manner, nor obligate them to pay the same; that by so signing said note they were only obligating the said gin company to pay said note.

"That said Ward at the time said note was executed was skilled and experienced in the transaction of business and familiar with the rules, laws and regulations relating to commercial paper, and the execution thereof by corporate bodies, and knew that the representations so made by him were false; that he made the same for the purpose of inducing and procuring these defendants to subscribe their names to said note not in manner to bind said gin company only, but for the purpose of binding and obligating these defendants to pay said notes.

"That said Ward further stated, at the time they subscribed their names to said note, that neither he nor the plaintiff wanted or desired that any of these defendants should become liable upon said note or obligated to pay the same, and that in subscribing the same these defendants did not believe that they were assuming any personal liability thereon.

"That in signing said note of said gin company, in manner and form as hereinbefore stated, and so as to make them appar-

ently liable as principals and sureties thereon, the same was done by mutual mistake of the plaintiff and said Ward and each and all of these defendants.

"That if, in making the statements and representations hereinbefore stated, the said Ward did not make the same in good faith and was not mistaken, as these defendants and each of them were, as to the effect which their signatures to said note would have upon their liability thereon, then defendants say that the statements and representations of said Ward were made for the deliberate purpose of deceiving, cheating and defrauding these defendants, and each of them."

The prayer of the cross complaint is for reformation of said instrument of writing, so as to correctly express the intention of the parties, and in such manner as to show that the signatures of the individual defendants were given for the sole purpose of making the instrument a valid obligation of said corporation. On final hearing of the case the chancellor found that "all of the defendants signed the note introduced in evidence; that at the time of signing the same it was agreed and understood, by and between the plaintiff and defendants, that only a note of defendant Farmers' Union Gin Company, as a corporate body, was being executed; that all the individual defendants signed said note only as representatives and directors of said corporation; that it was agreed and understood by and between plaintiff and all the defendants that none of said defendants would or should become personally liable upon said note for the payment thereof, nor incur any personal liability by signing the same, and that said defendants as individuals are not personally liable upon said note; that plaintiff is entitled to recover of and from the defendants, Farmers' Union Gin Company, the amount of the note sued upon and offered in evidence, and that the individual defendants are entitled to the relief prayed for by them." A decree was rendered in favor of plaintiff against the gin company, and a reformation was decreed as to the other defendants, and as to them the complaint was dismissed for want of equity. The plaintiff appealed.

The note was executed at Lake City, Ark., and Ward, the president of plaintiff corporation, and all of the defendants except Chamberlain and Varner were present. Ward came over from Memphis by appointment for the purpose of adjusting

the indebtedness of the gin company, and the others, who were directors in that corporation, met him for that purpose. The gin company owed plaintiff $5,560, or about that amount, on open account for borrowed money, and the account was past due. The gin company was insolvent, and the directors had previously offered to turn over to plaintiff the gin plant and machinery, but the offer was declined.

Ward testified in substance that he met the parties by appointment (except Chamberlain and Varner), and that they agreed to and did execute a note as personal indorsers of the gin company, and that it was executed on a printed form, being the same note exhibited with the complaint. He stated that he advanced to the gin company on that occasion the additional sum of about $200 to enable it to meet some small outstanding obligations, which sum was included in the note. He denied that the defendants indorsed the note for the purpose of making it a valid obligation of the gin company, or that he represented to them that it was necessary for them to do so as directors in order to make it valid, or that he represented to them that no personal liability would result from their indorsement in the manner in which they did.

All of the defendants executed the note the same day except Chamberlain and Varner, who were not present. The note was left for them to sign with the cashier of the bank at Lake City, and they came in separately on subsequent days and executed it, and it was then forwarded to plaintiff at Memphis by mail. Ward never saw Chamberlain or Varner, and they came in to sign the note at the instigation of some of the other defendants.

All of the defendants who met Ward and executed the note, together with other witnesses introduced by them, testified with singular unanimity as to what occurred on that occasion. Each of these defendants swore that the note sued on is not the one they signed, which they said was larger in size, and which all except Chamberlain and Varner signed on the face of the note, following the corporate name of the gin company, and not on the back of the note as the signatures appear on the note in suit. Some of them mention the circumstance of the president misspelling the word "gin" by using the

letter "j" in signing the corporate name, which was laughingly commented on at the time. The note exhibited in the complaint, as will be seen from the above copy, shows the misspelled word.

The defendants state that Ward represented to them that signing the note in that way was necessary in order to make it a binding obligation of the gin company, and that it would not render them personally liable except to the extent of their stock, or "for their *pro rata* as stockholders," as one or two of the witnesses expressed it. They all relate the following circumstance, which they say occurred in connection with the execution of the note: After the note was written out by Ward, one of them objected to a clause therein which they say appeared to make them personally liable, whereupon Ward remarked that he would fix it, and borrowed a pocket knife and made an erasure and wrote something else on it. One of the defendants, Mr. Stotts, so the witnesses say, at first refused to sign the note, but offered to pay his part, and Ward urged him to sign, saying that without his signature "the line would be broken," or that it "would be a broken body."

Now, the learned chancellor found that the defendants signed the identical note sued on, and we think he was correct in so finding. The original note has been brought up for our inspection, and we are clearly convinced that they signed it. They are mistaken in saying that they did not sign the note; they are mistaken in saying that they signed on the face of the note, instead of on the back; and they are mistaken in saying that something was erased from the note or that any change was made in it, for an inspection of the original note shows conclusively that it was not changed by erasure or otherwise. It is unnecessary to determine whether those misstatements were wilfully made or whether they resulted from defective recollection as to the transactions about which the witnesses testified. The question confronting us is whether or not the testimony of these witnesses, faulty as it is on material matters, and given wholly by those who are directly interested in the result of this suit, is sufficient to justify a court of equity in reforming a written instrument so as to change the obligation according to its plain import, or rather to entirely nullify the contract so

far as these defendants are concerned. This court has decided in an unbroken line of cases that, in order to reform a written instrument, the evidence must be "clear, unequivocal and decisive." *McGuigan* v. *Gaines*, 71 Ark. 614; *Goerke* v. *Rodgers*, 75 Ark. 72; *Tillar* v. *Wilson*, 79 Ark. 256; *Davenport* v. *Hudspeth*, 81 Ark. 166; *Marquette Timber Co.* v. *Chas. T. Abeles Co.*, 81 Ark. 420; *Mitchell Mfg. Co.* v. *Kempner*, 84 Ark. 349; *Turner* v. *Todd*, 85 Ark. 62; *Cherry* v. *Brizzolara*, 89 Ark. 309.

This court has, in several of the above cited cases, approved the following statement of the rule of evidence on this subject by Mr. Bishop in his work on Contracts, section 708: "In no case will a court decree an alteration in the terms of a duly executed written contract, unless the proofs are full, clear and decisive. Mere preponderance of evidence is not enough; the mistake must appear beyond reasonable controversy."

Measured by this rule, we do not think the evidence in this case is sufficient to justify a decree reforming the contract. Whilst the witnesses for defendants far outnumbered the one witness for plaintiff, yet the testimony of that one witness is reinforced by the writing itself, which is the best evidence of the contract between the parties; and we cannot shut our eyes to the fact that all of the defendant's witnesses—the defendants themselves and the three other witnesses they introduced—have misstated the facts as to material parts of the transaction. Taking the most charitable view of their testimony, that they are honestly mistaken in their recollection as to these matters, still it weakens their testimony to the extent that it does not establish by evidence which is "clear, unequivocal and decisive" the facts essential to a reformation of the written instrument.

It does not appear that the defendants were liable for the debts of the gin company. Yet there is evidence that some of them recognized a liability as stockholders in sums equal to the several amounts of their stock, and one of them offered to pay his part, rather than sign the note. Upon the whole, we are left in doubt, which seems to us to be well founded, as to whether or not the defendants intended, in executing the note as they did, to make themselves liable as joint makers. This being true, we conceive it to be our duty, in accordance with the rule hereinabove announced, to deny the prayer of defendants for reformation.

The decree is therefore reversed with directions to dismiss the cross complaint for want of equity, and to enter a decree against all of the defendants for the amount of plaintiff's debt.

LISMORE *v.* STATE.

Opinion delivered March 14, 1910.

1. CRIMINAL PROCEDURE—DEFECTIVE INFORMATION AND WARRANT.—It is immaterial that an information and warrant of arrest in a justice's court charging appellant with keeping a bawdy house were defective in alleging that the offense was committed on a certain day, instead of between certain days, as they accomplished their purpose when they brought appellant before the justice of the peace. (Page 209.)
2. MUNICIPAL CORPORATIONS—ORDINANCE LICENSING BAWDY HOUSES.—A city ordinance licensing the keeping of bawdy houses is contrary to the general laws of the State and void. (Page 210.)
3. BAWDY HOUSES—EVIDENCE OF REPUTATION.—Evidence that a house occupied by appellant has the reputation of being a bawdy house is of no force unless coupled with other evidence, such as that it was a resort of men and women reputed to be of lewd and lascivious character. (Page 210.) ffl.
4. EVIDENCE—PROOF OF ANOTHER OFFENSE.—Evidence of one offense is not admissible to prove another except to show that the latter was not committed by accident or mistake. (Page 210.)

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

Powell & Taylor and *T. W. Hodge,* for appellant.

1. Keeping a bawdy house is a common-law offense, and our statute has adopted the common law. Kirby's Dig., § § 623-4. The Legislature delegated to cities and towns authority to suppress and restrain bawdy houses. Kirby's Dig., § 5438. The general State law is repealed. 14 Cyc. 492; 2 Tex. App. 425; 38 Mo. 451; 9 Col. 450; McQuillin on Mun. Corp., p. 343; 59 Am. Rep. 731; Sedgwick on Statutory & Const. Law, p. 100; Dillon, Mun. Corp. (3 ed.), par. 88.

2. Evidence of one crime is not admissible to prove another, except to show guilty knowledge or intent. 72 Ark. 598; 1 Bish. Cr. Pro. & Prac. 1226; Wharton, Cr. Ev. 31-46; Clark,

Cr. Law 518; 36 Am. Rep. 887; 2 Arch. Cr. Pr. & Pl. (8 ed.) 335.

3. Evidence of the reputation of the house is not admissible. 60 Ala. 97; 59 Ala. 82; 94 Ill. 648; 63 Miss. 207; 27 Fed. Cas. 16, 191; 2 Cranch, C. C. 13; 15 Mont. 194; 29 Wis. 435.

4. A conviction bars all prosecutions covering the period up to the time of conviction. 12 Cyc. § 281, note 66; 119 Ind. 501; 7 Fed. Cas. 3935; 4 Cr. C. C. 114; Wharton, Cr. Ev. 579; Russell on Crimes (8 Am. ed.) 832; 105 Mass. 53; 126 Mass. 259; 80 Ark. 96.

Hal L. Norwood, Attorney General, *Wm. H. Rector,* Assistant, for appellee.

1. A municipality has no power to license bawdy houses. 2 Abbott, Mun. Corp. 982; 1 Dillon, Mun. Corp. (4 ed.), § 361; 26 N. E. 697; 137 Cal. 583.

2. Keeping a bawdy house is an offense against the common law. Kirby's Digest, § 623-4; 38 Ark. 637. The ordinance is void. 45 S. W. 779; 34 Ark. 372; 23 Ark. 304; 13 S. W. 779.

3. The plea of former conviction is not sustained. 72 Ark. 419; 48 Ark. 34; 42 Ark. 35; Wharton, Cr. Ev. 579; 105 Mass. 53.

4. The general reputation of the house may be proved, that is, its character. 24 Tex. App. 491; 22 *Id.* 639; 41 La. Ann. 1079.

BATTLE, J. On the 6th day of July, 1909, before a justice of the peace of Ouachita County, an information was filed against Roy Lismore, in which Roy Lismore was accused of keeping a bawdy house on the 3d day of July, 1909, in the county of Ouachita, in this State. Upon a trial for that offense she was convicted, and appealed to the Ouachita Circuit Court. She was tried in that court before a jury. In the trial evidence was adduced tending to prove that she occupied a house in the city of Camden, in Ouachita County, which had the reputation of being a bawdy house, and where men and women congregated and indulged in drinking spirituous and intoxicating liquors, unlawful sexual intercourse, and lascivious and disorderly conduct. A resolution of the city council of Camden, which regulated bawdy houses, and permitted and licensed them

in that city upon payment to the city marshal of $25 monthly, was introduced and read as evidence in the trial by the plaintiff over the objection of the defendant. Plaintiff was also allowed to read as evidence, over the objection of the defendant, the recorder's ledger of the city of Camden, in which is kept a record of the fines paid by the defendant; also copies of two judgments on the docket of the mayor of Camden, rendered, respectively, upon the 17th day of May, 1909, and the 8th day of June, 1909, by such mayor, upon pleas of the defendant.

The defendant objected to the admission of the evidence as to the reputation of her house, and excepted to the decision of the court admitting it.

The court instructed the jury over the objection of the defendant, in part, as follows:

"The court instructs the jury that if they find from the evidence in this case, beyond a reasonable doubt, that the defendant, Roy Lismore, did in Ouachita County, Arkansas, and within one year before the filing of the information herein, enter a plea of guilty in the mayor's court in the city of Camden, Arkansas, to the running of a bawdy house in the said city of Camden, Arkansas, in Ouachita County, or confessed to the running of a bawdy house in said mayor's court, as aforesaid, this will justify you in finding the defendant guilty."

And the court refused to instruct the jury, at the request of the defendant, as follows:

"No. 4. The jury are instructed under the law of this State the city of Camden had the right and power to regulate bawdy houses within the corporate limits of said city; and if you find from the evidence that the city of Camden, at the time of the alleged commission of the offense charged in the information, had in force an ordinance and resolution regulating bawdy houses within its limits, and you find that said resolutions were reasonable, then you will find the defendant not guilty."

The jury found the defendant guilty, and assessed her punishment at a fine of $100 and imprisonment for three months in the county jail. From this conviction the defendant appeals.

It is first urged that the information filed against the defendant is defective because it alleges that the offense was committed on one day, whereas the keeping a bawdy house is a

continuing offense, and should have been alleged as committed on divers days between two days certain. This is true, as a general rule. But this was before a justice of the peace. In that court no written pleadings are necessary. The warrant or summons in criminal cases may be issued by the justice of the peace upon facts within his own knowledge. Kirby's Digest, § § 2495, 2506. It need only describe in general terms the offense charged, and is sufficient if it brings the accused before the justice of the peace. *Kinkead* v. *State,* 45 Ark. 536; *Tucker* v. *State,* 86 Ark. 436.

The resolution of the city council of Camden authorizing the keeping of bawdy houses upon the monthly payment of $25 was inadmissible as evidence. The city council had no power to pass a resolution or ordinance to that effect. By section 4 of article 12 of the Constitution of this State it is provided that "no municipal corporation shall be authorized to pass any laws contrary to the general laws of the State." The common law making the keeping of bawdy houses a misdemeanor is a general law of this State, adopted and made so by statute, and made punishable by fine not exceeding one hundred dollars, and imprisonment not exceeding three months. Kirby's Digest, § § 623, 624; *State* v. *Lindsay,* 34 Ark. 372; *Goetler* v *State,* 45 Ark. 454.

For the reason that the city council cannot license the keeping of bawdy houses, the request of appellant for instruction numbered 4 and copied in this opinion was properly refused.

The evidence that the house occupied by appellant had the reputation of being a bawdy house was not sufficient to convict. It is a circumstance which may be shown in connection with evidence that it was a resort of men and women who are reputed to be of lewd and lascivious character. Independently, it is of no force or effect. *State* v. *Brunell,* 29 Wis. 435; 14 Cyc. 510, and cases cited.

The instruction given over the objection of the defendant, and copied in this opinion, should not have been given. It did not confine the jury to the consideration of confessions made as to the crime charged. Evidence of one offense is not admissible to prove another, except it may be shown to prove that the offense charged was not committed by accident or mistake. *Howard* v. *State,* 72 Ark. 586, 598.

Reversed and remanded for a new trial.

STATE v. LISMORE.

Opinion delivered March 14, 1910.

1. BAWDY HOUSES—PARTICIPATION IN KEEPING.—The fact that aldermen of a city voted for a resolution the effect of which, if enforced, would have been to license the keeping of bawdy houses in the city was not sufficient to make them participants in the subsequent keeping of the bawdy houses in the city. (Page 211.)

2. CRIMINAL LAW—FORMER CONVICTION.—A former conviction of a criminal offense is a bar to a subsequent indictment for any offense of which the accused might have been convicted under the indictment or information and testimony in the first case. (Page 212.)

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

Hal L. Norwood, Attorney General, and *W. H. Rector*, Assistant, for appellant.

Powell & Taylor and *Thomas W. Hardy*, for appellees.

BATTLE, J. The appeals in the above styled cases grow out of the same trial, had on the 5th day of November, 1909, under the same indictment. It is charged in the indictment that Roy Lismore, F. L. Agee, Ed Harper, J. G. McDonald and E. H. Carson kept and maintained a bawdy house in the city of Camden, in the State of Arkansas, on the second day of August, 1908, and on divers other days between that day and the tenth day of April, 1909. The defendants pleaded not guilty to the indictment, and Roy Lismore, in addition to the plea of not guilty, filed a plea of former conviction of the same offense, verifying it by the record.

There was no evidence tending to prove that Carson, Harper, Agee and McDonald were guilty of the crime charged. They were aldermen and members of the city council of Camden, which passed a resolution, the effect of which, if enforced, would have been to license the keeping of bawdy houses in Camden by any one upon the monthly payment of $25, and they voted for the resolution. But this was not sufficient to make them participants in the keeping of the bawdy houses in Camden that were kept after the resolution was passed. They were properly acquitted.

The defendant, Roy Lismore, offered to prove the allegations made in her plea of former conviction. She offered to

prove that an information accusing her of keeping a bawdy house on the third day of July, 1909, in the county of Ouachita, in this State, was filed against her before W. A. Perry, a justice of the peace of Ouachita County, Arkansas; and to prove by the record of the Ouachita Circuit Court that this accusation was taken by appeal from the court of W. A. Perry, a justice of the peace, and tried in that court before a jury; to prove the evidence adduced in the trial; to prove that the jury was instructed by the court that if they believed from the evidence in the case, beyond a reasonable doubt, that the defendant, Roy Lismore, in Ouachita County, Arkansas, and within twelve months before the filing of the information, did unlawfully keep and maintain a certain bawdy house, etc., they should find her guilty, and assess her punishment at a fine of some amount not to exceed $100, and by imprisonment in the county jail for some period of time not to exceed three months; and to prove the judgment of the court by competent evidence, and thereby that she was convicted by the jury, who assessed her punishment at a fine of $100 and three months' imprisonment in the county jail, and that judgment was rendered accordingly. And the court refused to allow her to make any part of such proof, and on motion of the plaintiff struck from the record of the court her plea of former conviction of the same offense; to all of which the defendant excepted, and reserved exceptions.

After hearing the evidence adduced for their consideration, the jury found the defendant, Roy Lismore, guilty and assessed her punishment at a fine of $100 and three months' imprisonment. The court rendered judgment according to the verdict, and the defendant, Lismore, appealed.

In *State* v. *Nunnelly*, 43 Ark. 68, it is said: "The established rule is that the former conviction is a bar to a subsequent indictment for any offense of which the defendant might have been convicted under the indictment and testimony in the first case."

In the case in which appellant was charged with keeping a bawdy house by the information filed before a justice of the peace the State could have shown, if it had sufficient evidence, that the offense was committed within twelve months before the 6th day of July, 1909, the date of the filing of the information,

and for that purpose could have adduced all the evidence of the commission of such offenses within that time, and relied upon the whole proof for a single conviction. In that case the appellant could have been convicted of any one of the offenses proved, if any; and such a conviction would be a bar to a subsequent indictment for any offense of which the defendant might have been convicted upon the testimony under the information in the first case. *State* v. *Blahut,* 48 Ark. 34; *Bryant* v. *State,* 72 Ark. 419.

Under the instructions given by the court in the prosecution instituted by the filing of the information before the justice of the peace on the 6th day of July, 1909, the jury could have found the defendant guilty of the keeping of a bawdy house, which they believed from the evidence adduced in that case beyond a reasonable doubt that the defendant committed in Ouachita County within twelve months before the filing of the information, a period of time extending from the 6th of July, 1908, to the 6th of July, 1909, and embracing the time within which the offense is charged in the indictment before us to have been committed, towit, from the 2d day of August, 1908, to the 10th day of April, 1909. If such evidence proved that more than one of such offenses were committed in the twelve months, and the defendant was convicted of any one of them, then such conviction is a bar to an indictment for any of them. According to this test, the evidence offered by the defendant and refused by the court was sufficient to entitle her to the submission of the issue, tendered by her plea of former conviction, to the jury for determination upon the evidence, and the court erred in striking the same from the record.

The judgment in favor of Agee, Harper, McDonald and Carson is affirmed, and the judgment against the defendant, Lismore, is reversed, and the cause is remanded for a new trial.

MAXEY v. COFFIN.

Opinion delivered March 14, 1910.

1. MANDAMUS—JUDICIAL DISCRETION.—While mandamus will lie against judicial officers to compel them to act, it will not lie to control their decisions. (Page 214.)

2. SAME—ALLOWANCE OF COSTS.—Where the circuit judge denied a motion to retax the costs in a case, the remedy of the aggrieved party is by appeal, and not by mandamus to compel the judge to allow the costs. (Page 215.)

Petition for mandamus; *Charles Coffin,* Judge; writ denied.

Petitioner, *pro se.*

There was no occasion for the exercise of discretion or official judgment, and mandamus is the proper remedy. 43 Ark. 62. The writ will issue whenever the refusal of an officer to act in a matter in which it is his plain duty to act may deprive one of his legal rights. 45 Ark. 121; Kirby's Dig., § § 5156 to 5161, inclusive; 35 Ark. 565; *Id.* 298; 33 Ark. 568; 26 Ark. 237.

HART, J. This is a petition for mandamus directed against the Hon. Charles Coffin, Judge of the Third Judicial Circuit.

The facts relied upon to obtain it are as follows: R. E. L. Maxey was convicted in the Stone Circuit Court for the crime of obtaining money under false pretenses. He appealed to this court, where the judgment was reversed on the ground that the evidence was not sufficient to support the verdict, and the case was remanded for a new trial. See *Maxey* v. *State,* 85 Ark. 499.

After the mandate from this court was filed in the circuit court Maxey moved the court to dismiss the case because more than one year had elapsed since the reversal of the case and the filing of the mandate in the circuit court. In the same motion he asked the court to retax the costs, claiming that he had expended $12.50 for printing briefs for the Supreme Court, and $50 for a transcript of the stenographer's notes to be used in his bill of exceptions on appeal. His motion was overruled by the court, and upon motion of the State the indictment was quashed, and the case resubmitted to the grand jury. Maxey has filed a petition in this court, setting out substantially the above facts, and asking the court to compel the circuit judge, through a writ of mandamus. to retax the costs as asked by

him, or to certify down to the county judge of Stone County the sum of $62.50, the amount claimed by him, as costs against the county in said case. The writ will be denied. It is well settled that mandamus will lie against judicial officers to compel them to act, but not to control their decisions. *McBride* v. *Hon,* 82 Ark. 483; *Branch* v. *Winfield,* 80 Ark. 61; *Collins* v. *Hawkins,* 77 Ark. 101; *Coit* v. *Elliott,* 28 Ark. 294.

Here the court did not refuse to act, but on the contrary did act by overruling Maxey's motion to retax the costs. In ruling on this motion the court did not act in a ministerial capacity, but exercised judicial functions. In determining the motion the circuit judge was called upon to decide two questions of law. First, whether rule 23 of this court, providing that the cost of printing the abstract and brief required by rule 9 shall be taxed against the losing party, applies to felony cases. Second, whether Maxey was entitled, under the act of March 16, 1897, to recover the amount paid by him to the court stenographer for transcribing his notes. The ruling of the court upon these questions was a judicial act; and if Maxey felt aggrieved by the judgment of the court, his remedy was by appeal.

Mandamus denied.

STATE v. PERRY.

Opinion delivered March 14, 1910.

LARCENY—INDICTMENT.—An indictment for larceny which alleges that defendant the property of another "unlawfully and feloniously did steal, take and carry away," etc., is sufficient, although it does not allege that defendant took the property with intent to convert it to his own use.

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

Hal L. Norwood, Attorney General, and *Wm. H. Rector,* Assistant, for appellee.

1. The indictment is good. It was unnecessary to allege that the taking was with the intent to convert to the defendant's own use, etc. 97 Cal. 194; 144 Mass. 568; 33 La. Ann. 979; 41

Id. 784. The indictment put the defendant on notice, and charged the offense with such certainty as to enable the court to pronounce judgment. Kirby's Dig., § § 2228, 2241, 2242, 2243; 84 Ark. 477; 63 Ark. 613; 5 Ark. 444; 19 Ark. 613.

2. The word "steal" includes all the elements of larceny at common law. 40 Neb. 545; 55 N. J. L. 17; 56 Pac. 708; 96 N. W. 1025; 1 Den. Cr. Cas. 376; 70 Pac. 280; 152 Mo. 124; 91 N. W. 605. The word "feloniously" implies the intent to convert to his own use.

Edwin Hiner and *C. T. Wetherby,* for appellee.

HART, J. The sufficiency of the indictment is the only question presented by the record. Omitting the formal parts, it reads as follows:

"The grand jury of Sebastian County, for the Fort Smith District thereof, in the name and by the authority of the State of Arkansas, accuse the defendants, Steve Perry and Frank Coley, of the crime of grand larceny, committed as follows, to-wit: The said defendants in the county and district aforesaid, on the thirtieth day of November, 1909, one horse of the value of fifty dollars, the property of one Josephine Coley then and there being, unlawfully and feloniously did steal, take and carry away, against the peace and dignity of the State of Arkansas."

It is claimed by counsel for appellee that the indictment returned by the grand jury contains the word "and" where "of" is used in the clause, "the property of one Josephine Coley;" but the record shows the indictment to be as copied above; and we are not asked to correct the record. The matter is immaterial, however, for the context shows that the word "of" is meant, and if the word "and" was used instead, it would be a clerical mistake, and would not vitiate the indictment. *Bennett* v. *State,* 73 Ark. 386.

The indictment is not defective because it does not allege that the defendant took the property with the intent to convert it to his own use. In the case of *State* v. *Boyce,* 65 Ark. 82, where the indictment in this respect was similar to the one in question, the court, after quoting our statute that "larceny is the felonious stealing, taking and carrying, riding or driving away, the personal property of another," said: "The word 'steal' has a uniform signification, and in common as well as

legal parlance means 'the felonious taking and carrying away of the personal goods of another.'"

Therefore the court erred in sustaining a demurrer to the indictment. The judgment will be reversed, with directions to overrule the demurrer, and to proceed with the case.

STATE v. LITTLE.

Opinion delivered March 14, 1910.

1. TAXATION—POWER OF LEGISLATURE.—Under Const. 1874, art. 16, § 5, providing that "all property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State," *held* that, subject to the constitutional restrictions, the authority of the Legislature in providing the means and agencies for valuing property for taxation is supreme. (Page 219.)
2. TAXATION—ERRONEOUS ASSESSMENTS—RELIEF.—The courts, whether of law or equity, can not give relief against erroneous assessments, except where they are especially impowered to do so. (Page 220.)
3. SAME—RIGHT TO RELIEF AGAINST VALUATION FIXED BY COUNTY COURT.—Under Kirby's Digest, § 6999, providing that the action of the county court in hearing the complaints of taxpayers "shall be final unless the owner or agents of such property as make complaint shall take an appeal to the circuit court," *held* that, where the county court lowers the assessment of a taxpayer, neither the State nor the State Tax Commission is entitled to relief in equity against such assessment. (Page 221.)

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

STATEMENT BY THE COURT.

The county board of equalization of Miller County, at its 1909 session, raised the valuation of the property of certain taxpayers. A number of persons whose property was affected applied to the county court of Miller County for a reduction of the assessment. At the October term, 1909, of the Miller County Court, the members of the board of equalization attended and explained the changes in valuation. The county court made an order reducing the assessments in certain cases. In the

meantime County Clerk A. B. Little had extended against the several tracts of land, whose valuations the owners had sought to reduce, and against the several personal assessments which were being complained of, the county and State taxes on the valuations as fixed by the county equalization board.

The State Tax Commission took the matter up, and concluded that the action of the county court in making the reductions was wrong. Having reached this conclusion, the members of the State board and the Attorney General, on behalf of the State of Arkansas, filed a bill in the chancery court of Miller County against A. B. Little as county clerk of said county, praying that he be enjoined as such clerk from making any changes in the valuation of property as extended on the tax books of said county until the further orders and directions of said chancery court.

A temporary injunction was granted in accordance with the prayer of the bill.

The persons whose property was affected were permitted to become parties defendant to the action. A demurrer to the complaint was filed, and a motion made to dissolve the temporary injunction. On final hearing of the case the chancellor found in favor of the defendants, and a decree was accordingly entered, dissolving the temporary injunction and dismissing the complaint for want of equity.

From this decree the plaintiffs have duly prosecuted an appeal to this court.

Hal L. Norwood, Attorney General, *Wm. H. Rector,* Assistant, *L. A. Byrne* and *David A. Gates,* for appellant.

1. No remedy at law is given from the action of the county court in reducing assessments. Art. 7, § § 14 and 33, Kirby's Dig. § § 1317, 1487, 6998-9. No method of appeal is provided. Nor is certiorari available. Spelling on Inj. § 16. The only remedy is in equity.

2. Property should be assessed uniformly, and in the absence of any legal remedy chancery can be invoked to rectify gross inequalities in the assessment. Kirby's Dig., § § 6998-9; art. 7, § 28, Const., and art. 7, § 28; art. 16, § 5; 46 Ark. 141.

3. Assessment of taxes is a ministerial function. 28 Ark. 270; 21 Ark. 55; 49 Ark. 518; 36 Ark. 142; 46 Ark. 386.

4. Assessors can be compelled to assess property uniformly. 58 L. R. A. 517. Abuse of discretion or fraud can always be corrected in equity. 58 L. R. A. 513; 123 Ill. 227; 78 Ill. 382; 179 Ill. 615; 176 Ill. 576; 43 Cal. 353; 83 Ill. 602. Courts of equity will interpose in a clear case of reckless disregard of duty whereby a grossly arbitrary and unreasonable assessment is placed on property. Spelling on Inj. § 654; 49 Ark. 524.

5. Final orders of county courts may be attacked by injunction collaterally. 30 Ark. 101, 278.

Henry Moore, Jr., for appellee.

1. A court of equity has no jurisdiction. No right of appeal is given the State Tax Commission. Const. art. 7, § § 28-33; Kirby's Dig. § § 1375, 6999; 70 Ark. 88; art. 16, § 5, Const.

2. The county court has exclusive jurisdiction. 43 Ark. 63; 44 Ark. 225; 47 Ark. 80; 70 Ark. 88.

Joel D. Conway, John N. Cook and *W. H. Arnold,* for appellee.

1. Chancery has no jurisdiction. 46 Ark. 471; *Ib.* 383; 49 Ark. 518; 27 Ark. 682.

2. An adequate remedy is provided by appeal, and that remedy must be followed. 18 Ark. 380; 43 Ark. 257; 47 Ark. 431; 92 N. Y. 604; Cooley on Tax, 748-9; 6 Pick. 98; 5 Gray, 365; 5 Cush. 93; 70 Pa. St. 221; 56 *Id.* 315; 43 Conn. 309; 13 Fed. Rep. 752; 49 Ark. 518; Kirby's Dig. § 6999.

HART, J., (after stating the facts). Our Constitution, art. 16, § 5, provides that "all property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State." Hence it will be seen that the taxing power is a legislative function, and that, subject to constitutional restrictions, the action of the Legislature is supreme. *Board of Equalization Cases,* 49 Ark. 518; *Prairie County* v. *Matthews,* 46 Ark. 383.

In the exercise of its province in providing the means and agencies for ascertaining the valuation of property for taxation, the Legislature passed an act providing for a county board of equalization. After prescribing the powers and duties of the board in regard to the equalization of property for taxation, it

provides that any person aggrieved by the action of the board may apply to the county court for relief.

Section 6999, of Kirby's Digest, which is a part of the act, reads as follows:

"The board of equalization shall attend at said term of said court and show cause, if any they can, why such valuations were raised in cases where complaint is made of such increase. The county court shall hear and determine all complaints made by the owners or agents of such property and approve or reject the action of said board as the facts may warrant, and such action of the county court shall be final unless the owner or agents of such property as make complaint shall take an appeal to the circuit court."

It will be seen that no right of appeal from the judgment of the county court is given except to the owner of the property, upon whose complaint the court has acted.

"The courts, either of common law or of equity, are powerless to give relief against the erroneous judgments of assessing bodies, except as they be specially empowered by law to do so." Cooley on Taxation, vol. 2, p. 1382; Desty on Taxation, vol. 1, p. 605.

The text is supported by numerous adjudicated cases from many of the States, and the rule is of general application. See, also, *Board of Equalization Cases,* 49 Ark. 518; *Clay County* v. *Brown Lumber Co.,* 90 Ark. 413; *Wells Fargo & Company's Express* v. *Crawford County,* 63 Ark. 576.

In support of their contention that plaintiffs are entitled to the injunctive relief prayed for in their bill, learned counsel have cited us to many cases where courts have held that the individual taxpayer, setting up facts which constitute fraud in the assessment of his property, or facts which show the assessment to be illegal, may seek relief in equity; but the decisions in those cases are based upon the ground that the facts alleged constitute a taking of the taxpayer's property without due process of law, and the illegal or fraudulent proceedings cast a cloud upon his title.

We have been cited to no case, and believe there are none, where, in the absence of statute conferring it, the State would be entitled to injunctive relief on account of the dereliction of its

officers, to whom it has entrusted the duty of ascertaining the valuation of property for taxation. The Legislure having provided the agencies for the assessment of property for taxation and the manner of its exercise, the action of such officers is conclusive on the State in the absence of a statute to the contrary; and the courts have no power to supervise and correct the assessments made by them.

Again, it is contended that the State Board of Tax Commissioners have the right to seek relief prayed for under the facts stated in their complaint. They rely on section 11 of the acts of Arkansas, 1909, c. 257, creating the State Tax Commission, to sustain their contention. The section referred to is copied in the opinion in the case of *Bank of Jonesboro* v. *Hampton,* 92 Ark. 492, and need not be copied here. In that case we held that the State board, being a creature of the statute, had no powers except such as are expressly or by necessary implication, given it, and that the supervisory control, given by the section referred to, was only to the extent of collecting information to be used by the State board for the purpose of enabling its members to discharge their duties in a more intelligent and efficient manner; and also for the purpose of collecting data to be furnished to the Legislature for its information in framing such legislation on the subject of ascertaining the valuation of property for taxation as it may deem necessary.

From the views expressed, it necessarily follows that the action of the chancellor in sustaining the demurrer was correct, and the decree will therefore be affirmed.

BELCHER *v.* HARR.

Opinion delivered March 14, 1910.

1. EVIDENCE—PRESUMPTION AS TO OFFICIAL ACTS.—Where swamp land certificates were lost, and duplicates were issued by the State officers, the presumption is that they were rightly issued. (Page 223.)
2. PUBLIC LANDS—PRESUMPTION IN FAVOR OF PATENT.—A patent for swamp land issued by the State is conclusive evidence of the legal title unless something to the contrary is shown. (Page 224.)

3. TAXATION—SWAMP LANDS.—Where swamp lands were paid for and a certificate of purchase was issued, from that date the lands became subject to taxation, unless otherwise exempt, without regard to the issuance of the patent. (Page 224.)

4. SAME—SALE OF SEVERAL TRACTS FOR LUMP SUM.—A tax sale of several tracts of land for a lump sum is void. (Page 225.)

5. SAME—TAX SALE—WRONG DAY.—A tax sale of land delinquent for the taxes of 1882, held on June 11, 1883, is void. *Allen* v. *Ozark Land Co.*, 55 Ark. 549, followed. (Page 225.)

6. REMOVAL OF CLOUD—LACHES.—Where the holder of the legal title to land brought suit within two years after defendant acquired a tax title thereto from the State, and before defendant expended any money in improving the land and before his condition became so changed that he could not be placed in his former state, the suit was not barred by laches. (Page 225.)

7. TAXATION—LIEN.—A purchaser of land under a void tax sale is entitled to a lien on the land for all taxes paid by him. (Page 226.)

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

George Sibly, for appellant.

1. The lands were not subject to taxation for ten years after entry. 21 Ark. 40-49; *Ib.* 35; Abbott's Nat. Dig. vol. 1, p. 570; 3 *Id.* 170; 4 *Id.* 264.

2. The lands were sold *en masse* for a lump sum, and the tax sale is void. 30 Ark. 579; 31 *Id.* 315; 55 *Id.* 109; 61 *Id.* 414; 65 *Id.* 70; 87 *Id.* 428; 61 Ark. 464; 46 Ark. 333; 66 Ark. 433.

3. Until some adverse right was set up, no action by appellant was required. 46 Ark. 96; 50 Ark. 393; 60 Ark. 665; 75 Ark. 194; 69 Ark. 424; 75 Ark. 312.

4. The tax sale on June 11, 1883, has been held void. 55 Ark. 549; 70 Ark. 257.

5. Mere lapse of time does not constitute laches or staleness of claim. 28 Oh. St. 568; 80 Va. 22; 37 N. J. Eq. 130; 12 A. & E. Enc. Law, 550-2, 558; 2 Dembitz on Land Titles, 1445, § 188, p. 1447; 46 Ark. 96; 50 Ark. 393; 54 Ark. 665; 75 Ark. 194. See also 70 Ark. 256; 81 Ark. 296; 75 Ark. 194; 45 Ark. 81; 76 Ark. 525; 81 Ark. 296; 88 Ark. 395.

J. G. & C. B. Thweatt, for appellee.

1. The patent to the Belcher heirs should not have been issued. Kirby's Digest, § 4747; 1 Wall. (U. S.) 109.

2. The tax sale was not void. 54 Ark. 668.

3. There was laches. 6 Ark. 381; 27 Ark. 343; 41 Ark. 53; 48 Ark. 277; 11 U. S. 201. An unreasonable delay in asserting rights is a bar to relief. 150 U. S. 193; 20 Wall. (U. S.) 14. Appellants are barred. 81 Ark. 352; 90 Ark. 430.

FRAUENTHAL, J. This was an action instituted by the plaintiffs below, S. M. Belcher and W. O. Belcher, to cancel a tax deed to certain lands and to quiet their title thereto. The chancery court found that "plaintiffs' right to the lands was barred in equity," and dismissed the complaint. There are several tracts of land involved in this litigation, which are claimed by the defendant under a tax deed from the State. One of these tracts was forfeited to the State in 1869 for the nonpayment of the taxes of the year 1868, and the other tracts were forfeited to the State in 1883 for the nonpayment of the taxes of 1882. The defendant purchased the lands from the State on June 1, 1904.

The plaintiffs deraign title to the lands as follows: The lands were granted by the United States to the State of Arkansas as swamp land by the act of Congress approved September 28, 1850, entitled "An Act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits."

On July 3, 1860, Wilson M. Belcher applied for and obtained these lands by purchase from the State of Arkansas, and it is claimed that he purchased same with swamp land certificates. He received a certificate of entry for the lands from the proper officials of the State, and made full payment therefor. W. M. Belcher died intestate on January 17, 1879, leaving surviving him as his only heirs four children, two of whom are the plaintiffs, and the other two children conveyed their interests in the lands to one of the plaintiffs. On February 21, 1906, the Commissioner of State Lands, in pursuance of sections 4746 and 4747 of Kirby's Digest, issued duplicate certificates for these lands to the heirs of Wilson M. Belcher in lieu of the originals issued to Belcher, which were averred and proved to have been lost; and thereafter on the same day in pursuance of said certificates he executed a deed from the State to said heirs of Wilson M. Belcher for said lands.

It is urged by the appellee that sufficient proof was not

made before the Commissioner of State Lands for the issuance of the above duplicate certificates under section 4747 of Kirby's Digest; but he has introduced no evidence to sustain that contention. The issuance of the duplicate certificates and the execution of the swamp land deeds were acts of an official nature, and in the acts of such nature everything is presumed to be rightly and duly performed. The patents for swamp land issued by the State are conclusive evidence of the legal title unless something to the contrary is shown. *Chrisman* v. *Jones,* 31 Ark. 609; *Holland* v. *Moon,* 39 Ark. 121; *Wilson* v. *State,* 47 Ark. 199; *Rozell* v. *Chicago Mill & Lumber Co.,* 76 Ark. 525; *Hibben* v. *Malone,* 85 Ark. 584; *Steel* v. *Smelting Co.,* 106 U. S. 447.

The plaintiffs are therefore the owners of the legal title to the lands.

The lands were fully paid for by Wilson M. Belcher, and certificates therefor were issued to him, and from that date they became subject to taxation, unless otherwise exempt, without regard to the issue of the patents of the State therefor. *Witherspoon* v. *Duncan,* 21 Ark. 240; *Diver* v. *Friedham,* 43 Ark. 203; *Smith* v. *Hollis,* 46 Ark. 17; *Burcham* v. *Terry,* 55 Ark. 398; *Nichols* v. *Council,* 51 Ark. 26; *Van Brocklin* v. *Tennessee,* 117 U. S. 151.

One of the tracts of land was forfeited and sold to the State in 1869 for the nonpayment of the taxes of 1868. It appears that this tract was sold in connection with several other tracts for a lump sum, and that this tract and the several other tracts were sold *en masse.* The taxes had been extended separately against each of these tracts. The sale was therefore void. *Pettus* v. *Wallace,* 29 Ark. 476; *LaCotts* v. *Quertermous,* 83 Ark. 174; *Harris* v. *Brady,* 87 Ark. 428; *Chatfield* v. *Iowa & Ark. Land Co.,* 88 Ark. 395.

It is urged also by counsel for appellants that the sale of said tract of land for the nonpayment of the taxes of 1868 was illegal and void because the land was for that year exempt from taxation. It is claimed that the land was located and paid for with swamp land scrip issued in pursuance of the act of the Legislature approved January 6, 1851, entitled: "An Act to provide for the reclaiming of the swamp and overflowed lands donated to this State by the Unites States;" and that by

the fourteenth section of that act it was provided that, in order to offer inducements to purchasers to take up the land, the "swamp lands shall be exempt from taxation for the term of ten years;" that the swamp land involved in this suit was purchased by Wilson M. Belcher in 1860, and was exempt from taxation for a term of ten years thereafter. Section 14 of the above act was specifically repealed by the act of the Legislature approved January 12, 1853.

In the case of *McGehee* v. *Mathis,* 21 Ark. 40, it was held that said repealing act was valid as to all lands purchased after the date of said repeal. But upon a writ of error to the Supreme Court of the United States in the case of *McGehee* v. *Mathis,* 4 Wall. 143, that court held that the contract of the State to convey the land for the swamp land scrip and to refrain from taxation for the term specified was a contract between the State and the purchaser by virtue of the said act approved January 6, 1851, and that the repeal of the exemption by the act approved January 11, 1855, was an impairment of that contract and therefore void. But we do not think it necessary to pass upon the question as to whether or not said land was subject to taxation for the year of 1868 for the reason that as above stated the said tax sale for that year as to this tract of land is void for other reasons.

All the other tracts of land involved in this suit were sold to the State in 1883 for the nonpayment of the taxes of 1882. The sale was made on the 11th day of June, 1883, and this was on a day unauthorized by law. The tax sale of these lands on that day was void as was held in the case of *Allen* v. *Ozark Land Co.,* 55 Ark. 549. See also *Ross* v. *Royal,* 77 Ark. 324; *Taylor* v. *Van Meter,* 53 Ark. 204; *Penrose* v. *Doherty,* 70 Ark. 256; *Spain* v. *Johnson,* 31 Ark. 314; *Vernon* v. *Nelson,* 33 Ark. 748.

It is contended by defendant that the rights and claim of plaintiffs to these lands are barred by laches. The lands are wild and unimproved, and the constructive possession thereof has always been since their purchase in the plaintiffs and their father, who were the true owners thereof. The defendant had no right to believe that they were abandoned, and there was no situation presented requiring action on the part of the plaintiffs until the actual possession of the land was taken by another, or until a color of title was obtained by one that might ripen into

perfect title by payment of taxes for the time required by the statute. The defendant purchased the land on June 1, 1904, and then began paying taxes thereon, and on March 22, 1906, this suit was instituted. In the case of *Earle Improvement Co.* v. *Chatfield,* 81 Ark. 296, it is said: "While it is true that the length of time during which a party may neglect to assert his rights and not be guilty of laches varies with the peculiar circumstances of each case and is subject to no arbitrary rule, like the statute of limitations, * * * yet, in the absence of some supervening equity calling for the application of the doctrine of laches, a court of chancery should and will follow the law, and not divest the owner of title by lapse of time shorter than the statutory period of limitations. * * * The payment of taxes for only five years, even with a great increase in the value of the land, we do not think would justify a court of equity in depriving the true owner of the right to have his title quieted, because the payment of taxes gave appellants no right to or interest in the land." *Updegraff* v. *Marked Tree Lumber Co.,* 83 Ark. 154.

In the case of *Chancellor* v. *Banks,* 92 Ark. 497, it was held (quoting syllabus): "A suit to remove a cloud upon the title of wild and unimproved land will not be barred by laches where it was brought within four years after defendant's tax title was acquired from the State, and where plaintiff had done nothing to indicate that he had abandoned the land except that he had failed to pay the taxes during that time." In the case at bar the plaintiffs instituted this suit within two years after defendant acquired his tax title from State, and before he expended any money in improvements on the land, and before his condition has in any manner become so changed that he cannot be placed in his former state. No supervening equities have arisen in favor of defendant so as to deprive the plaintiffs of their legal title to the land; and their right to the lands is therefore not barred by laches.

But the defendant has paid the taxes on the lands since he acquired them from the State, and these taxes are a charge upon the lands. The taxes for the year for which each tract was sold to the State are also a charge upon each tract, and by his purchase from the State the defendant became subrogated to the lien of the State for the taxes of the year for which the land

sold. The defendant is entitled to a decree for these taxes and a lien therefor on the lands. *Connerly* v. *Dickinson*, 81 Ark. 258; *Files* v. *Jackson*, 84 Ark. 587; *Seldon* v. *Dudley E. Jones Co.*, 89 Ark. 234.

In their complaint the plaintiffs asked that the tax title of the defendant be removed as a cloud from the south half of lot 3 in S. W. ¼ of section 18, but this tract is not embraced in the tax deed obtained by defendant, and the plaintiffs are not therefore entitled to this relief against defendant as to that tract.

The plaintiffs in their complaint also ask that the tax deed as to lots 1 and 5 in the northwest quarter of section nineteen be canceled, but said tracts are not embraced in the deed from the State to them, and they have not shown any title to said last two mentioned tracts. They are not entitled to the relief asked as to said two tracts.

It appears from the testimony that since the institution of this action W. O. Belcher, one of the plaintiffs, has died, but it does not appear that the cause of action as to him has ever been revived. Upon the remand of this action the cause as to this plaintiff should be duly and properly revived.

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

QUEEN OF ARKANSAS INSURANCE COMPANY *v.* FORLINES.

Opinion delivered March 14, 1910.

1. INSURANCE—COVENANTS—WAIVER.—A covenant in a policy of fire insurance that the insured will keep an inventory of his stock in an iron safe may be waived by the insurer either expressly by the assurance that it will not be insisted on, or impliedly by any acts or conduct of the insurer indicating that it will not be insisted on. (Page 231.)
2. SAME—AUTHORITY TO MAKE WAIVER.—A waiver of a covenant in an insurance policy may be waived by any authorized officer or agent of the insurance company; and an agent of the company who is intrusted with the apparent power to adjust the loss has the authority to waive provisions of the policy relative to the inventory and proof of loss. (Page 232.)
3. SAME—WHEN FORFEITURE WAIVED.—Any agreement, declaration or course of action on the part of an insurance company which leads a

party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by conformity on his part, will estop the company from insisting on the forfeiture. (Page 232.)

4. SAME—WAIVER OF FORFEITURE NOT REVOCABLE.—After an insurance company has once waived its right to declare a forfeiture, it cannot subsequently avoid the effect of such waiver. (Page 232.)

5. SAME—ABSENCE OF INVENTORY—WAIVER.—Where the insured had been in business only a month before the fire occurred, and had no inventory of his goods except the invoices, which were destroyed in the fire, but was told by the adjuster to procure duplicates of the invoices, which would serve as an inventory, and did so, the insurer will be held to have waived the necessity of an inventory. (Page 232.)

6. SAME—WAIVER OF PROVISION AGAINST WAIVER.—A stipulation in a policy of fire insurance that the conditions thereof shall not be waived by certain acts may be altered, changed, abrogated or waived by subsequent contracts or by conduct amounting to an estoppel. (Page 233.)

7. SAME—SUFFICIENCY OF INVENTORY.—Where the insured who had just opened his store kept a book showing each consignment of goods purchased by him, and the invoices giving each item of such consignments, he will be held to have substantially complied with the requirement of the policy to keep an inventory of his purchases. (Page 233.)

8. SAME—PROOF OF LOSS—WAIVER.—Denial by the insurer of liability, based upon reasons other than a failure to furnish proof of loss, constitutes a waiver of the provisions of the policy requiring proof of loss to be made. (Page 234.)

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

J. W. & M. House, for appellant.

1. There was no waiver of proof of loss. 72 Ark. 484. The mere mailing of the proof of loss is not sufficient unless it reaches the company within sixty days. Ostrander on Ins. § 238, p. 541; 52 L. R. A. 956; 84 Ark. 224; 114 S. W. 210; 112 *Id.* 200; 82 Ark. 476; 72 Ark. 484; 56 Mo. App. 343; 73 N. Y. Supp. 193; 86 N. Y. sup. 24.

2. There was no compliance with the iron-safe clause. 85 Ark. 579; 83 Ark. 126. Nor was there any waiver by the company. 114 Iowa 153; 62 Iowa 387; 72 Ark. 490.

3. The court erred in giving and refusing instructions. 85 Ark. 579.

Joel D. Conway and *William H. Arnold,* for appellee.

1. Forfeitures are not favored in law. A denial of liability is a waiver of proof of loss. 53 Ark. 494; 77 Ark. 27; 13 Am. & E. Enc. of Law, 330; 85 Ark. 169.

2. The company is estopped by the knowledge and acts of its agents who inspected the stock. 79 Ark. 266; 81 Ark. 508, 205; 71 Ark. 295; 79 Ark. 315; 79 Ark. 266; 52 Ark. 15; 71 Ark. 242; 63 Ark. 187; 62 Ark. 348; 82 Ark. 150-162; 88 Ark. 506; 61 Ark. 108; 79 Ark. 315. Parol evidence was admissible to show a waiver by the agent. 88 Ark. 550; 74 Ark. 72.

3. There was a substantial compliance with the iron-safe clause. Kirby's Dig., § 4375a; 83 Ark. 130; 85 Ark. 33; 86 Ark. 119.

FRAUENTHAL, J. This is an action instituted by J. H. Forlines, the plaintiff below, against the Queen of Arkansas Insurance Company, upon a fire insurance policy. The defendant executed its policy of insurance on October 14, 1908, by which it insured the plaintiff against loss by fire in the sum of $1,050, of which $600 was on his stock of goods, $250 on his fixtures and $200 on his household goods. The property was destroyed by fire on November 15, 1908.

A number of defenses were interposed against a recovery; and upon the trial in the lower court a verdict was returned in favor of the plaintiff. Upon this appeal only two of these defenses are specially urged for a reversal of the judgment.

1. It is contended by the defendant that the plaintiff violated the provisions of the policy contained in what is commonly known as the "iron-safe" clause thereof, and on that account is not entitled to recover. The policy provided: "The following covenant and warranty is hereby made a part of the policy. (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, one shall be taken in detail within thirty days of issuance of this policy, or this policy shall be null and void from such date, and upon demand of the assured the unearned premium from such date shall be returned. (2) The assured will keep a set of books, which shall clearly and plainly present a complete record of the business transacted, including

all purchases, sales and shipments, both for cash and credit, from the date of inventory, as provided for in first section of this clause, and during the continuance of this policy. (3) The assured will keep such books and inventories, and also the last preceding inventory, if such has been taken, 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 to do this, the assured will keep such books and inventories in a place not exposed to a fire which would detroy the aforesaid building. In the event of failure to produce such set of books and inventories for the inspection of the company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon."

The plaintiff began business in Texarkana, Ark., on October 9, 1908, and purchased all his goods from merchants in that city.

The goods were delivered at the store of plaintiff on drays, and the selling merchants made out invoices in duplicate of the goods as they were placed upon the dray, one of which was retained and filed away in a loose-leaf ledger and the other was sent by the drayman to plaintiff. As the goods were unloaded, the plaintiff checked same, and hung the invoice thereof on a hook in his store, and entered in a book kept by him the amount of each dray load of goods, the date received and the name of the merchant from whom same was purchased. All of his purchases were thus entered upon this book, and aggregated $1,401.60. This book also contained all cash which he paid to his creditors, and in it he also entered all cash and credit sales. This book was kept by plaintiff in his pocket, and was presented to the adjuster and also on the trial of the case. The invoices of the goods which plaintiff placed on the hook in his store were destroyed by the fire. About one week after the fire the adjuster of defendant came to plaintiff to negotiate relative to the adjustment of the loss. There was a sharp conflict in the evidence between the plaintiff and the adjuster as to what occurred between them, but the evidence on the part of plaintiff tended to prove the following: The plaintiff told the adjuster that the invoices which he had received from the merchants from whom he purchased the goods, and which constituted

the only itemized inventory that he had kept, had been destroyed by the fire; and he explained to the adjuster how he had kept same, and how he had entered same in said book. The adjuster thereupon directed the plaintiff to get duplicates of the invoices from the merchants who had sold him, and told him that they would answer the purpose of the inventory. The plaintiff then employed the entire day in securing duplicates of these invoices, and brought same to the adjuster, who, after having spent with plaintiff a considerable time in examining them and comparing them with the entries in said book, made no objection to them, but stated that some of the duplicate invoices were missing and to obtain them. Plaintiff thereupon at further trouble secured these missing duplicate invoices, and on the following day brought same to the adjuster.

The plaintiff testified that the adjuster then told him that he would not settle at all, and that the company did not owe him anything and would not pay him. The adjuster testified that he did not deny or admit liability; but we think there is sufficient evidence to sustain the finding that the adjuster did then deny that the defendant was liable on the policy. It is contended by the plaintiff that a forfeiture of the policy for a failure to comply with the provisions requiring an itemized inventory of the stock to be taken and to be kept in an iron safe or a place not exposed to the fire was waived by the adjuster of the company. The question relative to the waiver was submitted to the jury under proper and appropriate instructions, and the sole question upon this appeal relative thereto is whether or not the above evidence is sufficient to sustain the finding of the jury that there was such waiver. By the above provisions of the policy the plaintiff "covenanted" to make and keep in an iron safe or in a safe place an inventory of the stock, but the breach of that covenant did not itself, in the true interpretation of the contract, invalidate or nullify the policy. Such a breach only gave a right to the insurance company, if it saw fit, to declare that by reason thereof it would not be further bound thereby. It was a condition that was inserted for the benefit of the defendant, and it had the right to waive that condition, if it did not desire to insist upon a strict compliance with it. Such a requirement or condition of the policy may be waived, either ex-

pressly by the assurance that it would not be insisted on, or impliedly by any acts or conduct of the insurance company indicating that it would not insist upon the provisions as required by the conditions or stipulations of the policy, or which would be inconsistent with such requirements. Such waiver may be made by any authorized officer or agent of the company; and an agent of the company who is intrusted with the apparent power to adjust the loss has the authority to waive the provisions of the policy relative to the inventory and proof of loss. As to what acts will constitute a waiver of the forfeiture of the policy by reason of a breach of its conditions, this court in the case of *Phoenix Insurance Co.* v. *Fleming,* 65 Ark. 54, quoted with approval the rule formulated by the Court of Appeals of New York as follows: "The rule is now established that if, in any negotiations or transactions with the assured after knowledge of the forfeiture, the company recognizes the continued validity of the policy, or does acts based thereon, or requires the insured to do some act or incur some trouble or expense, the forfeiture is waived." In the case of *German Insurance Company* v. *Gibson,* 53 Ark. 494, this court said: "Forfeitures are not favored in law; any agreement, declaration or course of action on the part of an insurance company which leads a party insured to honestly believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by conformity on his part, will estop the company from insisting upon the forfeiture." *Planters' Mutual Ins. Co.* v. *Loyd,* 67 Ark. 584; *Minneapolis F. & M. Mutual Ins. Co.* v. *Fultz,* 72 Ark. 365.

And after the company has once waived its right to declare a forfeiture it cannot subsequently avoid the effect of such waiver. *German Insurance Co.* v. *Gibson, supra;* 19 Cyc. 872.

In the case at bar, according to the plaintiff's testimony. upon the arrival of the adjuster one week after the fire he told him that the only inventory he ever had was the entries on his book showing the totals by the dray loads and the invoices showing the items of the dray loads which had been destroyed by the fire. With full knowledge of these facts the adjuster told the plaintiff to obtain duplicates of these invoices, and that this would serve all the purposes of the inventory. He thus led the plaintiff to believe that the policy was still a valid contract, and

that by a compliance with the requirement then made to obtain these duplicate invoices the forfeiture of the policy would not be insisted on. The plaintiff complied with the requirement; and we are of opinion that there is sufficient evidence to sustain the finding that the adjuster waived any forfeiture on account of any failure to strictly comply with this condition of the policy.

It is urged by counsel for defendant that there is also a stipulation in the policy which provides that the insured shall, as often as required, produce for examination of its agents all invoices, if the originals are lost, and that the company shall not be held to have waived any condition of the policy or any forfeiture thereof by any requirement relative to any such examination; and that by reason of this stipulation the act of the adjuster in asking for duplicates of the invoices could not waive the condition of the policy relative to the inventory. But the invoices referred to in this stipulation relate only to the invoices of the goods purchased after the inventory is made. In the case at bar the plaintiff had only been in business for one month prior to the fire, and the invoices of the goods purchased during that time did in effect constitute the inventory of the stock required by the policy. Such was the understanding of the parties at the time, for the adjuster said that such invoices would serve the purpose of the inventory. In the estimation of the adjuster these invoices of the goods first bought by the plaintiff would in effect constitute the inventory of the stock required by the policy. We do not think therefore that these duplicate invoices which the adjuster directed the plaintiff to obtain are the character of invoices referred to in the above stipulation which the plaintiff should produce for examination of its agent. Furthermore, the conditions of the policy and the stipulations in the policy that the conditions thereof shall not be waived by certain acts are but contracts themselves, and, like the conditions themselves or other agreements, can always be altered or changed or abrogated or waived by subsequent contracts, or they can be waived by acts and conduct amounting to an estoppel. 19 Cyc. 777.

But we are further of the opinion that the entries made in his book by plaintiff of each consignment of goods, with the references therein to the merchants from whom such consignment was received, in connection with the invoices which were

kept by such merchants giving each item of each consignment, constituted a substantial compliance with the provisions of the policy relating to the inventory that was to be made and kept; and this book and these invoices were kept at places not exposed to the fire. The entries in the book showed the total of each consignment of goods, with the date thereof and the name of the merchant from whom same was purchased. The merchants from whom the goods were purchased retained the itemized statements of these goods, and from these merchants these itemized statements could be, and in this case were actually, obtained. In effect, the duplicates of the statements were the same as if the statements originally furnished to the plaintiff had not been destroyed but had been preserved. These statements gave the items of the goods purchased. The book which the plaintiff kept, showing in totals the stock of goods, was an index to these statements which were kept in a place safe from the fire and thus became a part of the book, and these, taken together, constituted an itemized inventory of the goods which the plaintiff had in stock. Our statute provides that substantial compliance upon the part of assured with the terms, conditions and covenants of fire insurance policies on personal property shall be deemed sufficient. Kirby's Digest, § 4375a; *Arkansas Mutual Fire Ins. Co.* v. *Woolverton,* 82 Ark. 476.

The object and purpose of the provisions in the iron-safe clause in requiring an itemized inventory to be made and kept and the keeping of books showing all purchases, sales and shipments was to obtain from these a complete record of the business, so that from these it could be ascertained what amount of goods was on hand at the time of the fire. In the case at bar the plaintiff had been in business such a short time that the invoices of the goods first bought by him constituted in effect an itemized inventory of his stock. The case of *Arkansas Insurance Co.* v. *Luther,* 85 Ark. 579, is not in conflict with this holding. In that case there was no itemized inventory of the stock, but the different classes of goods were "set down in lump." It was only a summary showing the total valuation of each class of goods, without giving the items thereof or indicating where the items thereof could be found.

2. It is urged by the defendant that the plaintiff did not

furnish proof of loss within sixty days after the fire, as required by the policy, and by its terms the policy was thereby avoided. The fire occurred on November 15, 1908, and proof of loss was mailed to defendant on January 14, 1909, but was not received by it at its home office until January 15, 1909. But from the testimony on the part of the plaintiff set out above we think there was sufficient evidence to sustain a finding that the adjuster denied liability when he saw the plaintiff one week after the fire; and by the repeated rulings of this court a denial of liability, based upon reasons other than a failure to furnish proof of loss, constitutes a waiver of the provisions of the policy requiring proof of loss to be made. *German Ins. Co.* v. *Gibson,* 53 Ark. 494; *Planters' Mutual Ins. Co.* v. *Hamilton,* 77 Ark. 27; *Yates* v. *Thomason,* 83 Ark. 126.

We have examined the other assignments of error made by the defendant, and we do not find that any of them are well founded.

Finding no prejudicial error in the trial of this case, the judgment is affirmed.

McDANIEL v. TEXARKANA COOPERAGE & MANUFACTURING COMPANY.

Opinion delivered March 14, 1910.

1. TAXATION—FOREIGN CORPORATION—PERSONAL PROPERTY.—The personal property of a foreign corporation that is used or employed in this State is taxable here like similar property of domestic corporations or citizens. (Page 237.)
2. SAME—LEGISLATIVE POWER.—The Legislature has the power to tax all property in this State that is not exempted by the Constitution, and may provide when and how taxes may be levied and collected. (Page 238.)
3. SAME—DOMICILE OF FOREIGN CORPORATION.—Where a foreign corporation has established a domicile in one county of this State, all of its personal property situated in another county of the State is taxable in the former county. (Page 238.)
4. SAME—INJUNCTION AGAINST ILLEGAL TAX.—Any taxpayer, citizen or corporation has the right, under Kirby's Digest, § 3966, to obtain from a court of equity an injunction against the collection of an illegal or unauthorized tax. (Page 239.)

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

C. W. McKay and *J. G. Lile*, for appellant.

The statute, Kirby's Digest, § 6936, does not provide for any data from which it can be determined how much property a foreign corporation, authorized to transact business here, has in the State, hence it is of no force as to such a corporation. But it is admitted that appellee has not complied with that statute, nor with § § 832 and 833, Kirby's Digest. It is in no position to come into equity demanding the relief prayed for. If the assessment was excessive or erroneous, the county court was the proper forum in which to seek relief. Art. 7, § 28, Const. Ark.; Kirby's Dig. § § 6998, 7003; 49 Ark. 518.

Stevens & Stevens, for appellee.

The appellee's property in the State is subject to assessment for taxation in the county of its domicil only. Kirby's Dig. § 6936; 78 Ark. 191. Appellant, having admitted that appellee is a foreign corporation and had filed its corporate papers with the proper officers of the State, cannot now question its corporate existence. 68 Ark. 134. Appellee has the right to maintain this suit. Kirby's Dig. § 833; 70 Ark. 525. And equity is the proper forum. Kirby's Dig. § 3966; 30 Ark. 278.

FRAUENTHAL, J. This was an action instituted by the appellee to restrain the collection of certain alleged illegal and unauthorized taxes levied on its property and to enjoin the sale thereof under said distraint. The appellee is a corporation duly formed under the laws of the State of Texas. On August 15, 1899, it filed in the office of the Secretary of State a copy of its articles of incorporation, and designated an agent upon whom service of summons and other process might be served, and received from the Secretary of State a certified copy of its articles evidencing that it had complied with the provisions of the act of February 16, 1899 (Kirby's Dig. § 825 *et seq.*), authorizing foreign corporations to do business in this State, and entitling them to all the rights and benefits therein conferred. Under the evidence adduced in the case, it established its principal place of business and governing office in this State at Stephens, in Ouachita County, and has maintained its principal place of

business and governing office in this State at that place ever since 1899. In 1906 it assessed all its personal property in Ouachita County for that year, and paid the taxes levied thereon in that county. It owned certain personal property, consisting of portable mills, staves and bolts, which were located in Columbia County in June, 1906. The assessor of Columbia County assessed this personal property in Columbia County for the year of 1906, and taxes were extended against the same for that year in that county. These taxes not being paid, the collector of Columbia County distrained said property for said taxes, and was proceeding to sell same when he was restrained by an injunction of the chancellor of the Columbia Chancery Court, which injunction was subsequently made perpetual by the decree of said court.

The question involved in this case is whether the appellee, a foreign corporation, which had complied with the laws of this State and established its principal place of business in Ouachita County, was required to assess and pay taxes on its personal property situated in Columbia County to the collector of said county, or whether it was required to pay taxes on all its personal property, wherever situated in the State, to the collector of Ouachita County. The appellee is a foreign corporation formed under the laws of the State of Texas, but it had brought into this State certain personal property and was transacting business in this State. Where a corporation of one State brings into another State a part of its personal property which is not in transit but is used and employed therein, it may be taxed by the latter State like similar property used in a similar way by its domestic corporations or citizens.

As is said in case of *Pullman Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18: "No general principles of law are better settled or more fundamental than that the legislative power of every State extends to all property within its borders, and that only so far as the comity of that State allows can such property be affected by the law of any other State." Property of the citizen or corporation of another State that is used and employed chiefly in this State is subject to taxation in this State. *Eoff* v. *Kennefick-Hammond Co.*, 80 Ark. 138.

The Legislature has the power to make all property in this State subject to taxation, except property exempted by the Constitution. It has the power to provide where and in what manner said taxes shall be levied and collected; and it may classify corporations and corporate interests for the purposes of taxation, and specify the mode of the assessment, levy and collection of the taxes on corporate properties and interests.

By art. 12, § 11, of Constitution of 1874, it is provided that foreign corporations may be authorized to do business in this State under such limitations as may be prescribed by law. The act of February 16, 1899, prescribed the things that should be done by a foreign corporation in order to do business in this State (Kirby's Digest, § 825 *et seq.*); and on August 15, 1899, the appellee complied with the provisions of that act. By that act it was further provided that "such corporations shall be entitled to all the rights and privileges and subject to all the penalties conferred and imposed by the laws of this State upon similar corporations formed and existing under the laws of this State." (Kirby's Digest, § 828.)

For the purposes of taxing the properties of foreign corporations employed in this State, the Legislature has placed foreign corporations in a classification with domestic corporations, and has provided for the assessment of the properties of such foreign corporations in a similar manner. By section 6936 of Kirby's Digest, it is provided that "gas, telephone, bridge, street railroad, savings banks, mutual loans, building, transportation, construction and all other companies, corporations or associations, incorporated under the laws of this State, or under the laws of another State and doing business in this State, * * * shall, through their president, secretary, principal accounting officer or agent, annually during the month of July make out and deliver to the assessor of the county where said corporation is located or doing business a sworn statement of the capital stock setting forth particularly." etc.

In the case of *Harris Lumber Co.* v. *Grandstaff,* 78 Ark. 187, it was held that the object of this statute is to secure a list of the personal property of the corporation for assessment. In construing that statute this court held in that case that all the personal property of a domestic corporation should be assessed in the county of its domicil, and that the principal place of

business of such corporation was in respect to its personalty the proper place of taxation; and that the assessment and taxation of its personal property in any other county was illegal. Foreign corporations are specifically named in this statute, and its provisions are made to apply to such corporations in like manner as they apply to domestic corporations. The object of this statute is also therefore to secure a list of the personal property of foreign corporations doing business in this State, and which is employed in this State, for assessment. The principal place of business and the situs of the governing office of such foreign corporation in this State is its domicil in this State and, in respect to personal property, is the proper place of taxation.

The mere fact that the corporation in making the assessment of its properties employed in this State to the proper official of Ouachita County did not make the formal list prescribed by section 6936 of Kirby's Digest would not make its personal property subject to taxation in another county. It is presumed that the officials of Ouachita County have complied with the provisions of the law in the mode of assessing the property of this corporation, and in any event the officials of that county have full power over the assessment and collection of the taxes of this corporation domiciled in their county. The assessment and taxation of the personal property of appellee in Columbia County are illegal.

It is urged by counsel for appellant that the appellee is not entitled to the equitable remedy of injunction because it could have appeared before the county court of Columbia County and obtained relief, or by appeal from that court in event such relief was denied. But by section 3966 of Kirby's Digest it is provided that injunctions and restraining orders may be granted in all cases of illegal or unauthorized taxes and assessments by county, city or other local tribunals or officers. A taxpayer, citizen or corporation has the right to obtain from a court of equity an injunction against the collection of an illegal or unauthorized tax. *Vaughan* v. *Bowie,* 30 Ark. 278; *Brodie* v. *McCabe,* 33 Ark. 690; *Cole* v. *Blackwell,* 38 Ark. 271; *St. Louis Southwestern Ry. Co.* v. *Kavanaugh,* 78 Ark. 468; *Dreyfus* v. *Boone,* 88 Ark. 353; *Merwin* v. *Fussell,* 93 Ark. 336.

The decree is affirmed.

CURRIE v. STATE.

Opinion delivered March 21, 1910.

1. APPEAL IN FELONY CASE—BY WHOM GRANTED.—Under Kirby's Digest, § § 2588-9, providing that appeals in felonies may be granted by the circuit court or by any judge or judges of the Supreme Court, there is no authority for an appeal in such case to be granted by the circuit judge in vacation. (Page 240.)
2. CRIMINAL LAW—APPEALS.—The act of May 31, 1909 (Acts 1909, p. 890), amending Kirby's Digest, § 6218, providing that where a verdict or decision is rendered within three days of the adjournment of a term of the circuit court, a motion for new trial with alternative prayer for appeal may be presented to the judge after term, has no application to criminal cases. (Page 241.)

Appeal from Jackson Circuit Court; *Charles Coffin,* Judge; appeal dismissed.

Gustave Jones, for appellant.

Hal L. Norwood, Attorney General, for appellee.

PER CURIAM. Appellant was convicted of felony at the October term, 1909, of the Jackson Circuit Court, and the circuit judge granted an appeal in vacation after the end of the term. The statute regulating appeals to the Supreme Court from judgments of conviction of felonies provides that an appeal may be granted by the "circuit court in which such conviction is had" or by any judge of the Supreme Court "if the court in which such conviction is had shall refuse to grant an appeal." Kirby's Digest, § § 2588-89. The act of March 6, 1899, provides that appeals and writs of error in criminal cases must be taken within sixty days after the judgment of conviction. There is no authority in the statutes for an appeal to be granted by the circuit judge in vacation.

In this instance the circuit judge proceeded under the act of May 31, 1909, which provides in substance that where a verdict or decision is rendered within three days of the adjournment of a term of the circuit court, a motion for new trial, with alternative prayer for appeal, may be presented to the judge or chancellor of the district at any time within thirty days from the date of the verdict or decision, and that on presentation of the motion to such judge or chancellor, if he overrules the mo-

tion, he shall, by indorsement thereon, grant an appeal to the Supreme Court.

This statute amends a section of the Civil Code (Kirby's Dig., § 6218), and has no application to criminal cases. There is a separate provision in the Criminal Code regulating motions for new trial in criminal cases, and the amending act of 1909 does not affect it.

The appeal is therefore dismissed.

NICHOLS v. HOWSON.

Opinion delivered March 21, 1910.

DEED—ACKNOWLEDGMENT BY GRANTEE'S AGENT.—A deed is not invalid because the grantor's acknowledgment was taken by an agent of the grantee.

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

Irving Reinberger, for appellants.

1. The deed is void for fraud and deceit exercised in procuring its execution. 17 Ark. 498; *Id.* 71. If appellant believed she was signing a mortgage and not a deed, the instrument should be construed as a mortgage. Jones on Mortgages, § 279.

2. Where the officer who takes the acknowledgment is the agent of the grantee, his act is invalid, and the record of such a deed imports no notice to subsequent purchasers of encumbrances. 43 Ark. 421; 32 Am. Dec. 754.

Taylor & Jones, for appellee.

1. Appellant's testimony by no means discharges the burden resting upon her to establish fraud, and it will not be presumed. 37 Ark. 148; 86 Ark. 455; 77 Ark. 357.

2. The acknowledgment, if defective, is cured by subsequent acts of the Legislature. Kirby's Dig., § § 783, 786; Acts 1907 p. 355; 62 Ark. 324. But the acknowledgment is not invalidated by reason of the notary's agency. 56 Ark. 511.

3. A chancellor's finding of facts will not be set aside unless contrary to a clear preponderance of the evidence. 67 Ark. 287; 68 Ark. 314; *Id.* 134; 72 Ark. 67; 73 Ark. 489; 67 Ark. 200; 75 Ark. 52; 77 Ark. 305.

McCULLOCH, C. J. The principal question involved in this case is whether a certain deed, executed by appellants, Sylvia Nichols and her husband, Emanuel Nichols, to appellee, Mary E. Howson, purporting to convey a tract of land in fee-simple, was intended to operate as a mortgage, and whether appellee or her agent in procuring the execution of the deed falsely and fraudulently represented to the grantors that the instrument was a mortgage deed. The case was submitted to the chancellor on conflicting testimony, and we cannot say that the finding is against the preponderance of the testimony. Indeed, we think there is a decided preponderance in favor of the finding of the chancellor.

Another question involved is one of law—whether or not the deed was invalidated by reason of the acknowledgment having been taken by a notary public who was the agent of appellee in the transaction of business. The deed was not invalidated by reason of that fact. *Penn* v. *Garvin,* 56 Ark. 511.

If, however, there were originally any defects in the conveyance, they have been cured by statutes passed since that time. See act of March 20, 1903 (Kirby's Dig., § 786), and act of April 4, 1907 (Acts of 1907, p. 354).

Decree affirmed.

STATE v. LESTER.

Opinion delivered March 21, 1910.

1. FALSE PRETENSES—SUFFICIENCY OF INDICTMENT.—An indictment for obtaining money under false pretenses which alleges that defendant, who was doing business as the Lester Vehicle & Implement Company, falsely pretended to the prosecuting witness that he was worth $68,000, and thereby induced such witness to purchase certain shares of stock "in an Arkansas corporation," without showing any connection between defendant or the Lester Vehicle & Implement Company and the unnamed Arkansas corporation, fails to state an offense. (Page 245.)

2. INDICTMENT—SUFFICIENCY.—Nothing can be taken by intendment in an indictment to supply the acts and facts necessary to constitute the crime sought to be charged. (Page 246.)

Appeal from Sebastian Circuit Court, Fort Smith District: *Daniel Hon,* Judge; affirmed.

STATEMENT BY THE COURT.

The appellee was indicted as follows: "The grand jury of Sebastian County, for the Fort Smith District thereof, in the name and by the authority of the State of Arkansas, accuse the defendant, R. A. Lester, of the crime of false pretense, a felony, committed as follows, towit: the said defendant, in the county and district aforesaid, on the 10th day of January, 1907, designedly and with the fraudulent and felonious intent to cheat and defraud one J. F. O'Melia, falsely, fraudulently, designedly and feloniously pretend and represent unto the said J. F. O'Melia that the said R. A. Lester, who was then doing business as the Lester Vehicle & Implement Company, was solvent and had a net worth of $68,000, which said representation and statement was in writing and signed by said R. A. Lester, and is in words and figures following, towit:

" 'Resources and liabilities of the Lester Vehicle & Implement Company at the close of business December 1, 1906:

" 'Resources.

Real Estate	$ 20,000.00
Mdse.	71,433.39
Bills Rec.	37,489.59
Accts. Rec.	11,391.59
Prop. Acct. (consisting of cattle, horses, mules, wagons, harness and office fixtures)	19,404.80
Cash	577.41
" 'Total	$160,896.78

" 'Liabilities.

Accts. pay.	$ 25,908.17
Bills pay.	65,421.14
Net worth	68,967.47
" 'Total	$160,896.78

" 'Bills payable as shown above, payable about as follows:

Bills pay. to bank	$ 9,500.00
Mdse. notes from Jan. 1, 1907 to Sept. 1, 1907	20,000.00
From Sept. 1, 1907, to Jan. 1, 1908	15,000.00
From Jan. 1, 1908, to March 1, 1908	8,500.00
From March 1, 1908, to Jan. 1, 1909	6,421.14
Borrowed from B. & L. Ass'n. on real estate	6,000.00
" 'Total	$ 65,421.14
" 'Total amount mdse. sold during year 1906	$250,271.38

" 'The bills rec. mentioned above are title installment interest bearing notes taken for balance on farm machinery, buggies, wagons and live stock. All merchandise notes given without interest.

" 'The above invoice taken and statement made by the undersigned, and is correct to the best of our knowledge and ability.

(Signed) " 'R. A. Lester.
" 'T. B. Maris.
" 'C. S. Lugenbed."

"Thereby inducing the said J. F. O'Melia, he, the said J. F. O'Melia, relying on said statement and representations as true, to subscribe for and pay the sum of $1,500.00 for certain shares of stock in an Arkansas corporation, by means of which false and fraudulent representations so designedly made by the said R. A. Lester, he, the said R. A. Lester, did then and there designedly, fraudulently and feloniously obtain from him, the said J. F. O'Melia, gold, silver and paper money of the value of $1,500, the money and property of said J. F. O'Melia, then and there being, when in truth and in fact the said R. A. Lester, doing business as the Lester Vehicle & Implement Company, was not solvent, and did not have a net worth of $68,000, and that above written statement was not true and correct, and which said statement and representations were false, and the defendant well knew them to be false when he made them, against the peace and dignity of the State of Arkansas."

Appellee demurred to the indictment upon the grounds that the facts set forth therein did not constitute a public offense. The said demurrer was sustained by the court over the objections of the appellant, who prayed an appeal. The appeal was

granted, and the cause is now before this court to review the action of the lower court in passing upon the demurrer to the indictment.

Hal L. Norwood, Attorney General, and *William H. Rector,* Assistant, for appellant.

All of the material elements comprising the offense were alleged in the indictment. It is not necessary in an indictment for false pretense to allege all of the facts and circumstances of the transaction. 1 Cox, Crim. Rep. 244; 34 N. Y. 351; 115 Mass. 481; 88 Ark. 203; 17 Tex. App. 213; 25 O. St. 217; 34 La. Ann. 1219; 116 Mass. 89; 105 Ia. 169; 133 Ind. 297.

Read & McDonough, and *Hill, Brizzolara & Fitzhugh,* for appellee.

The indictment is deficient in that it does not set out the three constituent elements of the crime. Kirby's Dig., § 1689.

WOOD, J., (after stating the facts). Section 1689 of Kirby's Digest is as follows: "Every person who, with intent to defraud or cheat another, shall designedly, by color of any false token or writing, or by any other false pretense, * * * obtain from any person any money, * * * upon conviction thereof shall be deemed guilty of larceny and punished accordingly."

No allegation is contained in the indictment showing that appellee or the Lester Vehicle & Implement Company was in any manner connected with the "Arkansas corporation," for whose shares of stock O'Melia subscribed and paid $1,500. There is no allegation that the Lester Vehicle & Implement Company was the Arkansas Company whose stock it is alleged O'Melia subscribed for and obtained by the payment of $1,500 to appellee. It is not alleged that appellee owned any shares of stock in the "Arkansas corporation," that he was an officer or agent of the corporation, or in any manner authorized to represent it in the sale of its stock. Without some such connection being alleged, the indictment does not charge the offense of obtaining money under false pretense. A general allegation is not sufficient. The facts constituting in law the offense must be alleged. If not alleged, they cannot be proved. In the absence of an allegation showing the connection between the Lester Vehicle & Implement Company, appellee, and the "Arkansas corporation," it is impossible to see how any false

representation of appellee with reference to the financial standing of the Lester Vehicle & Implement Company was calculated to and did induce O'Melia to purchase stock in some Arkansas corporation unnamed in the indictment. Nothing can be taken by intendment to supply the acts and facts necessary to constitute the crime with which it is sought to charge the accused. *Barton* v. *State,* 29 Ark. 68; *State* v. *Ellis,* 43 Ark. 93; *State* v. *Graham,* 38 Ark. 519. See also *Gage* v. *State,* 67 Ark. 308.

The ruling of the court sustaining the demurrer was correct.

Affirm.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY *v.* CARR.

Opinion delivered March 7, 1910.

1. RAILROADS—DUTY AS TO CROSSINGS.—It is the duty of a railroad company to exercise ordinary care in the operation of its trains so as to avoid injuring pedestrians at highway crossings. (Page 250.)
2. SAME—PRESUMPTION AS TO NEGLIGENCE.—Where a pedestrian upon a highway is injured by a door projecting from a car during the running of a train, a *prima facie* case of negligence on part of the railroad company is made out. (Page 251.)
3. SAME—DEGREE OF CARE IN OPERATION OF TRAINS.—A railroad company is bound to use ordinary care to avoid injuring persons who may lawfully be near its tracks; and whether or not under the circumstances of a particular case a railroad company was negligent in permitting an object to project or fall from its train and cause an injury to a person is a question of fact for the jury. (Page 251.)
4. SAME—DUTY TO MAKE INSPECTIONS.—A railroad company should exercise ordinary care in inspecting its cars, trains and appliances in order to discover defects and repair same, not only at stations, or stopping places along its line, but at all reasonable times along its route. (Page 251.)
5. SAME—CONTRIBUTORY NEGLIGENCE.—Although a railroad company owes to a pedestrian at a highway crossing the duty to exercise ordinary care to avoid injuring him, he cannot recover for injuries caused by its negligence if he was guilty of negligence which contributed to such injury. (Page 252.)
6. NEGLIGENCE—CULPABLE NEGLIGENCE DEFINED.—Culpable negligence is the omission to do something which a reasonably prudent man would

do or the doing something which such a man would not do under all the circumstances surrounding each particular case. (Page 252.)

7. SAME—CONTRIBUTORY NEGLIGENCE.—Whenever the danger due to another's negligence is such that an ordinarily prudent person would apprehend its existence, it is one's duty to exercise ordinary care to avoid such danger. (Page 252.)

8. RAILROADS—DUTY OF TRAVELLER AT CROSSING.—A pedestrian at a public crossing should exercise ordinary care to avoid danger from passing trains. (Page 252.)

9. NEGLIGENCE—WHEN CONTRIBUTORY NEGLIGENCE QUESTION FOR JURY.—What will constitute contributory negligence in a particular case depends on the circumstances; and if reasonable men might differ as to whether the person injured exercised ordinary care, the question must be left to the jury. (Page 253.)

10. RAILROADS—CONTRIBUTORY NEGLIGENCE—INSTRUCTION.—Where plaintiff, while standing near a railway track at a crossing, was injured by a projecting door on a passing train, it was error to instruct the jury that a traveler at a public crossing is not required to anticipate negligence on the part of the railroad company, but might presume that the company would not be negligent; whether plaintiff was negligent under the circumstances being a question for the jury. (Page 253.)

Appeal from Crawford Circuit Court; *Jephtha H. Evans,* Judge; reversed.

STATEMENT BY THE COURT.

This was an action to recover damages for a personal injury which the plaintiff alleged he sustained at a public crossing over defendant's railroad track in the city of Fort Smith, Ark. The plaintiff testified that about ten o'clock on the night of January 22, 1909, he was traveling on foot along a public wagon road or street which ran across the defendant's railroad track in said city; that when he got to within about thirty feet of the track he noticed a freight train going north along the crossing and towards the depot, which was about one mile from the crossing. He proceeded up nearer the crossing, and there stopped somewhat close to the track and waited a few minutes for the freight train to clear the crossing so that he could pass over. There was a number of box cars in the train, and several of these passed by him as he stood waiting for the train to clear the crossing. He was on the west side of the track, and was looking towards the north, the direction in which the train was moving, when he heard a noise, and turning saw a door or other object projecting

from the train; the door or projecting object struck him on the head before he could dodge it and knocked him down, rendering him unconscious and causing him to fall so that his legs were caught under the moving train. He was cut severely on the left side of his head, and his legs were injured to such an extent that they had to be amputated, one above and the other below the knee. Some time after the freight train had passed, a passenger train arrived over this track from the south; and the employees hearing his cries went to his assistance and took him on the train. All the employees of the crew on the freight train testified that they did not see the plaintiff, and did not know that he was injured until long after the occurrence, when they were told of it. They also testified that the freight train had left Paris, Texas, a distance of about 160 miles from Fort Smith, and that they had inspected the cars at every stopping place from that point, the last of which was fourteen miles from Fort Smith. They stated that there was no car in the train, from the last station, which had a swinging door, but that all the doors of the cars were upon slides; that when the cars were last inspected at the above station the doors were found in good condition, and that neither the doors nor any other object was projecting from any of the cars. No person other than the plaintiff testified to seeing the injury when it occurred.

At the request of the plaintiff the court instructed the jury; in substance, that if the plaintiff was at a crossing of a highway over defendant's track at Fort Smith in the night time, intending to cross the track on the highway, and a train of defendant, going north, prevented him from doing so, and while waiting for the crossing to be cleared he was struck by a car door negligently left open and thereby injured, the plaintiff should recover, if at the time he was exercising ordinary and reasonable care for his own safety; and instructed, in effect, that, if the injury did not occur at the public crossing, the jury should find for defendant. The court at the request of plaintiff, amongst other instructions, gave the following:

"7. If plaintiff was wanting in ordinary and reasonable care for his own safety, and was thereby injured, he cannot recover. Or, if the defendant was in the exercise of ordinary and reasonable care as herein defined, then plaintiff cannot recover.

"Plaintiff was not, however, in order to exercise ordinary care for himself, required to anticipate negligence on the part of defendant, if such negligence existed, but might presume that defendant would not be negligent."

At the time of the giving of this instruction the defendant made a specific objection to the latter portion thereof.

The defendant requested the court, amongst other instructions, to give the following, which were refused:

"2. I charge you that a railroad company owes no duty to one walking on its track or near its track, other than not to wantonly injure him after discovery. If you find from the evidence that the employees in charge of the freight train [which] passed going north about 10:40 P. M., on January 22, 1909, did not see the plaintiff, you will find the issues for the defendant."

"10. If you find that the cars were inspected at Jenson, fourteen miles from the injury, which was the last stop of the train before the injury, and found to be in perfect condition, and you further find that it was out of condition at the time of the injury, and you further find that none of the trainmen had any knowledge of any such defect, or of any break after such inspection and before the injury, then the defendant would not be guilty of any negligence."

A verdict was returned in favor of the plaintiff, and the defendant prosecutes this appeal.

W. F. Evans and *B. R. Davidson,* for appellant.

1. No negligence is shown on the part of appellant to warrant the submission of the case to the jury. 81 Ark. 368; 15 Am. Neg. Rep. 329; 153 Fed. 845; 111 Fed 586. A railroad company does not owe to a pedestrian the duty to have its car doors so secured as that they can not possibly fly open. Hence in this case no negligence is shown as to the proximate cause of the injury which would warrant its submission to the jury, 17 Am. Neg. Rep. 206. Under no circumstances did appellant owe to appellee more than the duty of ordinary inspection. 85 Ark. 460. By appellee's own testimony he was guilty of contributory negligence. 56 Atl. 613; 80 Ark. 186; 82 Ark. 522; 69 Ark. 135; 61 Ark. 549.

2. The seventh instruction is clearly erroneous. One going upon a railroad track or in close proximity to it has no right to

presume that the defendant would not be negligent, but, on the contrary, it was incumbent upon him to look out for his own safety. 131 Fed. 837; 95 U. S. 697; 114 U. S. 615; 62 Ark. 245; 56 Ark. 271; 9 Rose's Notes, 328.

3. The second instruction requested by appellant should have been given. If appellee was a trespasser, appellant owed him no duty except to avoid wantonly injuring him after discovering his peril. 90 Ark. 398; 88 Ark. 172; 83 Ark. 300; 82 Ark. 522; 80 Ark. 186; 77 Ark. 401.

Rowe & Rowe and *C. A. Starbird,* for appellee.

1. Proof of the injury and that it was caused by the running of appellant's trains was proof of negligence on the part of appellant. Art. 17, § 12, Const.; Kirby's Dig., § 6773; 87 Ark. 581; *Id.* 308; 83 Ark. 217; 82 Ark. 441; 81 Ark. 275; 65 Ark. 235. The question of contributory negligence on the part of appellee was, under the circumstances of this case, a question for the jury. 52 Ark. 368; 63 Ark. 636; 70 Ark. 481; 74 Ark. 610.

2. The seventh instruction given was correct. 37 Ark. 563.

FRAUENTHAL, J., (after stating the facts). It is urged by counsel that the defendant had the right to use its track at the crossing, and that it only owed the duty to plaintiff not to injure him after having discovered his position of peril. But the rule relative to the liability of a railroad company for an injury done after a discovered peril is not applicable to the facts of this case, as adduced on the part of the plaintiff. For, according to the evidence of the plaintiff, he was a traveller in a public highway at the crossing of the defendant's track, and in such case he was not a trespasser or licensee on defendant's right-of-way, but he had the right to use the highway crossing. It is true that the railway company had also the right to the use of its track over the highway crossing. Where the railroad is situated upon a highway, the public has the right to use the highway as well as the railroad, and each must make reasonable and proper efforts, with due regard to the rights of the other and in view of all the circumstances, to foresee and avoid collision. And in such a case it is the duty of the railroad company to exercise ordinary care and prudence in the operation of its trains and otherwise to prevent injuring a traveller. The traveller

should observe all the requirements of ordinary care; to him the track itself is a warning of danger, and he is under the duty to exercise precaution to inform himself of the proximity of the train and to exercise ordinary prudence in avoiding injury.

In the case of *St. Louis, I. M. & S. Ry. Co.* v. *Neely,* 63 Ark. 636, the railway company was operating its freight train along a street in the town of Warren, and while the train was passing Neeley in the street a car door fell from its place in the car and injured him. In that case it was held that "the railroad company owed him the duty to employ reasonable care to avoid injuring him." In *St. Louis S. W. Ry. Co.* v. *Underwood,* 74 Ark. 610, a pedestrian along a street was injured by a railroad, and in that case the court said: "This doctrine rules the case at bar, rather than the principle invoked by appellant that the railway company owed appellee no duty except to use ordinary care not to injure him after having discovered his place of peril." 3 Elliott on Railroads, § 1153; 33 Cyc. 1145.

And when at a public crossing a traveller in the highway is injured by a door or other object projecting from the car during the running and operation of the train, a *prima facie* case of negligence on the part of the railroad company is made out under section 6773 of Kirby's Digest. *St. Louis, I. M. & S. Ry. Co.* v. *Neely,* 63 Ark. 636; *Barringer* v. *St. Louis, I. M. & S. Ry. Co.,* 73 Ark. 548; *St. Louis, I. M. & S. Ry. Co.* v. *Briggs,* 87 Ark. 581.

A railroad company is bound to use ordinary care and caution to avoid injuring persons who may be near its tracks, and who are rightfully at such place; and whether or not under all the circumstances of the case the railroad company was negligent in permitting any object or article which caused the injury to project or fall from its train of cars is a question of fact for the jury to determine. *Kansas Pac. Ry. Co.* v. *Ward,* 4 Col. 30; Shearman & Redfield on Negligence (3 ed.), 477; 33 Cyc. 900.

The railroad company should exercise ordinary care and diligence in inspecting its cars, trains and appliances in order to discover such defects and to remedy and repair same. And it should not only use such care at its stations or stopping points along its line, but such care should be exercised at all reasonable times along its route to discover such defects.

But, although the railroad company may have been guilty in this case of negligence which caused the injury, still this did not absolve the plaintiff from the duty to exercise due and ordinary care to avoid the injury. For, if he was guilty of any negligence which contributed to the injury sustained by him, he cannot recover. This contributory negligence of the plaintiff would consist in some act or omission on his part amounting to a want of ordinary care. In *Hot Springs St. Rd. Co.* v. *Hildreth,* 72 Ark. 573, it is held that ordinary care is such as a man of reasonable prudence and caution would exercise under the circumstances; and "culpable negligence" is defined to be the "omission to do something which a reasonable, prudent and honest man would do, or the doing something which such a man would not do under all the circumstances surrounding each particular case." *Hot Springs Rd. Co.* v. *Newman,* 36 Ark. 607.

Where a danger is probable or obvious, it is the duty of a person to exercise ordinary care to avoid the injury, even though the other party was negligent. And this duty to avoid the consequences of another's negligence arises whenever the circumstances are such that an ordinarily prudent person would apprehend their existence. The law requires the exercise of ordinary care to observe danger and avoid it.

As is said in the case of *Southwestern Tel. & Tel. Co.* v. *Beatty,* 63 Ark. 65: "The fact that a street is a highway, and the appellee had the right to be in it, did not relieve him of the duty to exercise care to avoid the danger. If he was guilty of conduct which a reasonable and prudent man would not have adopted under the circumstances, and this conduct contributed directly to his injury, he was not entitled to recover." While a traveller at a public crossing over a railroad track may to a limited extent rely upon the railroad company to observe the requirements of ordinary care, nevertheless it is his duty, in approaching the crossing or in going on it, to exercise ordinary care, not only to learn of the approach of trains, but also to keep out of the way of probable danger, that is, he must use such care and prudence as would be exercised by a man of ordinary care and prudence under like circumstances. He cannot, by relying on the railroad company to exercise ordinary care, blindly run into a train or place himself negligently in

such close proximity to the train as to be injured. What will constitute contributory negligence on the part of the person injured must depend upon the circumstances of each case. If from those circumstances reasonable men might differ as to whether the person did or did not exercise ordinary care, the question must be left to the jury for its determination. The jury must then decide for themselves whether the person did any act which he should not have done or omitted to do an act which in the exercise of ordinary care he should have done under the circumstances of the case. The exercise of ordinary care might in the estimation of the jury require the person to look for any danger, even should it proceed from some negligent act of the defendant. The jury should be permitted to be the exclusive judges of what would be the exercise of ordinary care on the part of the plaintiff under all the circumstances of the case.

But by the above instruction number 7 given on the part of the plaintiff the court told the jury that, in order to exercise ordinary care, the plaintiff was not required to anticipate negligence on the part of the defendant; in effect, it said that the plaintiff, in regulating his conduct and acts under the circumstances of the case, might rely on the assumption that the defendant would not be negligent; and therefore need not use that care which the jury might have thought that an ordinarily prudent and careful person should have used under the circumstances of the case.

By this instruction the jury might have thought that the plaintiff was not required to exercise that care and prudence which the jury would have considered ought to have been exercised by a man of ordinary care under the circumstances of this case. For, if the plaintiff had an absolute right to conform his acts to any course of conduct because he did not anticipate negligence on the part of defendant, then the jury may have thought, from this instruction, that the plaintiff was excused from some act of negligence on his part because he had the right to assume that defendant would not be negligent. But the law is to the contrary; and, although the defendant was negligent, still the plaintiff himself must not have been guilty of any act of negligence which contributed to the injury, before he can recover. It was, under the evidence, a close question of fact

as to whether or not the plaintiff was guilty of negligence in going as close to the moving train as he did; and the determination of that question of fact should have been left to the jury without any qualification as to the care which the plaintiff should have exercised for his safety. By this instruction we think the court invaded the province of the jury, and therefore committed error, and that the error was prejudicial.

We have examined the other instructions that were given and refused in the case, and we do not find any prejudicial error in the rulings of the court thereon. There are other complaints made by appellant, but, if any of them amount to error, we do not think they will occur on a second trial. Under proper instructions we are of opinion that there was sufficient evidence to sustain the verdict of the jury.

For the error in giving the instruction number 7 on behalf of plaintiff the judgment is reversed, and the cause remanded for a new trial.

SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY v. ABELES.

Opinion delivered March 14, 1910.

1. ELECTRICITY—TELEPHONE WIRES—DUE CARE.—A telephone company, in maintaining its wires in a building, is required to exercise due care in selecting, placing and maintaining, in connection with its wires, such known and approved appliances as are reasonably necessary to guard against injuries. (Page 259.)
2. SAME—NEGLIGENCE IN MAINTAINING WIRES.—Where plaintiff was injured from an electrical shock received during an ordinary electrical disturbance while using defendant's telephone, and there was expert evidence tending to show that defendant was negligent in failing to use a ground wire, a finding of negligence on part of defendant will be sustained, though it was also proved that ground wire protectors were not in use in this State in connection with telephone wires. (Page 260.)
3. INSTRUCTION—OBJECTION TO FORM.—An objection to the mere form of an instruction should be specific. (Page 260.)
4. APPEAL AND ERROR—WHEN OBJECTIONS WAIVED.—Objections to evidence admitted or to remarks made by the trial court are waived where no exceptions were saved. (Page 261.)
5. ELECTRICITY—USE OF GROUND WIRES—RULES AS EVIDENCE OF NEGLIGENCE. —Where plaintiff sued for injuries caused by defendant's failure to

use ground wires in maintaining its telephone wires, it was not error to permit plaintiff to show that defendant's rules called for the use of ground wires. (Page 262.)

6. DAMAGES—LOSS OF HEARING—EXCESSIVENESS.—Where plaintiff, a young man, was severely shocked by an electrical current, suffered greatly for several weeks after the injury, lost the hearing in one ear, and had the hearing in the other impaired, a verdict for $6,900 as damages was not excessive. (Page 262.)

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

STATEMENT BY THE COURT.

Theodore D. Abeles instituted this action against the Southwestern Telegraph & Telephone Company to recover damages for physical injuries received by him on account of the alleged negligence of said company. From a verdict and judgment in his favor for $6,900 an appeal has been duly prosecuted to this court. The appellant owned and operated a system of telephone lines in the city of Little Rock, Ark., and one of its telephones had been installed in the office in the lumber yard of Charles T. Abeles & Company in said city. Appellee was an employee of Charles T. Abeles & Company, and a part of his duties was to answer telephone calls. On the 4th day of April, 1907, appellee was called to the telephone, and, while answering the call, he was severely injured. Appellee had put the receiver to his ear, and was using the telephone in the usual way at the time he received the injury. The physicians and the ear specialist who treated appellee testified that his hearing in the left ear was completely destroyed, and his hearing in the right ear somewhat impaired, although not seriously so. There had been April showers throughout the day on which appellee was injured. The testimony on the part of appellee tended to show that the storm was not an extraordinary one, but was of the ordinary kind incident to the season of the year, and was accompanied with the usual flashes of lightning; that at the time appellee received the injury the storm in the vicinity of the office where he was using the telephone had ceased.

Clem J. Drees, for appellee, testified that he graduated in electrical engineering from the State University in 1895, and had practiced his profession ever since. He said that he was

familiar with the installation of electrical appliances for the prevention or transmission of lightning and electricity. Here follows a question propounded to him and his answer:

"Q. I will ask you what was the proper way of installing a telephone in 1907 in regard to the safety from lighting or the transmission of lightning? A. The wires, on entering the building, should immediately be connected to a protective device which would protect the 'phone from lightning and also from abnormal currents and against what they call 'sneak' or small currents. There are three things to be guarded against in the 'phone: to be protected against crosses from outside wires and putting large currents into it, to protect it from lightning, and to protect it from small currents, called 'sneak currents.' These protective devices should be installed right at the point, or as close as possible to the point, where the wires enter the building where the 'phone is to be installed. Q. Explain to the jury what that protective device is. Give as plain a description of it as you can. A. These three protective devices against lightning, against abnormal currents, and against small currents, are sometimes separated, but they can be combined into one instrument. Frequently they are combined into one instrument. The protection against lightning is based on the theory that lightning generally follows the shortest path to the ground; it prefers the easiest path to the ground, rather than going through a long route or long circuit, so that lightning is shunted to the ground, or what we call 'short circuited' to the ground, by giving it a chance to go through a short circuit to the ground." Continuing, he explained in detail the action of lightning on these protective devices. He further stated that a protective device or lightning arrester, in the absence of a ground wire from the telephone, would be almost no protection against lightning. That the object of the ground wire is to convey the lightning from the lightning arrester to the ground. That the ground wire should be placed either on the outside or inside of the room, but generally it is placed on the outside.

The evidence shows that there was no ground wire in connection with the protective device or lightning arrester to the telephone in question.

The witnesses on the part of appellant, some of them being electrical engineers, testified that it was not the practice of tele-

phone companies to use ground wires in connection with lightning arresters for each telephone, but that ground wires were placed at stated intervals along the poles carrying the telephone wires. They testified that they were familiar with the construction of the telephone systems in the various towns and cities of this State, and that in none of these exchanges were any telephones equipped with lightning arresters or protectors, with ground wire attached to them at the telephone. That they considered the protective apparatus used by appellant much better than one to which is attached a ground wire. That appellant only uses lightning arresters or protective devices with ground wire attached on parts of its line where the telephone wires are laid underground.

Additional facts will be referred to in the opinion. We will not set out the instructions given or refused by the court. To do so would be to needlessly lengthen the opinion. Sufficient reference to them will be made in the opinion.

Walter J. Terry, for appellant.

1. Methods employed by other parties and companies in conducting a similar business is competent evidence as tending to show whether the particular party has exercised ordinary care. 117 Ga. 449; 97 Am. St. Rep. 169; 71 Ala. 509.

2. The first instruction is erroneous in that it assumes that the wires or instruments caused or contributed to the presence of the lightning, and does not submit to them the question they did so contribute. There was no evidence that they caused or contributed to attracting the lightning.

3. There was evidence that the stroke of lightning was of an extraordinary character. Appellant's fourth instruction should have been given. 9 S. W. 40.

4. The court should have given appellant's fifth instruction, in effect that, even though appellant was negligent, yet if the current of electricity was so great that a lightning arrester, properly located and having proper ground connection, would not have prevented the casualty, the jury should find for the defendant. 21 L. R. A. 723.

5. The court erred in refusing the eleventh instruction requested by appellant. Appellant was under no legal duty to

provide its wires with insulation sufficient to withstand a stroke of lightning. 63 L. R. A. 219.

John W. Blackwood and *Morris M. Cohn,* for appellee.

1. It was not necessary to reiterate and emphasize the allegations of the complaint, as the eleventh instruction requested by appellant sought to do. Not all of the allegations were relied on by appellee, and such of them as were relied on were fully covered in another instruction. 73 Ark. 183; 72 Ark. 384; 66 Ark. 523; 74 Ark. 133. The question of insulation was abandoned; no evidence was introduced concerning it. It is proper to refuse an instruction not warranted by the proof. 2 Crawford's Dig., col's. 1817, 1818. And it is prejudicial error to give an instruction based on a hypothesis unsupported by evidence. 70 Ark. 441; 63 Ark. 177; 14 Ark. 530.

2. Appellant's contention that the first instruction assumes that the wires or instruments caused or contributed to the presence of the lightning is not a reasonable conclusion. Under the instructions as a whole there could have been no finding for the plaintiff unless the jury found that there was no ground wire; that there should have been one; that such wire would have prevented the accident; that it occurred in an ordinary storm; and that there were known and approved devices which a reasonably prudent man would have used under similar circumstances. No other basis of liability was contended for, and the instructions covered the law of the case. 69 Ark. 558; 67 Ark. 1; 77 Ark. 458; 72 Vt. 441, 443, 444, 445; 48 Atl. 643; 42 L. R. A. 919; 116 S. W. 418; 1 Joyce, Electric Law, § 445f; 89 Ark. 581.

3. Had the testimony of Drees been incompetent, and proper exceptions saved, it was not prejudicial because the facts toward which it was directed were otherwise proved by competent evidence. 58 Ark. 125; *Id.* 374; *Id.* 446; 7 Ark. 542; 9 Ark. 545; 68 Ark. 607; 74 Ark. 417; 77 Ark. 453.

HART, J., (after stating the facts). 1. It is earnestly insisted by counsel for appellant that the evidence does not support the verdict. In other words, it is contended that the evidence, when considered in the light most favorable to appellee, did not warrant the jury in returning a verdict in his favor. In determining this question, it becomes necessary to ascertain

what is the duty of telephone companies in putting in and maintaining telephones.

In the case of *Southern Telegraph & Telephone Co.* v. *Evans* (Tex. Civ. Appeals), 116 S. W. 418, the court said: "The duty resting upon telephone companies to adopt precautions for preventing charges of atmospheric electricity from entering buildings over their telephone wires is thus stated by the Supreme Court of Vermont: 'Having undertaken to place and maintain the instrument in the house and connect it with its telephone line for the use of the deceased, in so doing it was under the duty to exercise the care of a prudent man under like circumstances. If, while in the exercise of such care, it had reasonable grounds to apprehend that lightning would be conducted over its wires to and into the house, and there do injury to persons or property, and there were known devices for arresting or dividing such lightning, so as to prevent injury therefrom to the house or persons therein, then it was the defendant's duty to exercise due care in selecting, placing and maintaining, in connection with its wires, such known and approved appliances as were reasonably necessary to guard against accidents that might fairly be expected when conducted to and into a house over its telephone wires.'" The following authorities are cited to the same effect: *Griffith* v. *New England Tel. & Tel. Co.*, 72 Vt. 441, 52 L. R. A. 919; *Southern Bell Tel. & Tel. Co.* v. *McTyer,* 137 Ala. 601, 97 Am. St. Rep. 62; 1 Joyce on Electric Law, § 445f. See also *Rural Home Telephone Co.* v. *Arnold* (Ky.), 119 S. W. 811; *Southwestern Tel. & Tel. Co.* v. *Bruce,* 89 Ark. 581.

Appellee, when injured, was in the discharge of his duty to his employers, and was using the telephone in the ordinary way. The evidence adduced in his behalf shows that he was not attempting to use it during a severe electrical storm. His own testimony tends to show that there was no storm in progress in the vicinity of the office when he went to use the telephone. The expert evidence adduced in his behalf tends to show that a protective device or lightning arrester without a ground wire attachment would be of almost no protection against lightning. His expert witness on that point went into details, and gave his reasons for his opinion. His testimony is flatly contradicted by the experts on the part of appellant; but that only

presents a conflict of evidence, upon which we are not called upon to pass. Counsel for appellant urges upon us that its telephones were constructed with the kind of lightning protectors generally in use in this State, and that protectors with ground wire attachments were nowhere in use in the State; but this testimony only tended to show that appellant had discharged its duty by using lightning arresters of the most practical kind and in general use; and it was still a question of fact for the jury to say if this was true. We have a statute requiring railroad companies to construct suitable and safe cattle guards in certain cases. In discussing the question of whether the evidence showed the company had discharged its duty, in the case of *Choctaw & Memphis Railroad Co.* v. *Goset*, 70 Ark. 427, the court said: "But the question is usually one of fact for the jury, and it would not be proper for the court to instruct them that the company has discharged its duty if the guard is similar to those used by other first-class railroads."

We are of the opinion that the facts and circumstances adduced in evidence, when considered in the light most favorable to appellee, warranted the jury in finding that the injury was received during an ordinary electrical disturbance, while appellee was using the telephone in the ordinary way, and that the failure on the part of appellant to attach a ground wire to its lightning arrester to the telephone in question was negligence, and that it was the proximate cause of the injury.

2. Counsel for appellant contends that the first instruction given by the court at the request of appellee assumes that the wires or instruments caused or contributed to the presence of the lightning. The objection is not tenable. The instruction merely defined the duty of appellant in installing its telephone to equip it with such appliances as were reasonably necessary to guard against injuries from lightning. Besides, the objection now urged, being to the form of the instruction, should have been met in the trial court by specific objection, which was not done. This rule has become too firmly established in this State to need a citation of authority to support it.

3. Counsel for appellant also insists that the court erred in refusing his fourth instruction, by which he sought to have the court tell the jury that, if they found the appellee had been

injured by an extraordinary stroke of lightning, appellant would not be liable.

This was not error because the appellee did not claim any right of recovery unless the jury found that he was injured in an ordinary electrical disturbance; and the instructions given by the court at the request of both appellant and appellee were predicated on the jury so finding.

4. Appellant's fifth instruction was completely covered by the eighth instruction given at the request of its counsel, and there was no error in refusing the fifth.

5. The eleventh instruction asked by counsel for appellant for the most part was covered by instructions given. A part of it was to the effect that appellant was under no legal duty to provide its wires entering into said building with insulating covering. No proof was offered to sustain this alleged ground of negligence, and appellee abandoned his right to recover under it. Hence the court did not err in refusing the instruction.

Other objections are made to some of the instructions, but we will not discuss them in detail. It is sufficient to say that the only ground of negligence relied upon by appellee for a recovery was the failure of appellant to equip its lightning arresters with a ground wire attachment, and this question, together with the other facts necessary to make appellant liable, was fully and fairly submitted to the jury by the instructions given by the court.

6. Again, counsel for appellant insists that the court erred in not excluding certain portions of Dr. Green's testimony, and in certain remarks made by the court when appellant's counsel made objections to the testimony. It is sufficient answer to this to say that no exceptions were saved either to the ruling of the court on the evidence or to the remarks made in doing so. Under the well established rules of this court, if any errors were committed, they have been waived.

7. Counsel for appellant next objects that the court permitted Drees to testify with reference to the general rules in vogue in the general business world, as to the installation of electric wiring in the city of Little Rock, with reference to lightning arresters or protective devices. An examination of the transcript shows that the witness did not answer the question

to which objection was made. He was instructed by the court to make his answer without reference to the code of rules, and he did so.

8. Counsel for appellant next insists that the court erred in admitting certain portions of the testimony of P. C. Ewing, but, inasmuch as he saved no exceptions to the ruling of the court, the objection must be considered as abandoned.

9. Counsel for appellant earnestly insists that the court erred in admitting appellee to read in evidence a part of appellant's printed specifications or rules with reference to ground wires. The objection to the introduction of the rule was that it was designed for protection against fire.

Appellant's foreman had testified for it that appellant had two methods of installing telephones. The new method by which the lightning arresters were provided with a ground wire attachment, and the old method, in which the ground wire was not used. We think the evidence was admissible, and the jury could consider it for what it was worth as tending to show that the installation of a telephone without a ground wire attached to its lightning arrester was dangerous, and that appellant recognized it to be so.

10. Counsel for appellant urgently presses upon us that the damages awarded by the jury are excessive. The testimony of eminent specialists shows that appellee was severely shocked, and that he suffered greatly for several weeks after the injury was received. The hearing in his right ear is impaired, and the hearing in his left ear is wholly destroyed. Appellee is a young man. This affliction and handicap he must bear throughout life, and we can not say that under such circumstances the verdict is excessive.

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

WHITENER-LONDON REALTY COMPANY v. RITTER.

Opinion delivered March 21, 1910.

1. TIMBER—FAILURE TO CONSUMMATE SALE—REFUNDING PURCHASE MONEY.—Under a contract for the sale of timber which stipulated that the vendor should furnish a conveyance and abstract of title to be approved by the vendee's attorney, the vendee is entitled to a return of the purchase money paid by him where the abstract of title tendered by the vendor was submitted to the vendee's attorney and rejected by him in good faith. (Page 267.)

2. SAME—EXTENSION OF CONTRACT OF SALE—EFFECT.—The fact that a vendor of timber extended the time for cutting same without any consideration will not entitle the vendor to claim that the vendee had forfeited so much of the purchase money as had been already paid. (Page 268.)

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

Charles D. Frierson, for appellant.

1. Where the court's findings are not supported by evidence, this court will reverse, notwithstanding the general rule that the findings of a court sitting as a jury are as conclusive as the verdict of a jury. 65 Ark. 278.

2. The court should have declared the law to be that the money paid by appellee was for the option or purchase privilege, and for the time given in the option contract, and the failure of the attorney selected by appellee to approve the abstract does not entitle appellee to recover the money paid.

3. If appellee's attorney was made the depositary for both parties, and the papers were deposited with him in escrow to be delivered in case the Harrell deed was found of record, and that deed was in fact found to be recorded, then appellee is not entitled to recover. It was appellee's duty to examine the abstract within the contract time. 1 Enc. L. & P. 203; 16 Cyc. 576; 5 Wall. 479, 18 L. Ed. 520.

4. An extension of an option without additional consideration is voidable. 1 Am. Cas. (Va.) 986; 24 Pac. 695; 2 Am. Cas. (W. Va.) 421; 68 Md. 21; 11 Atl. 284; note to 21 L. R. A. 128; 21 Am. & Eng. Enc. of L. (2 ed.) 929. Passing on the title by appellee's attorney was a duty, under the terms of the contract, and would therefore be no sufficient consideration for the extension. 5 Wall. 497, 18 L. Ed. 520; 9 Cyc. 347; 30 Ark. 50.

5. Relying on defects in the title, appellee must establish the same by competent proof, and such defects must be of a substantial nature. 20 Am. & Eng. Enc. of L. (2 ed.) 620, 621; 12 Cur. Law, 2220, and cases cited.

Lamb & Caraway, for appellee.

1. A purchaser is not obliged to accept a defective title, even though the vendor offers to indemnify the purchaser against outside claims. 29 Am. & Eng. Enc. of L. (2 ed.) 618; 36 S. W. 1080; 17 B. Mon. (56 Ky.) 518.

2. If a contract for an option based upon sufficient consideration is extended after the time limited without any consideration, such extension is not an option, but a continuing offer, and may be withdrawn at any time before acceptance. 21 Am. & Eng. Enc. of L. 929.

McCULLOCH, C. J. Appellant, a Missouri corporation, owned, or claimed to own, tracts of timber land in Mississippi County, Arkansas, aggregating about 8,000 acres, and on April 10, 1906, entered into a written contract with appellee for the sale of the timber thereon. Portions of the contract material to the present controversy read as follows:

"That, for and in consideration of the sum of five hundred ($500) dollars in cash to the party of the first part in hand paid by the party of the second part, the receipt of which is hereby acknowledged, the party of the first part hereby contracts and agrees to sell and convey at the time hereinafter specified by a good and sufficient warranty deed all the cut down timber and timber standing, growing and upon the following described real estate situated in Mississippi County, Arkansas, viz: [Here follows description of tracts of land], containing 8,037.21 acres, being the same land conveyed by J. E. Franklin and W. E. Talley to H. S. Whitener, upon the following conditions:

"First. That the said party of the second part shall on or before the 16th of August, September or October, 1906, as hereinafter provided, notify in writing the party of the first part by registered letter addressed to it at its office in St. Louis, Missouri, that he intends to and will consummate the purchase of said timber, and will pay for it the sum of thirty thousand dollars in cash, and execute to it two promissory notes, each for the sum of fifteen thousand ($15,000) dollars, due in one and

two years after date, respectively, with interest at the rate of six per cent. per annum from date. Said notes to be secured by an instrument in the nature of a trust deed upon all of said timber which shall permit him to cut timber on all said lands before the maturity of the notes.

"It is further agreed that, if the said Ernest Ritter shall not on or before the 15th day of August, 1906, be ready to consummate the purchase of said timber and pay the amount of money and execute the notes as above specified, he shall have the right to abandon said premises by forfeiting the $500 above mentioned, and will do so unless he shall notify in writing the party of the first part by registered letter addressed to it at its office in St. Louis, Mo., of his intentions to consummate the purchase or shall notify the party of the first part of his desire to have this agreement extended to the 15th day of September, 1906, accompanying his notice with three hundred ($300) dollars in cash; and at the expiration of the last date he shall notify the party of the first part of his intentions to consummate the purchase of said timber or of his desire for a further extension of this agreement to the 15th day of October, 1906, again accompanying said notice with a tender of three hundred ($300) dollars in cash.

"It is further agreed that, in the event the party of the second part shall not notify in writing the party of the first part of his intentions to consummate the purchase as hereinbefore provided at the times herein specified, then the said party of the second part shall forfeit to the party of the first part all the sums of money that he may have heretofore paid to it, and shall have no recourse on it or its successors or assigns for any of said sums of money or any part thereof.

"It is further agreed that, in the event the party of the second part shall pay to the party of the first part the sum of thirty thousand ($30,000) dollars and execute and deliver to it two promissory notes each for the sum of fifteen thousand ($15,000) dollars, due and payable in one and two years after date respectively as hereinbefore provided, or offer to do so on or before the 15th day of August, September or October as hereinbefore provided, neither the party of the first part nor its successors or assigns shall have any cause of action against the

party of the second part on account of his abandonment of this contract, other than the forfeiture of the sums of money herein mentioned, provided, however, that the party of the second part shall cut no timber from the above described premises until he shall have elected to and shall have consummated the purchase of the timber as herein provided.

"It is further agreed that, in case of failure of the party of the second part to consummate the purchase of said timber at the times hereinafter specified, the party of the second part shall have no cause of action against the party of the first part for entering upon and taking possession of said timber or the money advanced for this option. * * *

"It is further agreed that the conveyance of said timber and the abstract of title to the land upon which it stands is to be approved by some attorney selected by the party of the second part on or before the payment of the money and the execution of the notes herein provided for. * * *

"It is further agreed that the amounts of money paid for this option on the consummation of the purchase herein provided shall be treated as a part payment of the thirty thousand ($30,000) dollars cash herein provided for and deducted therefrom. * * *

"It is further agreed that the deed hereto attached marked 'Exhibit A' and made a part hereof is a deed of conveyance which the party of the first part will execute and deliver to the party of the second part on his notifying the party of the first part of his readiness to consummate the purchase herein provided for."

At the end of the last period mentioned in the contract, towit, October 15, 1906, the sale not having then been consummated, the period was by further agreement extended to November 1, 1906, on the payment by appellee of the additional sum of $150, which made the total sum of $1,250 which he paid. On the last named date, the sale still not having been consummated, the parties met in St. Louis, and another short extension was agreed upon, nothing additional being paid for that extension. An abstract of title was by appellant furnished to appellee prior to November 1, 1906, and the same was submitted to the latter's attorney, who never approved it. The sale was never consummated, and appellee demanded a return of the

amount he had paid ($1,250), on the ground that the title was not such as would meet the approval of his attorney. Payment was refused, and this action at law was instituted by appellee to recover the amount. The case was tried before the circuit judge sitting as a jury, and the result was a verdict in appellee's favor for the full amount of his claim.

The first and principal question we are called on to decide is one of law in the construction of the contract—whether or not, according to its terms, appellee is entitled to a return of his money when he declined to take the property because the title was not such that it met the approval of his attorney. Of course, it must be conceded that, if appellee failed or refused to perform the contract according to its terms, he cannot demand a return of his money, for the contract expressly provided that if he failed to consummate the sale he should have no cause of action for the return of the money paid. Appellant insists on a construction of the contract which makes it a mere option to appellee for the purchase of the timber; that he paid his money merely for the option, and that, if he failed to consummate the sale on account of the title not proving satisfactory to his attorney, he cannot demand a return of the money paid. In other words, it is contended that appellee paid his money solely for an option to purchase the timber on specified terms; that he got what he paid for, and cannot demand a return of his money on the ground merely that the title was unsatisfactory to his attorney.

This contention entirely ignores an important clause of the contract, viz: that provision to the effect that appellant's deed of conveyance and an abstract of title should be approved by some attorney selected by appellee before the sale should be consummated. Now, the only fair and reasonable interpretation of this clause is that appellant undertook thereby, after being notified of appellee's election to consummate the sale, to furnish a conveyance and an abstract of title which would stand the inspection and approval of an attorney of appellee's selection, and, if appellant failed to do this, then it, and not appellee, was in the attitude of having failed to perform the contract. If appellant undertook in the contract, as we hold it did, to furnish a conveyance and an abstract of title which would pass the inspection of the attorney, then it was bound to perform that part

of the contract when appellee gave notice of his election to purchase the timber, otherwise it could not claim on appellee a forfeiture of the money paid. Of course, an arbitrary, fraudulent or collusive refusal of the attorney to approve the title would not have deprived appellant of the fruits of the contract (*Ark-Mo. Zinc Co.* v. *Patterson,* 79 Ark. 506, and cases cited), but nothing of that kind is claimed or shown in this case. It is our duty, in construing the contract, to give some effect to the above-named provision, and, unless we give it the meaning stated above, it amounts to nothing at all, for, in the absence of a stipulation in the contract, appellee would have had the right to submit the conveyance and abstract to any attorney he saw fit to select, either before or after the consummation of the sale.

The contract in question is more than a mere option—it is a contract whereby appellant undertook for a consideration to sell to appellee the timber on the land described, and, in the event that the latter elected to consummate the sale, to execute a conveyance and furnish an abstract of title which would stand the approval of an attorney. Appellee was not to have merely an option to purchase whatever title appellant had to convey, but he was to have a title which an attorney of his selection would approve; and if appellant failed to furnish that, it failed to comply with the contract. We conclude, therefore, that if appellee elected to consummate the sale, and so notified appellant within the specified time, and his attorney in good faith disapproved the title offered by appellant, then appellee is entitled to a return of the amount paid.

It is also insisted by appellant that the title was in fact good, and that it devolved on appellee to show that there was a substantial defect in the title. Such is not the effect of the contract, as we have already shown. Appellee was not bound to accept title over the disapproval of his attorney. The attorney could not arbitrarily or capriciously disapprove a title free from real or apparent defect, but there is testimony to the effect that the title as shown by the abstract was not perfect and apparently free from defect.

There is no merit in the further contention of the appellant to the effect that the short extension agreed upon November 1, 1906, was without consideration and therefore void, because appellee paid nothing additional for it. It was at least good until

revoked, as a continuing offer to sell, and appellant could not, because of want of consideration, take advantage of that to claim a forfeiture of the amount theretofore paid by appellee.

Finally, it is contended that the finding of the court is contrary to the undisputed testimony. Appellant insists that, according to the undisputed testimony, when appellee and his attorney were in St. Louis on November 1, 1906, it was agreed that the attorneys for both parties should join their efforts in a proceeding to confirm the title; that appellant would enter into a bond with appellee to indemnify appellee against any defect in the title; that the attorney for appellee and the president of appellant corporation should go to Osceola, Arkansas, to ascertain whether or not a certain deed from one Horrel was on record, and that, if it was found to be on record, then the sale should be consummated, and appellee should accept the bond; that the bond was duly executed, with sureties, and delivered to appellee's attorney, and that the Horrel deed was found to be on record at Osceola. We do not regard the testimony as undisputed on all these points. It is true the bond of indemnity was executed by appellant and delivered to appellee's attorney; but there is a conflict in the testimony as to the purpose of the trip to Osceola being solely to ascertain whether or not the Horrel deed was on record. There is also a conflict as to whether or not appellee agreed to accept the bond in lieu of his attorney's approval of the abstract. The trial court was justified by the testimony in finding that, though the bond of indemnity was executed and delivered to appellee's attorney, there was no agreement that the title should be treated as approved, or that the bond should be accepted in lieu of the attorney's approval of the title and the sale consummated without such approval. The evidence justified the finding that the bond was delivered to the attorney merely to keep and have in readiness when the sale should be consummated.

It is unnecessary to discuss the various declarations of the law requested by appellant. We conclude that the finding of the court is sustained by sufficient evidence, and that the decision is not contrary to law.

Judgment affirmed.

LOUISIANA & ARKANSAS RAILWAY COMPANY v. NIX.

Opinion delivered March 21, 1910.

1. RAILROADS—TRAVELLER AT CROSSING—PROXIMATE CAUSE OF INJURY.—Where the team of a traveller at a public crossing was frightened by the negligence of defendant railway company, so that they ran across an open ditch and threw the traveller out, resulting in his being injured, the negligence of defendant in frightening the team was the proximate cause of this injury, even though it would not have occurred but for the open ditch. (Page 274.)

2. DAMAGES—PERSONAL INJURIES—EXCESSIVE DAMAGES.—Where plaintiff sustained a compound fracture of the ankle joint, which developed into ankylosis and necrosis of the bone, had his nervous system affected, suffered from septic fever and from absorption of toxine, was confined to his bed three months suffering excruciating pains, was permanently injured and unable to follow his vocation, had an expectancy of life of 16½ years, and had been earning $600 per year, *held* that an award of $6,000 was not excessive. (Page 276.)

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

Henry Moore and *Henry Moore, Jr.,* for appellant.

1. The sixth instruction requested by appellant should have been given. If the proximate cause of the injury was a ditch or unprotected culvert in the road crossing over the other railway company's road, over which appellant had no control, it is not responsible for the injury.

2. Appellee by his own testimony was guilty of contributory negligence; and if that negligence contributed in any degree to the injury, he cannot recover. 29 Cyc. 505. It was his duty to stop and look and listen for approaching trains. 63 N. W. 401; 48 La. Ann. 1; 109 La. 43. And he is not excused, even if the statutory signals were not given. 56 Ark. 457; 54 Ark. 431; 62 Ark. 235; 84 Ark. 270; 85 Ark. 532.

3. The verdict is so excessive as to show that the jury were influenced by passion or prejudice.

Searcy & Parks, for appellee.

1. It is well settled that the verdict of the jury settles all disputed questions of fact. The inquiry here is not whether the verdict is sustained by the weight of the evidence, but whether the evidence is legally sufficient to sustain it. 67 Ark. 401; 70 Ark. 140; 74 Ark. 478.

2. There was no error in refusing appellant's sixth instruction requested. 79 Ark. 490; 61 Ark. 141; 88 Ark. 524. The question of contributory negligence was submitted to the jury under proper instructions, and their verdict is conclusive. 71 Ark. 428. A railway company is held to the exercise of due care for the safety of all persons while in the exercise of its franchise, whether on its own road or that of another. 53 Ark. 347; 70 Ark. 297.

BATTLE, J. On the 25th day of June, 1908, W. M. Nix brought an action against the Louisiana & Arkansas Railway Company in the Lafayette Circuit Court, to recover damages caused by a personal injury. The plaintiff stated his cause of action in his complaint as follows:

"That the St. Louis Southwestern Railway Company owns and maintains several spurs or switch tracks in the town of Stamps, paralleling its main line track, and that, by some traffic arrangement between defendant company and the said St. Louis Southwestern Railway Company, said tracks are used by defendant company's engines and trains in switching cars and doing other work. That a public street or thoroughfare crosses said railroad tracks on the east side of Stamps, in what is known as 'East Stamps,' and that on said 6th day of February, 1908, the plaintiff was traveling in a wagon loaded with lumber, drawn by two mules, upon the said public highway, and while in the act of crossing the said railroad tracks at said crossing defendant's engine, run by defendant, attached to several cars, was suddenly pushed forward, which frightened the plaintiff's mules, then on said crossing, and that his mules and wagon barely escaped being struck by said backing cars and engine; that the sudden starting up of said engine and the closeness of the cars and engine rapidly moving down upon them so frightened said mules that they ran away, and plaintiff was thrown from his wagon, and was seriously and permanently injured. That he sustained a compound fracture of the ankle joint; the internal maleolus being severed at its base from the tibia, and fibula being fractured about two inches from the lower extremity, without any fault on his part. That the train causing the accident consisted of a locomotive and three or four cars; that it was a switch engine, and suddenly and rapidly moved or backed said cars down upon plaintiff, and omitted to give any signal by bell or

whistle of its approach to said crossing, and its presence was unknown to plaintiff at the time he drove upon said crossing, although he was careful and cautious in listening and looking for trains before going upon said track. By reason of said injuries the plaintiff has suffered intense pain, and was confined to his bed for three months, and that his injuries are permanent; that he is a farmer by occupation, and knows no other business, but that on account of his injuries he will never be able to perform his customary and necessary duties as such; and that he has necessarily expended for physicians and other services the sum of $....., and his general health is greatly impaired, and he has sustained other injuries, in all to his damage in the sum of ten thousand dollars."

The defendant answered, and denied the material allegations of the complaint, and pleaded that plaintiff's injuries were caused by his own contributory negligence.

Defendant moved that plaintiff be required to make his complaint more specific by showing in what manner he has sustained damage in the sum of $10,000. The court overruled the motion. We think that the complaint is sufficiently specific in showing how he sustained damage in the sum of $10,000.

The issues in the case were tried by a jury, and they, after hearing the evidence adduced by the parties and the instructions of the court, returned a verdict in favor of the plaintiff for $6,000. The evidence which sustained their verdict tended to prove the following facts: The St. Louis Southwestern Railway Company owns, operates and maintains several spurs or switch tracks in the town of Stamps, in this State, paralleling its main track. By some traffic arrangement between the defendant and that company these tracks were used by the defendant's engines and trains in switching cars and doing other work. A public street or thoroughfare crosses these tracks on the east side of Stamps, in what is known as "East Stamps." There were three of these tracks, and they were known as the south switch or planer track, middle switch or passing track, and the main line track, all being straight at this point. On the 6th day of February, 1908, plaintiff, in a wagon drawn by two mules, and loaded with lumber, approached this crossing. The mules were gentle and accustomed to trains. At this time

a row of box cars stood on the south or planer track, and extended west from the crossing as far as he could see, and obstructed his view and prevented him from seeing down the middle or passing track and the main line. On reaching within a few feet of the crossing plaintiff stopped his team and looked and listened for trains. Not hearing or seeing any, and no signal of approaching trains being given, and thinking the way safe, he drove upon the crossing, and just after his mules had passed over the planer track he saw three or four cars backed by defendant's switch engine, on the middle or passing track, approaching the crossing, which they crossed, at the rate of eight or ten miles an hour. The sudden proximity of the cars frightened the mules, causing plaintiff to lose control of them, and the mules to run away. The team with the wagon went up the railroad track for ten or twelve feet, and were brought back in a circle and off that track just as the cars and engine passed. As they went back into the road at the north side of the crossing, the wagon struck something, and threw plaintiff out, causing him to sustain a compound fracture of the ankle joint. The wound developed into complete ankylosis and into necrosis of the bone. His nervous system was affected, and septic fever developed, and a general debility from absorption of toxine and the general nervous shock. He was confined to his bed for three months, and during that time suffered excruciating pain, and most of the time had to take opiates to enable him to rest. At the time of the trial in this action, fifteen months after the injury, he was on crutches. The injury is permanent, and he cannot follow his vocation. At the time of the injury he was fifty-seven years of age; his expectancy of life was 16.5 years; he was in good health, and earning annually about $600.

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

"6. The jury are instructed that if they believe from a preponderance of the evidence in this cause that plaintiff's accident occurred at a public crossing over the St. Louis Southwestern Railway Company's road, and that, although the plaintiff's mules had become frightened at the engine or cars of the defendant and run away, yet if they further believe that said accident would not have occurred but for a ditch or unprotected culvert in said road crossing, for which the defendant was not

responsible, and that the proximate cause of the accident was said unprotected ditch or culvert in said public road crossing, then their verdict should be for the defendant."

The court rendered a judgment in accordance with the verdict, and the defendant appealed.

Should the refused instruction have been granted? A similar question was presented and decided in *Railway Company* v. *Roberts*, 56 Ark. 387. The facts in that case were as follows: "On October 4, 1888, Roberts and Lewis started from the town of Corning, going north. They were driving a two-mule team. For some 600 yards the public road ran sixty-five or seventy feet west of defendant's track and parallel with it. Then it crossed the track. After deceased and his companion had driven about 200 yards north, a north-bound train, going twenty-five or thirty miles an hour, came in sight. As it approached, the team became frightened and began to run. There was evidence from which the jury might have inferred that the mules were frightened by escape of steam; that, although the trainmen saw the team was frightened, they continued to blow their whistle and to permit the steam to escape from the time the mules took fright until the accident occurred, and that no effort was made to check the speed of the train. The driver lost all control of the mules; they ran on until they reached the crossing, where they turned and attempted to cross the track just in front of the approaching engine. The wagon crossed with slight injury, but Roberts was jolted out on the track. As he fell upon the ground, he was instantly struck by the pilot beam of the engine, and was so badly injured that he died immediately. There was testimony that the crossing was defective; also that a wagon could have been driven over it safely at an extraordinary rate of speed."

The defendant requested the court to instruct the jury as follows: "6. If the jury find from the evidence that the engineer of defendant's train was, at the time of the accident, on the lookout, and saw the deceased just before and as he started across the track, and immediately used every effort in his power and control to check his train, but failed because of the nearness of his engine to the deceased, the court instructs you that there was no negligence on the part of the defendant, and you will

find for the defendant." And the court modified it by adding: "Unless you find that the accident and injury was directly caused by the engineer negligently blowing off steam or by the negligence of the defendant in not keeping the crossing in repair."

Mr. Justice MANSFIELD, in delivering the opinion of the court, said: "But, in giving the sixth instruction requested by the defendant with the change made by the court, an error was committed which we cannot treat as otherwise than prejudicial to the defendant. The effect of that instruction was to direct a verdict for the plaintiff if the jury found that the injury to his intestate was caused by the defendant's negligence either in blowing off steam or in failing to keep the crossing in repair. It made the defendant's liability the same in either case; and the plaintiff was thus allowed to recover if the jury found there was negligence as to the crossing, although they were unable to find that there was any whatever in frightening the team. But all the evidence shows that the proximate cause of the injury was the frightening the team. * * * If that was due to the company's negligence, it was liable for all the consequences resulting directly from it; otherwise it was liable for none of them." To the same effect was *Railway Company* v. *Lewis*, 60 Ark. 409.

According to these two cases the instruction in this case was properly refused.

In this case the defendant's engine and cars were approaching a public crossing when the plaintiff was crossing or about to cross the same with his wagon and team. In such cases the statute provides that a bell of at least thirty pounds weight, or a steam whistle, shall be placed on each locomotive or engine, and shall be rung or whistled at the distance of at least eighty rods from the crossing, and be kept ringing or whistling until it shall have crossed the road or street. If the locomotive or engine commence moving within the eighty rods, the bell should be rung or the whistle whistled until it shall have passed the crossing. Kirby's Digest, § 6595. This is required for the protection of persons and vehicles passing over the public crossing. In this case there was evidence adduced tending to prove that plaintiff stopped and listened before he drove upon the crossing, and saw no locomotive or cars running, and heard no signal, and

in fact none was given, and thereupon he drove upon the crossing. There was evidence tending to prove that, if a signal had been given, he would have avoided injury. His stopping, looking and listening was evidence of an intention not to go upon the crossing if he had heard a signal indicating that it was dangerous to cross. As it was, he would have crossed in safety if his mules had not been frightened, and their fright was due to the failure to give the signal, as they would not have been exposed to such fright if the signal had been given.

The evidence was sufficient to sustain the verdict in this court as to the amount of damages and in other respects.

Judgment affirmed.

WRIGHT v. WOOLDRIDGE.

Opinion delivered March 21, 1910.

EQUITY—JURISDICTION ON APPEAL FROM JUSTICE OF THE PEACE.—As the circuit court, on appeal from a justice of the peace, acquires only such jurisdiction as the latter court possessed, it was error to transfer the cause in such case from the circuit to the chancery court for the purpose of maintaining an equitable defense.

Appeal from Cleveland Chancery Court; *John M. Elliott,* Chancellor; reversed.

A. T. Whitelaw, for appellant.

The chancery court was without jurisdiction. Kirby's Dig., § 5985; 71 Ark. 222; *Id.* 484; 46 Ark. 272. Jurisdiction cannot be conferred by consent of parties where none existed before. 33 Ark. 31; 34 Ark. 399; 70 Ark. 347; 1 Black on Judgments, 217.

Pitt Holmes, for appellee.

Since the chancery court would not assume jurisdiction of this cause except upon agreement of parties waiving objections as to jurisdiction, appellant ought not to be heard now to object to the jurisdiction.

BATTLE, J. This action was brought by J. H. Wright against E. and H. Wooldridge, on the 14th day of December,

1906, before a justice of the peace of Cleveland County, to recover $200, loaned by plaintiff to the defendants, and interest. The plaintiff recovered judgment, and the defendants appealed to the Cleveland Circuit Court. On appeal the action was transferred by consent to the Cleveland Chancery Court, and on hearing that court dismissed plaintiff's complaint for want of equity, and plaintiff appealed to this court.

In *Whitesides* v. *Kershaw*, 44 Ark. 377, 379, it is said: "On appeal from a justice of the peace court, the jurisdiction of the circuit court is derived from and is dependent upon the appeal. It cannot put its original jurisdiction into exercise by superadding to the pending controversy a cause of action or an issue that the justice of the peace could not entertain. In such case the circuit court can render no judgment that the justice of the peace is not authorized to render." To the same effect, see *Brewer* v. *Winston*, 46 Ark. 163; *Jackson* v. *Gorman*, 70 Ark. 88; *Barrett* v. *Nichols*, 85 Ark. 58.

Neither could a chancery court, in such cases, acquire, by a transfer from the circuit court, jurisdiction which the justice of the peace did not have. Justices of the peace cannot enforce equitable remedies, and no such jurisdiction can be acquired by any court by appeal from that court.

The judgment of the chancery court is reversed, and the cause is remanded with directions to that court to remand it to the Cleveland Circuit Court.

SCHIELE v. DILLARD.

Opinion delivered March 21, 1910.

1. PARTIES—SUBSTITUTION.—While the court may in its discretion allow additional parties plaintiff or defendant to be added, it cannot make an entire change of parties, as that would be tantamount to a new suit between different parties. (Page 281.)
2. GARNISHMENT—PARTIES.—Where plaintiff sued the Dillard & Kilgore Company, a corporation, and procured a garnishment to be sued out against a third person, and subsequently sued the Dillard & Kilgore Company, a partnership, but in the latter suit did not procure a garnishment to be issued against the third person, no jurisdiction of the latter was acquired in the suit against the partnership. (Page 281.)

3. SAME—WAIVER OF PROCESS.—One who is indebted to the defendant, but is not served with process as garnishee, cannot enter his appearance and waive process against himself as garnishee. (Page 281.)

Appeal from Garland Circuit Court; *W. H. Evans,* Judge; affirmed.

STATEMENT BY THE COURT.

This case comes to this court upon an appeal taken from a judgment of the Garland Circuit Court, overruling a motion filed by appellant asking the said court to modify an order and judgment which it had previously made distributing a fund which had been paid into the said court by the North State Fire Insurance Company, which had been garnished for money in its hands belonging to A. J. Dillard; said fund having been paid into the said court by order of the court in the case of Klein Bros. *v.* A. J. Dillard.

The facts heard upon the motion show that appellants on the 17th day of April, 1907, filed a suit in the circuit court of Garland County against Dillard & Kilgore Company, and on the same day sued out a writ of garnishment against the North State Fire Insurance Company, of Greensboro, N. C. Summons was issued, and on said 17th day of April, 1907, was served upon A. J. Kilgore, as president of Dillard & Kilgore Company, a corporation. On the same day the writ of garnishment was served on the said garnishee commanding it to appear and answer what goods, etc., it had belonging to the defendant, the Dillard & Kilgore Company. It was afterwards ascertained that the Dillard & Kilgore Company was in fact a partnership composed of A. J. Dillard and John Kilgore. On the 9th day of August, 1907, appellants sought to amend their complaint by making it run against A. J. Dillard and John Kilgore, as partners doing business under the firm name of Dillard & Kilgore Company. A summons was issued on this so-called amended complaint on the same day it was filed, and was served on the parties named therein, but no writ of garnishment was issued or service had on the North State Fire Insurance Company after the so-called amendment to the complaint was filed.

On the 4th day of September, 1907, garnishee filed its answer, admitting an indebtedness of $1,750 to the defendant, A. J. Dillard. In the meantime on the 20th day of April, 1907,

Klein Brothers filed a suit in the Garland Circuit Court against A. J. Dillard, and Dillard & Kilgore Company, and sued out a writ of garnishment against the North State Fire Insurance Company, and O. H. Sumpter and R. L. Williams, insurance agents, alleging that said garnishees were jointly indebted to the defendant, A. J. Dillard, in the sum of $2,500, and summons was issued upon said complaint upon the 20th day of April, 1907, and was served upon A. J. Dillard, as president of said company.

On the 20th of June, 1907, Dillard filed his separate answer. This gave the court jurisdiction of Dillard. Also on the 24th day of May, 1907, the Standard Distilling Company filed its suit in the common pleas court of Garland County against the Dillard & Kilgore Company and A. J. Dillard, and at the same time sued out a writ of garnishment against the North State Fire Insurance Company, of Greensboro, N. C., summons on which complaint was served on A. J. Dillard as president of Dillard & Kilgore Company, on said date, and which writs of garnishment were served upon R. L. Williams and O. H. Sumpter on the 24th day of May, 1907.

The garnishee, North State Fire Insurance Company, filed its answer to the writ of garnishment of Klein Brothers and the Standard Distilling Company's writ of garnishment on the 4th day of September, 1907, admitting an indebtedness to A. J. Dillard of $1,750.

On the 13th day of February, 1908, Klein Brothers filed an amendment to their complaint, setting up that A. J. Dillard and John Kilgore were partners doing business under the firm name of Dillard & Kilgore Company, and praying for judgment as in their original complaint, and on said day sued out an *alias* writ of garnishment against R. L. Williams and J. H. Reece and North State Fire Insurance Company, jointly, which said writ was on the 13th day of February, 1908, served by delivering a true copy thereof to J. H. Reece, a member of the firm of Williams & Reece. No answer of either of garnishees was ever filed in response to this writ.

On July 24, 1909, the circuit court, on motion of the Standard Distilling Company and Klein Brothers, made an order, distributing funds in the hands of the clerk, as paid in to him by the North State Fire Insurance Company, under judgment

against it in favor of A. J. Dillard and the garnishments in the several suits, directing the clerk, after paying the costs and attorney's fees, to pay the entire balance in his hands to Klein Brothers and the Standard Distilling Company.

On July 31, 1909, a judgment was rendered against the defendants in said suit of appellants against A. J. Dillard and John Kilgore, partners doing business as Dillard & Kilgore Company and the garnishee, North State Fire Insurance Company.

Subsequently Edwin Schiele & Company, appellants here, filed their motion in said court to consolidate the case of Klein Brothers, and the case of Dillard against the North State Fire Insurance Company, and to amend the order of court ordering the distribution of the funds.

On August 14, 1909, the court overruled said motion, to which ruling of the court appellant excepted, and prayed an appeal to the Supreme Court, which was granted.

C. Floyd Huff, for appellant.

The lien of a garnishment dates from the time the garnishment writ is served upon the garnishee. 39 Ark. 97; 40 Ark. 531; 3 Ark. 509; 6 Ark. 391; 18 Ark. 249. The garnishment in appellant's case was first served. The amendment to the complaint, and the answer of the garnishee admitting an indebtedness, relate back to the filing of the original complaint. 33 Ark. 251.

Greaves & Martin and *Wood & Henderson,* for appellees.

A party will not be permitted to amend his complaint by substituting entirely new parties as defendants. 3 Estee, Pleading, § 4487; 34 Ark. 144. The amendment in this case could only have the effect, if any, of starting a suit against the defendants, the partnership, and would date as of the time it was filed. 1 Enc. Pl. & Pr. 545; 25 Hun (N. Y.) 475; 89 N. Y. 82; 75 N. Y. 303. Unless a court has acquired jurisdiction of the defendant in the main suit, it cannot take jurisdiction in the ancillary garnishment proceeding. 9 Enc. Pl. & Pr. 810; 7 Am. St. Rep. 64; 48 *Id.* 92. The validity of garnishment proceedings rests entirely upon complying with judicial process and statutory provisions. 52 W. Va. 450; 6 L. R. A. 178; 18 La. Ann. 476; Drake on Attachments 451.

WOOD, J., (after stating the facts). The appellants sought by amendment to their complaint to substitute new parties defendant. This could not be done. While the court may in its discretion allow additional parties plaintiff or defendant to be added or struck out, it can not make an entire change of parties plaintiff or defendant. That would be tantamount to a new suit between entirely different parties. *State* v. *Rottaken,* 34 Ark. 144; 3 Estee's Pleading, § 4487.

Appellants' suit therefore against the partnership of Dillard & Kilgore Company must date from the day the so-called amended complaint was filed and the summons issued, towit, August 9, 1907. 1 Ency. Plead. & Pr. 545, and cases cited.

The North State Fire Insurance Company was never summoned as garnishee in this new suit, and no allegations and interrogatories were filed against it after the so-called amendment. Therefore the court did not acquire jurisdiction of the North State Fire Insurance Company as a garnishee in this new suit.

The garnishee must be served with process. In this respect the garnishee is different from the defendant, who can give jurisdiction to the court by entering his personal appearance, even though not served with process. The validity of garnishment proceedings rests entirely upon complying with judicial process and statutory provisions. *Pennsylvania Rd. Co.* v. *Rogers,* 52 W. Va. 450, 62 L. R. A. 178-186; *Schlindler* v. *Smith,* 18 La. Ann. 476.

The court had acquired no jurisdiction of Dillard, the individual, in the original suit brought by appellant against the Dillard & Kilgore Company, the corporation, and hence in that suit it did not acquire jurisdiction of the North State Fire Insurance Company, garnishee, who owed A. J. Dillard, the individual, and not Dillard & Kilgore Company, the corporation.

The appellees acquired jurisdiction of A. J. Dillard, the individual, and of the North State Fire Insurance Company before the appellants acquired such jurisdiction, and the judgment of the court therefore in favor of appellees must take precedence. The fund was impounded under the order of the circuit court directing the garnishee to pay same to the clerk of that court, and it was proper for the appellee, Standard Distilling Company, having a lien prior to that of appellant, to apply to the circuit court for its distributive share of the fund.

There was no error in overruling appellant's motion, and the judgment of the circuit court is therefore affirmed.

CORNISH v. FRIEDMAN.

Opinion delivered March 21, 1910.

1. SALES OF CHATTELS—WARRANTIES.—Whether an assertion by a vendor at the time of making a sale is an affirmation of a positive fact or, on the other hand, only praise and commendation, opinion or judgment, is a question for the jury, where its meaning is ambiguous, and in such case the intention of the parties may be gathered from the surrounding circumstances. (Page 293.)
2. INSTRUCTIONS—CONFLICT.—It is error to give instructions which are in irreconcilable conflict. (Page 293.)
3. SALES OF CHATTELS—WARRANTY.—Any affirmation of a material fact, as a fact, intended by the vendor as and for a warranty and relied upon as such, will constitute a warranty, whether the vendor intended to warrant or not; but mere representations by way of commendation, or which merely express the vendor's opinion, belief, judgment or estimate, do not constitute a warranty. (Page 294.)
4. SAME—DEFENSE.—Where, in a suit by one of the vendors of corporate stock to recover upon a purchase money note, the defense was a partial failure of consideration growing out of a breach of a warranty made by plaintiff in such sale, it is immaterial that the note was payable to plaintiff alone, who was a creditor of the corporation; if the plaintiff had to make good his warranty to the defendants, he would be entitled to contribution from the other stockholders according to the number of shares sold by them. (Page 295.)

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

STATEMENT BY THE COURT.

This was an action upon a promissory note in the Sebastian Circuit Court, the plaintiff reciting that the defendants, Lewis Friedman and I. Isaacson, had executed to the plaintiff on the 2d day of November, 1907, a promissory note for two thousand dollars, due thirty days after date without grace, with interest from date at eight per cent. per annum until paid, reciting the nonpayment of the same, protest fees $4.90, and concluding with

a prayer for the recovery of said two thousand dollars and interest and $4.90 protest fees.

Answering, defendants Friedman and Isaacson acknowledged the execution of said note, and that they had failed to pay, and set up in the second paragraph as a defense that the said Cornish, together with J. W. Crabtree, J. M. Crabtree, F. F. LaGrave, Isaac Kempner and Dave Kempner, were the owners of all the stock of the Merchants' Transfer Company, a corporation in the city of Fort Smith, and that the Crabtrees, LaGrave and Cornish were officers and directors. That the stock of said corporation amounted to five hundred shares of $25 each, owned as follows: J. W. Crabtree 120 shares, J. M. Crabtree 120 shares, LaGrave 120 shares, Cornish 70 shares, and the two Kempners 35 shares each. That on the day of the execution of the note Lewis Friedman bought all of said stock from said parties; that Cornish was the agent of the Kempners in said sale; that the Crabtrees, LaGrave and Cornish represented to and assured plaintiff that the bills and accounts payable of said corporation amounted to $2,485, itemized as follows: Overdraft $360, note $750, purchase price of horse $175, and accounts $1,200. That the said representations and assurances constituted a warranty. That, instead of owing $1,200, they owed $2,455, or $1,245 more than was represented. That at the same time said parties represented to and assured said defendant that the accounts due said corporation amounted to $3,100, when, as a matter of fact, they amounted to only $2,748.46, or $351.54 less than represented. That these representations and assurances on the part of the parties constituted a warranty. That the said Lewis Friedman had no knowledge of the assets and liabilities, and relied solely on the said representations and assurances, and that, relying upon such, he bought the stock and executed the note in suit for two thousand dollars to said Cornish, the same being part of the purchase price of said stock. That the co-defendant, Isaacson, signed said note as surety for said Lewis Friedman. That he did not learn of the discrepancy in the bills payable and bills receivable as set out above until he had paid $1,100 of said indebtedness and had executed the note to Cornish, and that by the said acts he had been damaged in the sum of $1,596.94, and a failure of consideration to that extent. That he would not have purchased the stock or executed the note but for said representations, and prays that the

same be taken as a cross-complaint against said Crabtrees, LaGrave and Cornish, and that the defendants be allowed credit on the note for $1,594 as of the date of its execution.

The Crabtrees and LaGrave filed answers to the cross-complaint, denying its allegations; but, as they passed out by the instructions and verdict, and are not parties here, it is unnecessary to set out their answer.

Appellee Friedman had arranged to purchase the capital stock of the Merchants' Transfer Company, a corporation doing business at Fort Smith, Arkansas.

There were two gentlemen by the name of Crabtree, two by the name of Kempner, and one named LaGrave, and appellant who owned the stock of the company consisting of five hundred shares. The Crabtrees and LaGrave lived in Fort Smith, and they owned three hundred and sixty shares of the stock. Appellant and the Kempners lived in Little Rock, and they owned one hundred and forty shares. The Crabtrees and LaGrave were the officers of the corporation, and constituted a majority also of its board of directors. The latter as individuals had agreed with Friedman that they would sell him the entire capital stock of five hundred shares for the sum of fifty-four hundred dollars. The Crabtrees and LaGrave, in this tentative agreement with Friedman, undertook to secure the stock of the Kempners and appellant.

It was stipulated in this written agreement, which the Crabtrees and LaGrave had already signed, that the purchase price of fifty-four hundred dollars should be applied by Friedman as follows, towit: The sum of thirty-four hundred dollars to the payment of a note of the said Merchants' Transfer Company for said sum to the Fort Smith Bank & Trust Company, and the sum of two thousand dollars to the payment of a note of the said Merchants' Transfer Company for the said sum to Cornish and Kempner.

The Crabtrees and LaGrave also agreed that they would pay all of the indebtedness of the corporation, other than the two notes above mentioned, and there was a stipulation that "for the purpose of paying said indebtedness there shall be used the proceeds of collections of all accounts due said Merchants Transfer Company made prior to this date. If the proceeds of such collec-

tions are not sufficient to pay such indebtedness, the parties of the first part (Crabtrees and LaGrave) agree to pay whatever balance may be necessary to pay said indebtedness. If the proceeds of such collections are more than sufficient to pay such indebtedness, the surplus shall go to said parties of the first part."

This was the status of the negotiations when appellant appeared upon the scene at Fort Smith. The parties, it seems, were waiting for him. He would not agree to the arrangement that Friedman and the Crabtrees and LaGrave had made, and so it was never signed by Friedman, and was not carried out. From the time that Cornish appeared appellees contend that the further negotiations leading to the consummation of the purchase by them of the Transfer Company were conducted on the part of the company mainly by Cornish, and that he made certain representations as to the assets and liabilities of the Transfer Company which induced the appellees to consummate the purchase, and which amounted in law to personal and individual warranties on the part of appellant.

The appellee, Friedman, concerning this, testified in part as follows: "He (appellant) showed me that the company owed twelve hundred dollars, and were three hundred and sixty dollars overdrawn in the bank and a note for $750, on which Mr. Cornish was indorser; that was all they owed, $2,310. He showed me $3,100 owing them, and said: 'You can take off ten per cent. —three hundred and ten dollars—and that leaves twenty-six hundred and ninety, or three hundred and eighty dollars to the good.' I looked over the accounts, and asked him if they were good, and he said he couldn't tell. He said they were amounts people owed, and were accurate. I looked over the names, knew they were all right, and told him I would take the accounts, provided the people owed them. Mr. Isaacson was with us, but, to satisfy myself about the accounts, I asked him, 'Are you sure the people owe these?' speaking of one of the large accounts, and he answered, 'They are absolutely correct accounts.' And I asked again, I says, 'And twelve hundred dollars is all the company owes?' And he said, 'Not exceeding twelve hundred dollars; their account will not exceed twelve hundred dollars,' and Mr. LaGrave said, 'I don't see how it can be twelve hundred dollars.' Mr. Isaacson asked him, 'Is there anything else the company is indebted for?' And Mr. Crabtree said, 'Yes, there is a mortgage on a horse for

one hundred and seventy-five dollars.' He asked me if I was willing to make the deal on that basis, and I said, 'Yes, I believe I will do it, if the amount is not over twelve hundred dollars, and three hundred and sixty and seven hundred.' With that we went up to the bank, and I gave my check for $750 and $360, and gave Mr. Cornish a note for two thousand dollars. That is the note in controversy. I took possession and began paying the debts, and soon found that the accounts ran over twelve hundred dollars. Before my note was due I saw that the accounts were running nearly double the amount—twenty-four hundred dollars—and several accounts had receipted bills for what they had paid. Found that the acounts they owed through the town was twelve hundred more than they had stated to me. This representation was made to me by Mr. Cornish straight out; myself and Mr. Isaacson were present. There were several accounts, amounting to $354, that the people didn't owe, and they had receipted bills for, that they had failed to get credit for, and some of them had been charged twice through mistake, which was proved between Mr. Crabtree and the people that owed that they really didn't owe it. So when this note came due, I refused to pay it. I claim credit for $351.54 that I found on their accounts as due which was not owing to the Merchants' Transfer Company. The other is the twelve hundred dollars indebtedness that they owed more than they told me, making $1,551.54. I claim credit for that on the two thousand dollar note. The indebtedness of the transfer company before I bought the stock was fifty-four hundred dollars, two thousand to Mr. Cornish the Merchants' Transfer Company owed; that is, he was the indorser for the note given to the trust company. Thirty-four hundred dollars was the stock put up as collateral in the bank, the Fort Smith Bank & Trust Company, making fifty-four hundred dollars. They owed, in addition, about twenty-four hundred dollars city accounts and outstanding accounts; three hundred and sixty dollars overdraft; seven hundred and fifty dollar note, and one hundred and seventy-five dollars for a horse, making nine thousand eight-five dollars.

"We figured their equipment, horses and wagons, harness, feed and other things used by the transfer company at fifty-four hundred dollars, and the accounts due them at thirty-one hundred dollars. This was all the assets.

"They represented it to be eighty-five hundred dollars, and represented that they owed an indebtedness of twelve hundred dollars less than it really was. Mr. Cornish figured out on a piece of paper the thirty-one hundred dollars; there was no question about this. It was the only question discussed whether twelve hundred dollars would pay the total liabilities. I asked Mr. Cornish whether he was absolutely sure that twelve hundred dollars was all the indebtedness, and he told me it was. This was said in the presence of Mr. LaGrave and Isaacson, and LaGrave said at that time, 'I don't see how it could possibly go to twelve hundred dollars, and I am positive it wouldn't exceed twelve hundred dollars.' Mr. LaGrave and Mr. Cornish both said that in the presence of Mr. Isaacson and Mr. Crabtree."

The stock was transferred to the witness. He paid the three hundred and sixty dollar overdraft and the seven hundred dollar note, and gave Cornish a note for two thousand dollars.

The appellant, on the other hand, contends that the representations he made were not warranties, and not intended to be, and were not acted on by appellees as warranties. He further contends that the note in suit given to him by appellees for part of the purchase money represented the amount that the corporation owed him, and that he accepted the note in payment of same; that, if there was a partial failure of consideration for the sale of the stock of the Transfer Company, the entire amount thereof should not be deducted from the note held by him, but that it should be deducted from the entire consideration, and that he should be made to bear only his proportionate part of such failure.

To sustain his contention, he testified in part as follows: He lives in Little Rock, and has lived there for nearly twenty years; had some stock in the transfer company at Fort Smith, and represents the two Kempners. The officers of the company were LaGrave and Crabtree. Crabtree was the president, and LaGrave was the secretary and treasurer. They lived in Fort Smith. Had nothing to do with the details of the management. That Crabtree called him up on November 1, 1907, about the trade. Didn't know who it was with. "I don't remember seeing the contract; I might have seen it." Told

him in regard to that contract that I wanted to see the books first. "The company owed me two thousand ($2,000) dollars. I was also indorser on a note for seven hundred and fifty ($750) dollars, and I wanted to see that these things were taken care of. I told him I wanted to see the books, and I immediately commenced looking in the books for this statement—the statement you have there. This showed the assets of the company to be about thirty-one hundred ($3,100) dollars and the indebtedness seven hundred and fifty ($750) dollars to the Fort Smith Bank, three hundred and sixty ($360) dollars overdraft and two thousand ($2,000) dollars they owed the Kempners and myself. Twelve hundred ($1,200) dollars was estimated to cover the city bills. I told them that the statement was what was shown by the books, but I could not certify as to the correctness of the accounts. That I did not know how much the outstanding bills were, but that we could go back and get them from Crabtree and LaGrave, the people in charge, and we did so. I told him I did not know what they were, and we would have to get them from Crabtree and LaGrave. I am not positive whether the question about outstanding accounts came up before or after we went down to the office. When we went to the transfer company's office, Mr. Friedman and Mr. Isaacson went over every account of any consequence on this list with Mr. Crabtree, and also asked them about the outstanding city bills. They asked Mr. LaGrave, and he said, as near as he could estimate, it was twelve hundred ($1,200) dollars. I do not remember whether Mr. Crabtree made a statement or not. I told Mr. Friedman all along that I did not know what the outstanding city bills were; that the books did not show, and I had no way of knowing, and we could only get the information from Crabtree and LaGrave. I positively did not at any time state to Mr. Friedman that I would guaranty the correctness of the outstanding accounts. Mr. Friedman did not so testify at the last term of the court. I had no knowledge or information of any kind as to the amount of outstanding city bills until I had asked Mr. LaGrave about it. I am not positive that I asked him. The question was asked when we were down there. I said I thought Friedman asked him. However, one of us asked him, and we got the information from LaGrave, and that is the only source

from which I could get it. I did not get the bills, and there was nothing on the books to show."

LaGrave testified on behalf of appellant, in part, as follows:

"When Mr. Cornish, Isaacson and Friedman were in the office and asked about the amount of the outstanding city bills —in other words, what we owed for supplies and city accounts —I told them I could not answer; that it was the first of the month, and a lot of bills would not be in until the tenth of the month. They were in the habit of bringing them around from the first to the fifteenth, and besides bills I did not know of; that I could not give them a positive statement as to the amount of the outstanding accounts. They insisted, and I told them that the only thing I could give them was an estimate of the approximate amount; then they wanted to know what the approximate amount would be, to the best of my knowledge, and after studyng the things a little I named twelve hundred ($1,200) dollars; stated that it was approximately twelve hundred ($1,200) dollars. I most positively did not state in that connection that the outstanding debts would not exceed twelve hundred ($1,200) dollars."

The court instructed the jury at the instance of appellant as follows:

"1. The court instructs the jury that, in order to constitute a warranty, there must be a positive affirmation of fact, not made as a matter of belief or opinion, for the purpose of assuring the buyer of the truth of the fact and inducing him to make the purchase, and which is so received and relied upon by the purchaser.

"2. The court further instructs you that, before you can find that the said Ed Cornish made any warranty to the effect that the oustanding city bills referred to in the evidence owing by said transfer company amounted to only twelve hundred dollars, you must find that he stated as a fact that said outstanding city bills would amount only to that sum, and that such statement was made for the purpose of assuring said Friedman of that fact and inducing him to make the purchase of the stock, and that said Friedman received and relied upon said statement so made by said Cornish.

"3. If you find from the evidence that said Cornish did not

know what the said outstanding city bills would amount to, and that he so stated to Friedman, and that they inquired of LaGrave the amount of the same, and LaGrave stated that they would amount to $1,200, and said Friedman and said Cornish relied upon said statement of LaGrave in making said deal, then there was no warranty upon the part of said Cornish as to the amount of said outstanding city bills.

"4. Before you can find against the said Ed Cornish on account of a shortage of the accounts owing to said Merchants' Transfer Company, you must find either that said Cornish agreed in express terms to guaranty the amount thereof, or that he stated positively that they amounted to the sum of $3,100; and if you find that said Cornish took the list of accounts from the books of the company, and this fact was known to said Friedman, and said Cornish stated to said Friedman in substance that he had no other information in regard to them than as shown by the books of the company, this would not constitute a warranty as to the correctness of said accounts.

"5. If you find from the evidence that the only information Cornish had as to the bills payable of the transfer company was obtained from LaGrave in the presence of Friedman, and that was to the effect that said LaGrave could only estimate them at $1,200, then there was no warranty on the part of Cornish as to the amount of said indebtedness."

At the instance of appellees, and over the objection of appellant, the court gave the following prayers (after first stating the alleged representations of appellant) towit:

"1. There are two questions for the jury to determine. (1) Whether said Ed Cornish made to plaintiff such representations or assurances, and (2), if so, whether such representations amounted to a warranty that they were true. A warranty is an expressed or implied statement of something which a party undertakes shall be a part of the contract. It is not necessary that in making the contract the word 'warranty' be used. No particular phraseology is required to constitute a warranty. If the person makes a positive affirmation as to any fact affecting the value of the property sought to be sold, or utters what is equivalent to a promise regarding it, instead of expressing a belief merely, then such affirmation or promise

amounts to a warranty, and he is liable upon it if the other party relied upon it. It does not depend upon whether the person who made the affirmation intended to be bound by it or not; nor does it depend upon whether he knew it to be true or not. If he makes it whether in good faith or not, and the purchaser relies upon it in making the purchase, then it constitutes a warranty and the person making it is bound by it.

"2. If you find from the testimony that Ed Cornish represented to Friedman that the accounts owing by the Merchants' Transfer Company amounted to twelve hundred dollars, when in fact they amounted to twenty-four hundred forty-five dollars, or any other sum in excess of twelve hundred dollars, and you further find that Ed Cornish represented to Friedman that the bills collectable of the Merchants' Transfer Company amounted to thirty-one hundred dollars, when in fact they amounted to twenty-seven hundred forty-eight and 46-100 dollars, or any other sum less than thirty-one hundred dollars, and Friedman in making the purchase of the stock of the Merchants' Transfer Company relied upon such representations, then you are instructed to allow credit on the note sued on for the difference between such amounts as represented and the amounts as they really were.

"3. If Cornish made inquiry of LaGrave as to the amount of city bills the Merchants' Transfer Company owed, and LaGrave replied that they were about twelve hundred dollars, or would not exceed twelve hundred dollars, and Cornish accepted and adopted that amount in his negotiations with Friedman with the intention of having Friedman rely on that amount in making his calculations, and that Friedman did rely on that amount in making the trade, then you are instructed that Cornish was bound by that statement as to the amount of city bills and Friedman and Isaacson will be entitled to a credit on said note for said sum as of the date of the note."

Appellant duly excepted to the ruling of the court. The jury returned a verdict in favor of appellees in the sum of $504.83. From a judgment entered in favor of appellees for that sum this appeal has been duly prosecuted.

Read & McDonough and *Mehaffy, Williams, Cockrill & Armistead,* for appellant.

1. In order to constitute a warranty, there must be a positive affirmation of fact, and not a mere expression of belief or opinion, made for the purpose of assuring the buyer of the truth of the fact and to induce him to make the purchase. If such statements are not made with the intention of influencing the buyer and accepted by him, there is no warranty. 74 Ark. 568; 54 Am. Dec. 741; 4 Har. (Del.) 425; 1 Houst. (Del.) 215; 15 Ill. 345; 64 Mo. 531; 24 N. C. 411; 48 N. C. 419; 66 N. C. 596; 18 Vt. 176; 35 Vt. 577; 11 Ill. 35; 120 Ill. 199.

2. The error in an inherently incorrect instruction is not cured by giving other instructions correctly declaring the law on the subject. 77 Ark. 200; *Id.* 64; 65 Ark. 64; 76 Ark. 224; *Id.* 69; 74 Ark. 585.

3. If there was a discrepancy in the amount of indebtedness which appellees assumed, whether it be warranties or not, such discrepancy went to the diminution of the consideration of the entire purchase price. Cornish could not be made to bear the whole burden. Failure of consideration pleaded as a defense to a promissory note must be entirely between the parties. 4 Cyc. (2 ed.) 196.

Youmans & Youmans, for appellees.

Any distinct assertion or affirmation of the quality or character of the thing to be sold, made by the seller during the negotiations for the sale, which it may reasonably be supposed was intended to induce the purchase and was relied upon by the purchaser, will be regarded as a warranty, unless accompanied by an express statement that it is not intended as such. 30 Am. & Eng. Enc. of L. 137; Tiedeman on Sales, 282-3; 11 Ark. 340. "It is not necessary that the vendor should have intended the representation to have constituted a warranty." 118 N. Y. 260; 81 S. W. 262; 87 Ky. 161; 51 N. Y. 202; 67 Tenn. 162.

WOOD, J., (after stating the facts). 1. In the "American note" to "Benjamin on Sales," concerning the subject of "what constitutes an express warranty," it is said:

"(1). All agree that neither the word 'warrant' nor any other particular word or form of words is necessary.

"(2). All agree that mere words of praise and commendation, or which merely express the vendor's opinion, belief, judgment, or estimate, do not constitute a warranty.

"(3). All agree that any positive affirmation of a material fact as a fact, *intended by the vendor as and for a warranty,* and relied upon as such, is sufficient; and some hold the actual intent to warrant unnecessary.

"(4). All agree that whether a particular assertion is an affirmance of a positive fact, or, on the other hand, only praise and commendation, opinion or judgment, is a question for the jury, where the meaning is ambiguous, and the intention of the parties may be gathered from the surrounding circumstances." Benj. on Sales, p. 664.

According to the last of the above subdivisions, it is clear that whether the alleged representations of appellant in this case were warranties or not was, under the evidence, a question for the jury. The court properly submitted that question in prayers granted at the instance of appellant. But the court in prayer number 2 granted at the request of appellees allows the jury to find appellant liable to appellees if they find that appellant made certain representations that were not in fact true, and if they further find that appellee, Friedman, relied upon such representations in making the purchase of the stock of the transfer company. This instruction would make Cornish liable, even if he made such representations only as matter of opinion, belief, judgment or estimate, which, if so made, according to all the authorities, would not be a warranty. The law in this regard is correctly expressed in prayer number 1 asked by appellees and given by the court, also in prayer number 1 given at the request of appellant. But the omission of this idea from prayer number 2 *supra* given at the request of appellees makes the instruction inherently defective and incomplete and an unsound proposition of law, which must be so held on a general objection thereto. It is wholly irreconcilable with the correct prayers. *Bayles* v. *Daugherty,* 77 Ark. 200; *St. Louis, I. M. & S. Ry. Co.* v. *Beecher,* 65 Ark. 64; *Id.* v. *Hitt,* 76 Ark. 224; *Grayson-McLeod Lumber Co.* v. *Carter,* 76 Ark. 69; *Jones* v. *State,* 89 Ark. 213; *Miller* v. *Nuckolls,* 77 Ark. 64; *Fletcher* v. *Eagle,* 74 Ark. 585; *St. Louis, I. M. & S. Ry. Co.* v. *Rodgers,* 93 Ark. 564.

The above instruction and also instruction number 1 given at the instance of appellees also ignored the question as to

whether, in order to constitute a warranty, it is necessary that the vendor intend that his representations shall be a warranty.

In *Sauerman* v. *Simmons,* 74 Ark. 568, we said: "The law is well settled that any affirmation of a material fact, as a fact, intended by the vendor as and for a warranty, and relied upon as such is sufficient; but mere representations by way of commendation, or which merely express the vendor's opinion, belief, judgment or estimate, do not constitute a warranty." The only question in that case was whether or not the court erred in giving an instruction which assumed that a certain representation was a warranty, instead of submitting the question to the jury. Therefore our announcement of what constituted a warranty in that case was *obiter dictum.* The announcement, however, was strictly correct, as shown by all the authorities according to the American note (2) and (3) quoted above from Benjamin on Sales. It will be observed that we only announced in *Sauerman* v. *Simmons, supra,* that representations of a "material fact, as a fact, *intended by the vendor as and for a warranty,*" etc., is sufficient. Of course, in such case, where the representation is "intended by the vendor as and for a warranty," there can be no question about it. But we did not by the above language say or hold that an intention to warrant was a necessary element, or conversely that the actual intent to warrant was unnecessary. That question is presented here in the giving of appellee's prayer number 2 and in ignoring the proposition in appellee's prayer number 2.

Is an intention to warrant on the part of the vendor necessary to constitute a warranty? The text in 30 Am. & Eng. Ency. of Law (2 ed.), is as follows: "It was laid down in a very early case that an affirmation made at the time of the sale in regard to the character or quality of the thing sold is a warranty, provided it appears that it was intended as such, and this is the prevailing view now. In determining whether the affirmation was intended as a warranty the decisive test is whether the seller assumed to assert a fact of which the buyer was ignorant, or merely expressed an opinion or judgment upon a matter about which the seller had no special knowledge, and as to which the buyer might be expected to exercise his own judgment or be equally able to form a correct opinion. In the

former case there is a warranty, in the latter there is not." As sustaining the text, cases are cited from various States in the footnote 4. But see to the contrary 30 A. & E. Ency. Law, 140.

The author of the "American note" to Benjamin on Sales, at page 665, has this to say: "The better class of cases holds that a positive affirmation of a material fact, as a fact, intended to be relied on as such, and which is so relied upon, constitutes in law a warranty, whether the vendor mentally intended to warrant or not; and that his intention is immaterial." Citing cases.

Mr. Tiedeman, in his work on Sales, at page 283 says: "Some of the cases hold that, in order that any statement of the seller may amount to an express warranty of quality, it must be shown that he made the statement with the intention of warranting its truth. Unless this intention appears, it matters not how material and precise the statement is, it will not amount to a warranty. But the better opinion is that any positive statement of a material fact, which is made with the intention of influencing the buyer to buy, and the truth of which is relied upon by the buyer, will constitute a warranty, whether the seller intended to warrant the goods or not. The intention to warrant is conclusively presumed from his effort to influence the buyer's actions by a statement of fact." See cases cited in note to sustain the text.

We concur with Mr. Tiedeman and the author of "American note" to Benjamin on Sales in the views above expressed. See also *Buckman* v. *Haney,* 11 Ark. 340; 30 A. & E. Ency. (2 ed.) 140 *supra.*

2. The evidence shows that appellees purchased the entire capital stock of the corporation. The note executed to Cornish was not in payment for his shares of stock or of his shares and Kempners, but was in part payment for all the shares of stock purchased. The warranty, if there was a warranty, applied as well to that note as to any other note, or any other part of the consideration. The defense of partial failure of consideration, growing out of the alleged breach of warranty, would be good against any one who sought to recover from the appellees the entire consideration or any part thereof. Contribution was a matter between Cornish and the other stockholders. If there

was a partial failure of consideration which Cornish had to make good to the purchaser of the stock, he could call upon the other stockholders to pay their proportion according to the number of shares owned by each of them. But he could not hold appellees for that proportion. They were not liable for it. Moreover, there is no reversible error in the instructions on this point, because the question was not specifically raised in any manner in the trial court, and can not be raised here for the first time.

For the error indicated in giving appellee's prayer for instruction number 2, the judgment is reversed, and the cause is remanded for new trial.

MAXEY v. COOPER.

Opinion delivered March 21, 1910.

EXECUTION—MORTGAGED PERSONAL PROPERTY.—Where a mortgage on personal property has been duly filed or recorded, the property is not subject to execution for a debt of the mortgagor.

Appeal from Garland Circuit Court; *W. H. Evans,* Judge; reversed.

STATEMENT BY THE COURT.

This was a suit in replevin for a buggy. The facts are substantially as follows: One Barnes owned the buggy, and sold it to one Mitchell, taking a mortgage back to secure the purchase money, which was duly filed with the clerk of the circuit court of Garland County,....., 1907. Cooper Brothers obtained a judgment against Mitchell ....., 1907. On the 13th day of December, 1907, Mitchell sold the buggy to Barnes, or rather permitted Barnes to take it under his mortgage. On the same day (December 13, 1907) Barnes sold the buggy to appellant. Mitchell, while having the buggy in his possession, placed it in the livery stable of Cooper Brothers. Execution was issued on the judgment of Cooper Brothers against Mitchell and placed in the hands of appellee John Smith,

the constable. He levied upon the buggy December 14, 1907, as the property of Mitchell. Smith permitted Simon Cooper to hold the buggy in his possession for him. This suit was brought against them by appellant to recover possession of the buggy. There were originally other defendants, but before the trial all passed out except Smith and Simon Cooper.

Under the instructions of the court the jury returned a verdict in favor of Smith and Cooper. From the judgment in their favor appellant duly prosecutes this appeal.

R. G. Davies, for appellant.

WOOD, J., (after stating the facts). The judgment and execution of Cooper Brothers against Mitchell gave them no lien on the buggy. Mortgaged property, where the mortgage has been duly filed, is not subject to execution. *Jennings* v. *McIlroy,* 42 Ark. 236; *Buck* v. *Bransford,* 58 Ark. 289, 291. At the time the execution was levied, December 14, 1907, the appellant was the owner of the buggy, having purchased same from Barnes, who purchased of Mitchell December 13, 1907.

Appellant was entitled to a judgment upon the undisputed evidence. The judgment is therefore reversed, and the cause is remanded for new trial.

DODD v. STATE.

Opinion delivered March 21, 1910.

SCHOOLS—DISCRETION OF TEACHER TO PUNISH CHILD.—Where a child had been in attendance at a school, but had withdrawn from the school without notifying the teacher, and he appeared upon the school grounds and was distracting the attention of the pupils, it was within the discretion of the teacher to require him to come in the school house or to leave the school grounds, and, if the child refused to obey, to administer reasonable corporal punishment for his disobedience.

Appeal from Miller Circuit Court; *Jacob M. Carter,* Judge; reversed.

STATEMENT BY THE COURT.

Appellant, a school teacher, of Miller County, was convicted before a justice of the peace of the charge of assault and

battery for whipping Everitt Hillar. He appealed to the circuit court of Miller County, was tried before a jury, who returned a verdict of guilty, assessing his punishment at a fine of one dollar.

The facts were substantially as follows: Everitt Hillar, the prosecuting witness, was an enrolled pupil of the school taught by the defendant, R. B. Dodd; he did not attend the morning session on the day of the incident complained of, but after noon recess he appeared on the school grounds at a window of the school room and attracted the attention of the children who were at the blackboard. The teacher then noticed the boy, and told him to come into the house, but he did not move or respond. The teacher then told him he would have to come into the house or go home, and the boy answered, "What for?" The teacher then went out and struck him lightly three licks with a switch for the purpose of inducing him to take his seat in the school room. They went toward the front of the building, the teacher supposing that he was going to turn in the front door, but he passed on into the public road running by the school house, and went home, and thereupon his mother caused a warrant to be issued for the teacher's arrest.

The boy testified that this occurred on a certain Wednesday, and that he had not been at school since the preceding Friday. The teacher testified that he was at school the day before, and his books were still in the house.

The court, over the objection of the appellant, gave the following instruction:

"It devolves on the State to prove by the evidence, beyond a reasonable doubt, in this case that the defendant unlawfully did strike the prosecuting witness, as set out in the information. If the State has shown these facts beyond a reasonable doubt from the evidence, then you may convict the defendant of assault and battery, unless you find from the evidence that the defendant was justified therein, as hereinafter explained. If the prosecuting witness was a pupil in attendance on the school at the time the punishment is alleged to have been inflicted, then the defendant had a right, under the law, to administer to him any reasonable punishment for his refusal or failure to obey the defendant as such teacher of the school; but if you find

from the evidence, beyond a reasonable doubt, that the prosecuting witness was not there that day in attendance on the school as a pupil, then the defendant had no right to punish him at all."

The appellant offered the following prayers:

"1. If you find from the evidence that the boy, Everitt Hillar, was on the regular roll of pupils at the Independence School, and that at the time of his punishment the teacher of said school had no notice that it was the intention of the parent of said boy to take him out of school, and that said boy appeared upon the school grounds during school hours, then you are instructed that the defendant had the right to direct and control him as a pupil of said school, and to punish him for disobeying the orders of said defendant that said boy leave the grounds or go into the school house, if such orders were given.

"2. You are instructed that a teacher has the right to punish a pupil for disobedience of an order to enter the school room or leave the grounds; and in this case if you find that the boy, Everitt Hillar, was a pupil of Independence School, and that he was standing at or near the window of the school house, and that defendant directed him to enter the school house, or leave the grounds, then you are instructed under the proof in this case that the defendant had the right to make said order, and to punish the boy for failure to promptly obey, if you find that he did not do so until the defendant went from the school room to the yard.

"3. If you find from the evidence that the boy, Everitt Hillar, was an enrolled pupil of the school taught by defendant, and appeared on the school grounds during school hours, and the defendant had no notice that it was not his purpose or the purpose of his mother for him to attend school on the day when the defendant punished said boy, and if the defendant had the right, as a reasonable man, in view of all circumstances, to believe that said boy was in attendance on the school, then you are instructed that the defendant had the right to control said pupil.

"4. If you believe from the evidence that Everitt Hillar was on the school grounds during school hours on the day of his alleged punishment by the defendant, and that he appeared

at one or more of the windows of the school house, and his appearance there caused a disturbance or a commotion in the school room, and that the defendant warned him to leave the school yard or come in the house, and he refused to do so, and if you further find that the defendant went out where he was and did not use means more than what a man of ordinary prudence would have used to eject or require said boy to leave the grounds or enter the house, then you are instructed to find the defendant not guilty."

William H. Arnold, for appellant.

Hal L. Norwood, Attorney General, and *William H. Rector,* Assistant, for appellee.

When acting within the sphere of his duties, a teacher has the right to administer corporal punishment to his pupils when, in his judgment, such punishment is necessary for the benefit of the pupil, or to maintain the discipline of the school, provided such punishment is not unreasonably severe. 2 Dev. & Batt. 365; 19 Vt. 102; 27 Me. 266. But that right no longer exists when the relation of teacher and pupil has ended. 66 Mo. 286; 3 Pitts. Rep. 264.

WOOD, J., (after stating the facts). The evidence shows that the lad Hillar had been a pupil of the school until Friday preceding the Wednesday following when he received the castigation. There was no evidence that he had ceased in the meantime to be a pupil of the school. If he had in fact withdrawn, the teacher had no notice of that fact. The teacher was warranted therefore, upon the undisputed facts, in treating Hillar as a pupil, and the court should not have submitted that question to the jury. Hillar, being a pupil of the school at the time the teacher thereof commanded him to leave the grounds or "to come in" the school house, should have obeyed the commands of his teacher. There is no evidence that punishment administered for the failure to obey was excessive. There was nothing to show that the teacher was actuated by any personal animosity toward the pupil.

In *Douglass* v. *Campbell,* 89 Ark. 258, we said: "Wholesome discipline is absolutely essential to the success of any school. Large discretion is allowed the teacher and the board,

within the statute, in determining what course of conduct on the part of pupils is necessary for the good of the whole school. That is the prime consideration. Any conduct on the part of a pupil that tends to demoralize other pupils and to interfere with the proper management of the school may subject the offending one to the punishment prescribed by the above statute."

In that case the punishment prescribed and administered was suspension. Here the punishment was not prohibited, and it was not administered in any arbitrary manner or malicious spirit. It was not unreasonable. Appellant had the authority to administer such punishment. *State* v. *Pendergrass,* 2 Dev. & Batt. 365; *Hathaway* v. *Rice,* 19 Vt. 102; *Stevens* v. *Fassett,* 27 Me. 266.

The appellant therefore was not guilty, and under the evidence was entitled to the prayers for instructions presented by him. The court erred.

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

WILSON v. SHOCKLEE.

Opinion delivered March 21, 1910.

1. SALES OF LAND—VENDOR'S LIEN.—A vendor of land who has parted with the legal title has in equity a lien on the land for the unpaid purchase money, as against the vendee and his privies, including subsequent purchasers with notice. (Page 304.)
2. ESTOPPEL—MARRIED WOMAN.—A married woman who sold her land and parted with the legal title will not be estopped to enforce her equitable vendor's lien by reason of the fact that her husband represented to the purchaser that he owned the land and waived such lien where there is no testimony that she knew of such representation or permitted her husband to use her separate estate as his own. (Page 305.)

Appeal from Columbia Chancery Court; *J. M. Barker,* Chancellor; affirmed.

STATEMENT BY THE COURT.

This action was instituted by Mrs. Fannie M. Shocklee in the Columbia Chancery Court against J. B. Wilson and J. E.

Farris. It was commenced in November, 1907, and its object was to enforce a vendor's equitable lien on 226 acres of land situated in Columbia County, or to redeem from a mortgage on said lands executed in favor of the defendant, Wilson.

Wilson filed a separate answer, in which he interposed the defense of an innocent purchaser for value of said lands. The facts are as follows: On the 15th day of May, 1904, J. E. Farris and N. L. Malone purchased a machine called a "merry-go-round" from M. L. Martin Company, and gave their note in the sum of $1,500, indorsed by J. E. Smith and J. J. Murphy, for the purchase price. The note was made payable on or before the 15th day of May, 1904, and it was agreed that the title to the machine should remain in the vendor until paid for. Farris and Malone applied to J. B. Wilson for a loan to pay off said note, and offered to give him as security therefor a lien on certain real and personal property belonging to them. Wilson deemed the security insufficient, and refused to make the loan. It was then agreed that T. M. Shocklee should sell to Farris the land in controversy, and that Farris should mortgage the same to Wilson as additional security for the loan. Pursuant to this agreement, on the 9th day of May, 1904, T. M. Shocklee executed to J. E. Farris a deed to the lands in controversy for the consideration of $800, which was recited in the deed to have been paid. The consideration, however, was not in fact paid, and Farris gave to T. M. Shocklee his two promissory notes therefor. Mrs. Fannie M. Shocklee, the wife of T. M. Shocklee, signed the deed, and acknowledged her relinquishment of dower and homestead therein. On the 12th day of May, 1904, J. E. Farris and his wife executed a mortgage on said lands in favor of J. B. Wilson, to secure the payment of the $1,500 above referred to, which was made payable on the 15th day of October, 1904. After the deed of T. M. Shocklee to J. E. Farris was executed it was learned that the title to the lands was in Fannie M. Shocklee. On the 16th day of May, 1904, Fannie M. Shocklee executed a deed to J. E. Farris to the lands in controversy, and the consideration, which was recited in it as paid, remained the same as in deed of T. M. Shocklee. Default having been made in the payment of the mortgage debt, Wilson caused the mortgage to be foreclosed under the power of sale

contained in it, and became the purchaser at the foreclosure sale on the 25th day of February, 1905, for the sum of $458.33. On the 28th day of February, 1906, the trustee, who made the sale under the power contained in the mortgage, executed to J. B. Wilson a deed to said lands.

At the hearing of the case it was shown by the testimony of J. E. Farris and T. M. Shocklee that J. B. Wilson knew, at the time he made the loan to J. E. Farris and Farris executed the mortgage to him, that the purchase price of the land had not been paid. These two witnesses and Mrs. Fannie Shocklee also testified that they were present in a justice's court where there was a trial between Mrs. Fannie M. Shocklee and J. B. Wilson over the rent of the land, and heard Wilson say that he had asked Shocklee if he was not afraid to let Farris have the land for the reason that Farris might never pay for it.

Mrs. Fannie M. Shocklee in her own behalf testified that the land was conveyed to her several years before she conveyed it to Farris, and that she was the owner of it at the time she executed the deed to Farris; that Farris was to pay her $800 for the land, and that the purchase price had never been paid; that she never saw the notes given for the purchase money until after she had executed the deed.

J. B. Wilson in his testimony admits that he knew that Farris was not paying for the land, but said that it was agreed by Shocklee that he would either give a mortgage on the land to secure the indebtedness of Farris, or would convey the land to Farris for the purpose of enabling Farris to mortgage it. In this latter statement he is corroborated by his attorney, who represented him in the matter.

The chancellor found that Farris had not paid the purchase price of said lands with the accrued interest to Mrs. Fannie M. Shocklee, and that the same was due; and also found that J. B. Wilson was not an innocent purchaser of said lands. A decree was accordingly entered in conformity with his findings, and the defendant Wilson has duly prosecuted an appeal to this court.

Stevens & Stevens, for appellant.

1. Appellee's equity, if any, cannot be superior to appellant's. T. M. Shocklee was the owner of the land in equity,

controlled the legal title and caused it to be conveyed to Farris. He is entitled to the purchase money, and, if there is a lien, he holds it. 17 Fed. 304.

2. In the disposal of the land appellee had no contract, express or implied, through which the right to have a lien declared upon the land could be maintained. The deed itself acknowledges receipt of the purchase money. The notes taken do not describe the land, and there was no contract giving a lien to any one. The so-called lien is but a right, even when it exists, which may in a proper case be enforced in equity. 27 Ark. 229. It is not assignable, and has no existence until established by a decree of a court. *Id.* 231, 232.

3. The court erred in instructing the jury that it devolved upon appellant to show by a preponderance of the testimony that he did not know of the notes outstanding. Only when the defendant sets up affirmatively the defense of innocent purchaser is the preponderance on him. 29 Ark. 568.

4. Appellee's husband being her agent in the sale of the land and, while so acting, having obtained knowledge of the purpose of Farris in buying, his knowledge so obtained is knowledge to her. 1 Clark & Skyles, Agency, § 475. If she can sue, it is as an undisclosed principal, and she cannot enforce any right her agent could not enforce. *Id.* § 537.

J. M. Kelso and *J. E. Hawkins,* for appellee.

1. There is no proof to sustain the contention that the land was paid for by appellee's husband, and that he was the equitable owner; but if it was true, and he caused it to be conveyed to appellee, the presumption would be that it was a gift, and she would have both the legal and equitable title.

2. The court found that Wilson did have notice of the outstanding indebtedness, and that he was not an innocent purchaser. If he had notice, the vendor's lien was as effective against him as against Farris. 2 Washburn, Real Prop., (6 ed.), § 1033; Hawley & McGregor on Real Prop. 259; 77 Ark. 309; 54 Ark. 467; 75 Ark. 228; 80 Ark. 86.

HART, J., (after stating the facts). "A vendor of land, who has parted with the legal title, has, in equity, a lien on the land for the unpaid purchase money, as against the vendee and his privies, including subsequent purchasers with notice." *Ste-*

phens v. *Shannon,* 43 Ark. 464; *Osceola Land Co.* v. *Chicago Mill & Lbr. Co.,* 84 Ark. 1.

The undisputed evidence in this case shows that the plaintiff was the owner of the land when she conveyed it to Farris, and that the purchase price is due, and has not been paid. The evidence on the part of plaintiff shows that the defendant Wilson knew these facts at the time he made the loan to his co-defendant, Farris, and took the mortgage from him on the lands in controversy to secure the same. Indeed, Wilson does not deny this, but testified to a state of facts which tends to show that he thought the title to said lands was in T. M. Shocklee, instead of his wife, Mrs. Fannie M. Shocklee, and that T. M. Shocklee had agreed to waive his lien in equity for the unpaid purchase money. Under this state of facts, if the title to the land had been in T. M. Shocklee, he would be estopped from setting up his vendor's lien for the unpaid purchase money as against the defendant Wilson. *Scott* v. *Orbison,* 21 Ark. 202.

The most serious question in the case is, can, under the facts and circumstances as shown by the record, the doctrine of estoppel be invoked against the plaintiff, Mrs. Fannie M. Shocklee?

In the case of *McCombs* v. *Wall,* 66 Ark. 336, the court held: "By virtue of his general authority as such, a husband has no authority to bind his wife by an agreement as to her land." In the case of *Latham* v. *First National Bank of Fort Smith,* 92 Ark. 315, in discussing the acts and declarations of the husband in regard to his wife's property, the court said: "A principal is not bound by the acts and declarations of an agent beyond the scope of his authority. A person dealing with an agent is bound to ascertain the nature and extent of his authority. No one has the right to trust to the mere presumption of authority, nor to the mere assumption of authority by the agent. *City Electric St. Ry. Co.* v. *First Nat. Exch. Bank,* 62 Ark. 33, 40. These well settled principles must determine this controversy in favor of appellant. The declarations of Latham, the agent of appellant, that he owned the lease contract, and that appellee could have the same as security, were wholly incompetent as against appellee to establish the

authority of Latham to use the rents belonging to Mrs. Latham for the purposes stated, or to show that he owned the lease."

In the present case there is no testimony tending to show that Mrs. Shocklee permitted her husband to use her separate estate, or to represent that the land in controversy would be conveyed to Farris for the purpose of enabling him to execute a mortgage on it to the defendant, Wilson, to secure the loan made by Wilson to Farris, or to show that she knew her husband had made such representations.

Applying the rules announced above, it is plain that the representations made by T. M. Shocklee to Wilson can not be used as evidence against Mrs. Shocklee. The recitals in the deed of Mrs. Shocklee to Farris that the purchase price was paid can not avail the defendant, Wilson, in the face of the proof that he was told that the purchase money was not paid before he made the loan to Farris.

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

KING v. BOOTH.

Opinion delivered March 21, 1910.

1. TRESPASS—WHO MAY SUE.—The holder of the legal title to land, although not in possession, may sue to recover damages for permanent injury to the freehold, as for cutting timber. (Page 308.)
2. TAXATION—TAX DEED—DESCRIPTION OF LAND.—A tax deed is insufficient which describes the land sold as four-sixths of a certain quarter section, without describing the tract sold with sufficient definiteness to locate it with reference to the remainder of the tract. (Page 309.)
3. LIMITATION OF ACTIONS—PAYMENT OF TAXES.—The seven years statute with reference to the payment of taxes on wild and unimproved land under color of title does not begin to run, in case the color of title is a tax deed, until expiration of the period of redemption from tion from such tax sale. (Page 310.)
4. DEEDS—AFTER ACQUIRED TITLE—QUITCLAIM.—As a quitclaim deed does not purport to convey any title except what the grantor has at the time of its execution, title subsequently acquired by the grantor will not inure to the benefit of the grantee. *Wells* v. *Chase*, 76 Ark. 417, followed. (Page 311.)

Appeal from White Circuit Court; *Hance N. Hutton,* Judge; reversed.

STATEMENT BY THE COURT.

On August 14, 1907, the plaintiff, J. G. Booth, brought this suit in the White Circuit Court against the defendant, E. M. King, and, for cause of action, alleged as follows: That he was the owner and entitled to the possession of the following described lands situate in White County, towit: the north ½ of the northwest ¼, and the southeast ¼ of the northwest ¼, of sec. 24, twp. 6 north, range 8 west, containing in all 120 acres, more or less. That said lands are wild and unoccupied, and that on or about the 1st day of May, 1907, the defendant entered upon said lands and unlawfully cut and removed therefrom a large amount of timber standing and growing thereon.

The defendant answered, denying all the material allegations of the complaint. It is admitted that the lands are wild and unimproved, and that appellant went upon the lands, and cut and removed therefrom certain trees growing thereon. The remaining facts are sufficiently stated in the opinion. There was a verdict and a judgment for the plaintiff, and the defendant has duly prosecuted an appeal to this court.

Rachels & Robinson, for appellant.

1. To maintain trespass the plaintiff must have possession; and where he was not in actual possession at the time of the trespass, he must plead and prove that he had the legal title, and that the land is not in the actual possession of any one. 85 Ark. 211; 65 Ark. 600; 80 Ark. 31; 76 Ark. 426; 44 Ark. 74; 14 Ark. 433; 8 Ark. 470; 1 Ark. 470; *Id.* 448; 26 Ark. 496; 69 Ark. 427; Shipman's Com. Law Pleading, 63. There can be no constructive possession of land, even by the holder of the legal title, where another is in actual adverse possession thereof. 40 Mich. 559; 61 Mich. 368; 28 N. W. 127; 74 Ark. 386.

2. Title to land acquired by one subsequent to his having made a quitclaim deed to such land does not pass to the grantee in the quitclaim deed. 76 Ark. 417; 72 Ark. 82; 34 Ark. 596; 1 Devlin on Deeds, § 27.

3. A clerk's tax deed which describes the land as "4-6 of N. W. Sec. 24, Tp. 6 N., R. 8 W.," is void on its face, and gives

no color of title. 85 Ark. 7; 59 Ark. 462; 77 Ark. 576; 83 Ark. 537; 50 Ark. 484; 83 Ark. 199; 69 Ark. 357. A clerk's tax deed describing the land as "all of the undivided two-sixth (2-6) of the northwest quarter," etc., is void.

4. Appellee has acquired no title by the payment of taxes. The two tax deeds, being void, give no color of title; but, even if they gave color of title, seven successive yearly payments of taxes cannot be shown, even from the date of the first tax deed. Booth and Greer being adverse holders, Greer's payment of taxes for 1903 and 1904 cannot be tacked to the payment by Booth for 1902. 67 Ark. 94.

S. Brundidge, Jr., and *H. Neelly,* for appellee.

1. The conveyances under which appellee claims gave at least color of title. All that he or those under whom he claims needed to constitute color of title was that they should have a deed to the land in apt words purporting to convey the same to him from the grantor. 102 U. S. 540; 40 Ark. 237; 47 Ark. 487; 70 Ark. 487; 71 Ark. 487; *Id.* 386; 96 Ga. 860; 7 Wash. 617; 32 N. E. 309.

2. If appellee did not acquire title by the payment of taxes, which is not conceded, he would still have the right to maintain this suit upon his tax deeds. Appellant, having failed to show that he and those under whom he claims title were the owners of the land at the time of the sale, is in no position to attack the tax title of appellee. Kirby's Dig., § 7105. If it were true, as claimed, that appellant held under a conflicting tax title, the last sale, under which appellee holds, would cut off the title acquired by appellant. 73 Ark. 560.

3. Appellant had notice from appellee a short time after going on the land that he, appellee, was claiming it, and, having in effect offered to purchase, recognized appellee's title. 163 Ill. 283; 63 Cal. 112; Tyler on Ejectment, 921.

HART, J., (after stating the facts). The appellant first contends that appellee could not maintain the action because he was not in the possession of the land, claiming to be the owner thereof; but the court has held adversely to his contention. In discussing the question in the recent case of *Crowder* v. *Fordyce Lumber Co.,* 93 Ark. 392, the court held that such action is not one for damages for an injury to the pos-

session of the land, but was one to recover damages for permanent injury to the freehold, and that the holder of the legal title, although not in possession, could maintain the action. To the same effect is the decision in the case of *Newman* v. *Mountain Park Land Co.*, 85 Ark. 211, where our former decisions on the question are reviewed.

The most serious question in the case is, did appellee, at the time he brought the suit, have the legal title to the lands? Appellee first claims title to said lands by virtue of two clerk's tax deeds. The first deed was executed on the 23d day of August, 1901. It recites that "the following described property, towit: 4-6 of N. W. ¼ Sec. 24, Tp. 6 N., R. 8 W., situate in the county of White, and State of Arkansas, was subject to taxation for the year A. D. 1898." That in 1899 they were sold to appellee under that description for the nonpayment of the taxes for the year 1898, and, the period of redemption having expired, the county clerk executed a deed to appellee to said lands, describing them as above set forth. The deed of the county clerk to appellee was void on its face on account of a defective description of the lands. This court so held with reference to a tax deed with a similar description in the case of *Beardsley* v. *Hill,* 85 Ark. 7, in which our former decisions on the point are collected.

The second deed was executed by the county clerk to appellee on the 8th day of February, 1906. This deed recites that "the following described property: und. 2-6 of northwest ¼ of section twenty-four (24) in township six (6) north, range eight (8) west, containing fifty-three and 33-100 acres, situate in the county of White and State of Arkansas, was subject to taxation for the year A. D. 1899." Under the same description the lands were sold to appellee for nonpayment of taxes, and a deed made to him by the county clerk.

We are also of the opinion that this deed is void on account of a defective description of the lands. The purchaser at a tax sale must stand strictly on his legal title. In the case of *Bonner* v. *Bd. Directors St. Francis Levee Dist.*, 77 Ark. 521, the court said: "The statutes of this State provide that real property, belonging to the same owner, shall be assessed by section, or the largest subdivision of which the same is capable; and that 'in

all cases, when practicable, and the land is owned by one person, or one or more persons jointly, description of lands, both on the tax books and delinquent lists, shall be in tracts not less than one hundred and sixty acres,' and that lands shall be described on the delinquent lists as they are described on the tax books; and impliedly that they shall be sold at tax sale in the same manner. Kirby's Digest, § § 6976, 7024, 7083 and 7085."

The rule there announced distinguishes the present case from the case of *Payne* v. *Danley,* 18 Ark. 441. In the latter case the land was described in the tax books and in the delinquent list under its proper legal subdivision, the value and amount of taxes were set out, and opposite appeared the words: "Moses U. Payne and Bank of Kentucky each owns one undivided half." Payne paid his part of the taxes, and, the bank having failed to do so, its undivided share of the land was sold. The court held that where a tract of land is assessed against tenants in common, and one of them pays the tax on his undivided share, the interest of the other may be sold to satisfy the residue of the assessment. In the case at bar an undivided 2-6 part of the land, containing 53 acres, was assessed and sold separately from the other portions of the tract. The part so assessed and sold was attempted to be segregated, and the number of acres contained in it was given, but there is no earmark furnished by which to distinguish it from the other parts of the tract. From the description given its location with reference to the other parts of the tract is not shown; its value as compared with the other parts can not be ascertained, and we think the description falls within the rule heretofore laid down by this court that where a part of a tract of land is assessed and sold for the nonpayment of taxes, and the description is not sufficiently definite to locate it with reference to the remaining portions of the tract, the sale will be void. See *Bonner* v. *Bd Directors of St. Francis Levee Dist., supra; Beardsley* v. *Hill, supra,* and cases cited; *Beardsley* v. *Hill,* 71 Ark. 211; *Buckner* v. *Sugg,* 79 Ark. 442.

It is also claimed by appellee that he acquired title to said lands by payment of taxes for seven years under the act of March 18, 1899 (Kirby's Digest, § 5057), but the statute did not begin to run against the owner until the expiration of the

period of redemption. *Earle Improvement Co.* v. *Chatfield,* 81 Ark. 296. The period of redemption under the first sale did not expire until June, 1901, and the suit was commenced in August, 1907. Hence it is manifest that appellee could not have acquired title by the payment of taxes for seven successive years. The period of redemption under the second sale was a still later date, and appellee could not have acquired title under the act of March 18, 1899, to the lands embraced in the second deed.

In February, 1906, appellee received a quitclaim deed to said land from L. E. Moore, but the record shows that at that time Moore had no title or interest in said lands. Appellee seeks to avail himself of certain conveyances subsequently made to Moore to the lands in question; but this he cannot do, under the rule announced in the case of *Wells* v. *Chase,* 76 Ark. 417. In that case the court held (quoting from syllabus): "As a quitclaim deed does not purport to convey any title except what the grantor has at the time of its execution, such a deed is not within the statute which provides that 'if any person shall convey any real estate by deed purporting to convey the same in fee simple absolute, or any less estate, and shall not at the time of such conveyance have the legal estate in such lands, but shall afterwards acquire the same, the legal or equitable estate afterwards acquired shall immediately pass to the grantee.'"

For the reasons given in the opinion, the judgment will be reversed, and the cause remanded for a new trial.

BANK OF EASTERN ARKANSAS *v.* BANK OF FORREST CITY.

Opinion delivered March 21, 1910.

1. COUNTY DEPOSITARY—SUFFICIENCY OF BID.—Under Acts 1909, p. 150, providing for a depositary of county funds, which directs that the county court shall advertise for sealed bids and shall select as depositary of the county funds the bidder offering the highest rate of interest on such funds, *held* that a bid whereby the bidder offered to pay a certain per cent. more on the funds than the highest and best bid that should be made by any other bidder should not be received. (Page 314.)

2. SAME—LOWEST BIDDER—RIGHT TO COMPLAIN.—The lowest bidder for the funds of a county, under Acts 1909, p. 150, is not entitled, by virtue merely of its being a bidder, to complain because the county court rejected its bid and accepted the proposal of another to become the depositary of the county's funds, when the county court reserved the right to reject all bids. (Page 317.)

Appeal from St. Francis Circuit Court; *Hance N. Hutton,* Judge; affirmed.

S. H. Mann and *Norton & Hughes,* for appellant.

The paper submitted by appellee makes no definite proposition, and could not alone be the basis of a contract. The law contemplates definite bids, which, together with the acceptance will amount to a contract, without reference to any other bid or thing. 11 Ill. 254.

James P. Clarke, for appellee.

1. Appellant has proceeded upon the erroneous theory that because it was a bidder at the offering it was the party aggrieved, and, without having made application to be made a party and having such application granted, either directly or indirectly, that it therefore had the right of appeal. 52 Ark. 100; 77 Ark. 588.

2. Appellant is in no position to question the sufficiency of the bid. Under section 3 of the act the county court was given power to reject any and all bids, at discretion, and this discretion will not be interfered with except for fraud. 8 Fed. Cas. 955-956; 35 Neb. 346; 24 Neb. 106.

3. An unsuccessful bidder, as such, has no such rights as entitle him to compel the award of the contract to him in opposition to the action of the official appointed by law to make the award. 26 L. R. A. 707; 24 Wis. 683; 27 N. Y. 378; 78 Fed. 31; 57 Ark. 322.

FRAUENTHAL, J. This is an appeal from a judgment of the circuit court affirming an order of the county court of St. Francis County selecting the Bank of Forrest City as the depository of all the public funds of said county. This order was made in pursuance of an act of the Legislature approved March 9, 1909, entitled "An act to provide a depository for the county funds of * * * St. Francis * * * counties" (Acts of 1909, p. 150). By

said act it is provided that it shall be the duty of the county court of said county at a specified term, and at the same term every two years thereafter, to receive propositions from any bank, banker or trust company in said county desiring to be the depository of the public funds of the county, and that notice of the intention to receive such propositions or bids should be published in some newspaper. Any such institution desiring to become such depository was directed to file, on or before the first day of said term of court, a sealed bid stating the rate of interest which it offered to pay upon the public funds that might be deposited with it if such bid should be accepted; and, as an evidence of good faith, a certified check for $250 should accompany said bid. On the first day of said term of court it was provided that the bids should be publicly opened and entered of record, and that the court should select as the depository the bidder offering the highest rate of interest on the funds; and it was also provided that the court should have the right to reject any and all such bids. The act directed that in the event no bids should be offered, or should such bids be deemed too low or not for the whole amount of the county funds, the court should order said funds deposited with one or more banks in the county which it might select at a rate that might be agreed upon between the court and the banks.

In pursuance of the provisions of said act, the notice therein required that sealed bids would be received was given, and the notice also stated that the right was reserved to reject any and all such bids. Appellant, Bank of Eastern Arkansas, and the appellee, Bank of Forrest City, respectively, made sealed bids for said funds, and they were the only institutions making such bids. The appellant in its bid stated that it offered for said funds five and one-fourth per centum per annum, to be computed on daily balances. In its sealed proposal the appellee did not name any specific rate of interest, but stated that it agreed to pay five-sixteenths of one per cent. more on the funds than the highest and best bid that should be made by any other bidder. Thereupon the county court made the following order: "Whereupon the court, after due consideration, adjudged that the Bank of Forrest City is the highest and best bidder for the custody of said funds at and for the price of five and nine-sixteenths

per centum per annum, to be computed on daily balances, for a term of two years;" and said bank was thereby selected as said depository of said funds. The Bank of Eastern Arkansas then filed an affidavit for appeal from said order to the circuit court. Upon a hearing of said appeal, the circuit court entered a judgment affirming in all things the above order of the county court; and from this judgment the Bank of Eastern Arkansas prosecutes this appeal.

The appellant was a bidder to become the depository of the public funds of St. Francis County, and solely in the character of a bidder it appealed from the order of the county court selecting the appellee as such depository, and now prosecutes this appeal solely in the right of such bidder. It does not appear as a taxpayer of said county, nor does it present any interest in or right to prosecute an appeal from the order of the county court other than such as may arise by reason of its having been such a bidder.

Appellant contends that the proposal of the appellee, purporting to be a bid to become the depository of the funds of said county, was in fact not a bid at all because it named no specific rate of interest which it agreed to pay on the funds. The result of the contention made by appellant is that the proposition made by the appellant was the only legal bid made, and that therefore it should have been selected as the depository of said funds. The merits of this contention, and the rights of the appellant, must be determined by the provisions and purposes of the act.

One of the chief purposes of this act was to secure the highest rate of interest on the county funds from the institution becoming its depository. One of the methods by which it was expected to obtain the highest rate of interest was to advertise for and receive from competitors sealed propositions or bids stating the rate of interest offered by each bidder. This was but another mode of offering the depository to the highest bidder by auction. Fairness and justice demand that in both such cases, whether by sealed bids or upon auction, all bidders should be treated on equal terms. Public policy demands that anything that prevents competition on the one hand, or which gives to one party an undue advantage over another by any surreptitious

action, should be deemed tainted with fraud, and should thereby invalidate the bid.

It is the evident intent of this act that every bidder should make his bid without any knowledge of the bid made by any other institution. By section 7 of the act it is provided that it shall be a misdemeanor for the county judge, or the county clerk or his deputy, to disclose to any person prior to the time of opening the bids the amount or terms of any such bid. It thus appears that it was the clear purpose of this act to place all bidders upon exactly equal terms, so that no one of them could have any advantage over the others in making his proposition. If the proposals are made by sealed or secret bids, then no bidder should know, before making his bid, what any other bidder has offered. This is the plain object and purpose of making such sealed bids. It is to the advantage of the county, as well as right to the bidder, that this rule should be enforced. It is to the advantage of the county that a bidder should not know what bids he is contending against, because he may be anxious for the funds, and might bid a very much higher rate of interest if he was not advised of the highest rate that was offered by the others. If a bidder is permitted to make a proposal or offer of a certain amount higher than the highest rate offered by any other bidder, it in effect makes known to such bidder the offers that have been made by the others, and permits him thus to base his bid thereon. By this sharp practice he becomes the successful bidder, and possibly at a rate of interest lower than he otherwise would have offered. Good faith and fair dealing require that the bid obtaining such unfair advantage should not be received. *Webster* v. *French,* 11 Ill. 254.

But, because the proposal made by the appellee was not a valid bid for the reason that it did not name a specific rate of interest, this did not give to the appellant a right to have its bid accepted. The provisions of this act which seek to obtain by competitive bidding the highest rate of interest for the county funds are manifestly designed, not for the benefit of the bidder, but for the benefit of the people of the county; and there is no provision therein that gives to the highest bidder an absolute right to demand that he be selected as the depository. The competitive bidding by sealed proposals is only one mode pro-

vided by the act for securing the highest rate of interest on the funds. The act further provides that the county court shall have a right to reject any and all of the bids, and if the bids are deemed too low the court is empowered to order the funds deposited with other banks at a rate of interest to be agreed upon by said court and such banks. Thus it will be seen that a measure of discretion is lodged with the county court in accepting the bids and in selecting the depository. In the absence of fraud or of arbitrary or improvident action on the part of the county court which would work an injury to the public, no one has a right to complain of the court's action in making such selection of the depository. A taxpayer or property owner would have such an interest so as to have a right to correct such action by proper procedure; but a bidder has no such right or interest by which he can be aggrieved by such action of the county court. The rules that are applicable to the letting of the right to become the depository of the county funds under this act are the same as those that apply to the letting of contracts for public works. The lowest bidder for a contract for public works has no vested or absolute right to demand a compliance with the provisions of the statute relative thereto.

Mr. High in his work on Extraordinary Legal Remedies, § 48, says: "The better doctrine, however, as to all cases of this nature, and one which has the support of an almost uniform current of authority, is that the duty of the officers entrusted with the letting of contracts for works of public improvements to the lowest bidder are not duties of a strictly ministerial nature. * * * And the true theory of all statutes requiring the letting of such contracts to the lowest bidder is that they are designed for the benefit and protection of the public, rather than for that of the bidders, and that they confer no absolute right upon a bidder to enforce the letting of the contract. * * * Nor does the mere issuing of proposals by officers entrusted with letting contracts, inviting bids for the performance of the work, without binding themselves to award the contract to the lowest bidder, create such an obligation on the part of the officers as to entitle the bidder to a mandamus to obtain the contract."

The advertisement required to be made under the act for

the bids is but an invitation to persons to make offers to the proposer, which the proposer has a right to accept or reject. And more especially is this true in this case, where the statute, and the advertisement itself, under which the bids were made, state that the proposer reserves the right to reject any and all bids. In the case of *People* v. *Board of Supervisors of Kings County,* 42 Hun 456, it is said that, the bidder having made his bid under an advertisement which stated that the right to reject any and all bids was reserved, he cannot complain that the board exercised the right he so conceded to them. It was a plain condition of his bid that the board might reject it, and, having given his assent to such right, he cannot challenge the power to exercise that right. To the same effect, see 2 Page on Contracts, § 1049; *Anderson* v. *Public Schools,* 122 Mo. 61; *Colorado Pav. Co.* v. *Murphy,* 49 U. S. App. 17, 37 L. R. A. 630; *State* v. *Board of Education,* 24 Wis. 683; *People* v. *Contracting Board,* 27 N. Y. 378; *State* v. *Rickards,* 28 L. R. A. 298.

Under the provisions of this act appellant had no right to demand that its bid be accepted, even if there had been no other bid made. The county court had the right to reject its bid; and when the court failed or refused to accept it, in effect the court rejected its bid. The appellant was then not in privity of relation with the court, either by contract or otherwise, so that it could be said to have had any right or interest that was affected by the order of the court selecting another as depository of the county funds. It acquired no right, by reason of its being a bidder, to challenge the legality of the order of the county court of St. Francis County in selecting appellee as the depository of said funds.

In the case of *Arkansas Democrat Co.* v. *Press Printing Co.,* 57 Ark. 322, a similar question was involved. A statute of the State required a certain contract for the printing of public documents to be let to the lowest bidder. Invitations for bids were made by the board in advertisements, and the appellant and appellee in that case were bidders. The contract was awarded to the appellant, and the appellee, claiming to have been the lowest bidder, sought to restrain the execution of the contract between the board and appellant. In that case

this court said: "The abstract and brief for the appellee does not state or intimate that it is a taxpayer even, and shows no injury to itself. These contracts, and the provisions of the law prescribing how they shall be let, are for the protection of the public interests, and not the interests of individuals as such. The State might complain if its own interest had suffered, but the State is not complaining here. The appellee makes no claim, and shows no right, to represent the State or the public The contract was not awarded to it, and it has no rights under the contract."

In the case at bar, the appellant in the character of a bidder only had no vested or absolute right in the matter of the letting or awarding the depository of the public funds of St. Francis County; it had no such right that it could be aggrieved by the order of the county court selecting appellee as such depository. The plain purpose of the act was to obtain for the public the highest rate of interest on the county funds. When the county court learned that it could obtain a rate of interest higher than that offered by appellant, it was justified in not accepting the appellant's bid; and, until its bid was accepted, appellant had no interest in the matter by which in law it could be injuriously affected by any action taken by the court.

It therefore follows that the appellant has no right to complain of the order of the county court herein, either because its bid was not accepted or because the court selected as the depository of the funds one who did not make a bid in full compliance with the provisions of the statute. The judgment is therefore affirmed.

SOUTHERN PRODUCE COMPANY v. OTERI.

Opinion delivered March 21, 1910.

1. SALES OF CHATTELS—IMPLIED WARRANTY.—Where a carload of bananas was sold in New Orleans to be shipped to this State and resold, and the vendee had no opportunity to inspect them, there was an implied warranty that they were in condition to stand shipment to this State and be in condition for resale when they arrived at their destination. (Page 321.)

2. SAME—BREACH OF WARRANTY—MEASURE OF DAMAGES.—The measure of damages for breach of an implied warranty of salability in the sale of chattels is the difference between the price fixed by the contract and the market value of the goods in a merchantable condition at the time and place of delivery. (Page 323.)

Appeal from Miller Circuit Court; *Jacob M. Carter,* Judge; reversed.

John F. Simms, for appellant.

1. In charging the jury as to the general custom, the court's instruction is not responsive to the issues. The instruction also errs in declaring the law to be that plaintiffs were obliged to properly load and ship bananas "in a condition to stand shipment to Texarkana within a reasonable time," etc. That is not the test. The implied warranty was that the fruit loaded would be in such condition as to stand the transit by the means selected and arrive in Texarkana in a merchantable condition there, its destination. 77 Ark. 546.

2. The instruction offered by the appellant laid down the proper test, and should have been given. 72 Ark. 343; 48 Ark. 330; Benjamin on Sales, 1358.

FRAUENTHAL, J. This was an action instituted by the plaintiffs below, S. Oteri & Company, against the Southern Produce Company, to recover upon an alleged breach of a contract of sale of one car of bananas which plaintiffs claimed to have sold to defendants. The plaintiffs are wholesale fruit merchants and banana importers, located at New Orleans, La., and the defendants are wholesale merchants, located at Texarkana, Ark. On January 22, 1908, the defendants, through a broker at Texarkana, sent a telegraphic order to plaintiffs for one car of bananas to be shipped to Texarkana by quickest way, and on the same day confirmed this by written order sent by mail. It was claimed by the defendants that it was understood between the parties that the defendants purchased the bananas for the purpose of resale at Texarkana, and that when the plaintiffs accepted the order there was an implied warranty on the part of plaintiffs that the bananas when shipped from New Orleans were in proper condition to stand shipment to Texarkana, and to be in a merchantable condition when they reached the latter place, and there be fit for the purpose of resale. The bananas ar-

rived at Texarkana on the evening of January 25, and were then inspected by defendants; and they testified that they were over-ripe and on the verge of decay, and were not in a merchantable condition for sale; that on this account they refused to accept them, and at once notified plaintiffs. The plaintiffs thereupon directed their broker at Texarkana to sell the bananas for whom it might concern, which was done. The amount of the sale, less the freight charges, was credited by the plaintiffs upon the contract price, and they instituted this suit for the balance thereof. It appears from the evidence that the plaintiffs immediately upon receiving the order, on January 22, accepted same and delivered the bananas to a common carrier, properly directed to defendants; and they testified that the bananas were at that time in perfectly good merchantable condition to stand the shipment to Texarkana. The evidence tended further to show that there was no delay in the transportation by the carrier, and that there was no negligence upon the part of the carrier in handling or caring for the bananas in transit so that they could have been injured during transportation. The defendants testified that the bananas were immediately inspected upon arrival at Texarkana, and that they were found to be in an unmerchantable condition, and not fit for resale.

The court, over defendant's objection, gave the following instruction to the jury:

"If you find from a preponderance of the evidence that it was a general custom of banana importers in shipping out to interior points from New Orleans to sell all cars of bananas f. o. b. at New Orleans, and if you further find that the plaintiffs properly loaded said car at New Orleans with bananas in a condition to stand shipment to Texarkana within a reasonable time, considering the distance, the time of year and means of shipment, and delivered said cars to the railroad company at New Orleans billed to these defendants at Texarkana, then you may find for the plaintiffs in the sum sued for; provided the plaintiffs by their own acts through their messenger in charge of the bananas out from New Orleans to Lake Charles were not guilty of such conduct or carelessness in the handling of the car from New Orleans at the time he delivered it to the diverting carrier at Lake Charles as would ordinarily under all cir-

cumstances and proof in evidence, without fault of the defendant or the diverting carrier at Lake Charles, have caused the damage to the shipment of bananas within a reasonable time for transportation from Lake Charles to Texarkana, considering the time of year and the means for transportation; and if you should find from a preponderance of the evidence that the plaintiff's messenger through his conduct aforesaid of the car caused the damage to the shipment within the terms of the foregoing instruction, your verdict will be for the defendant."

The defendant requested the court to give the following instruction, which was refused:

"If you find that the car of bananas for which this suit is brought was shipped f. o. b. New Orleans, La., and that the defendant had no opportunity to examine or inspect the same before shipment, and that Oteri & Company knew that defendant was a wholesale fruit dealer and ordered the fruit for resale in its business here, then the court tells you that Oteri & Company were obliged under this order to load and ship such fruit and in such a condition as would stand the trip to Texarkana by the route over which shipment was made and arrive here in such condition as to be fit for resale by the Southern Produce Company, as originally contemplated in the order, and if Oteri & Company failed to load and ship such fruit as would stand the trip and arrive in merchantable condition, they cannot recover, and you must find for the Southern Produce Company,"

In their answer the defendant also pleaded a counterclaim for damages which it alleged it sustained by reason of loss of profits which it would have made on the car of bananas. Upon the trial of the case the court refused to permit the introduction of testimony tending to prove the amount of the profits thus claimed to have been lost.

A verdict was returned in favor of the plaintiffs, and from the judgment thereon the defendant prosecutes this appeal.

This case is controlled and ruled by the case of *Truschel* v. *Dean,* 77 Ark. 546. In that case we held: "In sales of goods where the purchaser has had no opportunity to inspect them, there is an implied warranty that they are reasonably fit for the purpose for which they are ordinarily used; and when they are, under such circumstances, purchased for a particular purpose

known to the seller, there is an implied warranty that they are fit for that purpose,"—citing *Bunch* v. *Weil,* 72 Ark. 343; *Curtis & Co. Mfg. Co.* v. *Williams,* 48 Ark. 330; Benjamin on Sales, § § 645, 656; Mechem on Sales, § 1358. This rule, we think, is applicable to the facts of this case. It is true that the delivery of the goods by a seller to a common carrier properly addressed to the buyer is in effect a delivery to the buyer; and if any loss occurs to the goods during the carriage, it becomes the loss of the purchaser. *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; *Harper* v. *State,* 91 Ark. 422.

But in this case this latter question is not involved. The evidence on the part of the plaintiffs shows that the goods were properly handled and cared for during the period of transportation, and they were not injured or their condition damaged by any act or omission of the carrier. In fact, the plaintiffs sent a messenger along with the shipment for a great part of the route, and he testified that the bananas were properly transported and properly handled in transit. The defense is founded solely upon the implied warranty made, under the circumstances of this case, by the plaintiffs that the bananas when delivered to the common carrier at New Orleans were in a proper condition, so that they would stand shipment to Texarkana by means of the transportation selected by them, and that when they arrived at Texarkana they would be in a merchantable condition for resale, in event they were not damaged by delay or otherwise during the carriage. The question therefore involved in the case was whether or not the bananas were in that condition; not solely whether they were in a merchantable condition at New Orleans for sale, but whether they were in such a condition that they would stand the shipment to Texarkana and at this latter place be in a merchantable condition for resale, if not damaged by any act or omission of the carrier while in transit. The defendants were entitled to have that question submitted to the jury under proper instructions. The undisputed evidence was that the bananas were not injured in any way during transportation by any delay or failure to properly handle and care for them. The plaintiffs introduced testimony

tending to prove that the bananas were in proper condition when delivered to the common carrier at New Orleans to stand shipment and be in condition for resale when they arrived at Texarkana. The testimony on the part of defendants tended to prove that when the bananas arrived at Texarkana they were not in a merchantable condition for resale, and therefore tended to show that when shipped at New Orleans they were not in that condition impliedly warranted by the plaintiffs that they would stand shipment under the means of carriage selected and be in a salable condition upon arrival at Texarkana. By this testimony a disputed question of fact was presented, which it was the province of the jury to determine under proper instructions. The instruction given to the jury permitted them to consider the condition of the bananas when delivered to the carrier at New Orleans and the time of year and distance and means of shipment; but by this instruction the entire attention of the jury was directed only to determine whether the bananas were in a merchantable condition at New Orleans when loaded on the car. As is held in the case of *Truschel* v. *Dean, supra,* the court should have gone further and told the jury, as asked by defendants, that the test of the merchantability of the bananas at New Orleans was whether their condition was such as to stand shipment to Texarkana and reach the latter place in a condition fit for resale.

The court erred in refusing the above instruction asked by defendants and in failing to modify the above instruction given by it so as to conform therewith.

We are of opinion that the court did not err in refusing to permit the introduction of testimony by the defendants showing alleged loss of profits. This was not the true measure of the damages. The measure of damages in such case, if any, would be the difference between the price fixed by the contract and the market value of the goods in a merchantable condition at the time and place of delivery.

For the errors indicated the judgment is reversed, and the cause remanded for a new trial.

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

Opinion delivered March 28, 1910.

1. CARRIER—CARRYING PASSENGER BEYOND STATION.—Where a passenger was wrongfully carried beyond her station, and she got off at the next station and drove to her home, she was entitled to recover damages for the inconvenience and hardship of travelling the additional distance occasioned by being carried beyond her station. (Page 325.)
2. SAME—ALLOWANCE OF ATTORNEY'S FEE.—Kirby's Digest § 6621, providing that in all actions at law or suits in equity against any railroad company "for the violation of any law regulating the transportation of freight or passengers by any such railroad, if the plaintiff recover in any such action or suit, he shall recover a reasonable attorney's fee," etc., permits a recovery of such fee only as a penalty for violation of a statutory regulation of railroads, but not for carrying a passenger beyond his destination. (Page 326.)

Appeal from Franklin Circuit Court, Ozark District; *Jeptha H. Evans,* Judge; reversed in part.

Lovick P. Miles, for appellant.

None of the circumstances making it necessary for appellee to debark at Poping were made to appellant. 71 Ark. 572. The court erred in taxing an attorney's fee in this case. 81 Ark 429; 72 Ark. 357.

McCULLOCH, C. J. This is an action instituted by appellee to recover damages for being carried by the railroad station to which she was destined. With her husband, she took passage on one of appellant's trains at Poping, a station about five or six miles west of Ozark, Ark., for Fort Smith, and returned during the afternoon of the same day, having tickets for Poping. The train did not stop at that station. As soon as the train passed Poping, appellee's husband went to the brakeman and train auditor and demanded that the train be stopped and backed to the station. This was not done immediately, but soon afterwards the train came to a stop, but the conductor refused to back up to Poping. This was from one to three miles beyond the station, according to the varying statements of the witnesses. Appellee's husband declined to get off at that place, and the train moved on and stopped next at Ozark, and appellee and her husband debarked. There was some evidence to the effect

that the train auditor offered them return transportation to Poping on the next train, but the testimony is conflicting on this point.

Appellee lived south of the Arkansas River, about three miles from Poping, which was north of the river and a few hundred yards therefrom. Appellee and her husband drove to the river that morning in a buggy and left the conveyance at a farm there, intending to drive back home on their return from Fort Smith that afternoon. Mrs. Evans left her wraps at the farm with the buggy. She had two small children, one of whom was with her on the journey, and the other, about two years old, she left with her mother, who lived in the neighborhood.

When they left the train at Ozark, they immediately hired a buggy and drove through to the home of appellee's mother, a distance of about twelve miles. The first train going west from Ozark would have carried them back to Poping the next day. This was on November 25, and the weather was very cold.

The trial jury returned a verdict in appellee's favor, assessing damages in the sum of $87.50, and the court, over appellant's objection, rendered judgment for that sum and also an attorney's fee of $20. The testimony was undisputed as to the appellee having been wrongfully carried by her station, and the court gave a peremptory instruction to the jury to return a verdict in her favor.

On the measure of damages, the court gave the following instruction: "2. The amount of her recovery should be such a sum as in your judgment from the evidence will fairly compensate her for the additional exposure, if any; the inconvenience, if any; and the physical pain and suffering, if any, approximately occasioned by being carried beyond her station. No consequential or remote damages can be recovered or considered." In an instruction requested by appellant, the court told the jury to disregard all the evidence as to permanent affliction.

It is insisted that the verdict is excessive, but we think this case is ruled by *St. Louis S. W. Ry. Co.* v. *Knight,* 81 Ark. 429, which sustains the assessment of damages.

Appellant contends that appellee should have got off and

walked back when the train stopped a few miles distant from Poping, or should have remained overnight at Ozark and taken a train back the next day, and that only the expenses of remaining at Ozark until the next day should be allowed as damages. We cannot give our assent to this. Appellee should not be permitted to recover damages augmented by her own act in unnecessarily or negligently exposing herself to hardships and suffering; but she was not bound to suffer the inconvenience of remaining overnight away from home and child when she could, by reasonable effort and inconvenience, get home earlier. But counsel argues that appellee should not be permitted to recover because she and her husband drove through the country to her mother's, instead of to Poping. The evidence does not show how far it is from Ozark to Poping by public road; but, even if it is nearer than the distance actually traveled, appellee was not bound to go back to Poping. Her destination was her mother's home; and when she started from Ozark she had a right to choose the nearest route, without regard to the distance back to Poping—though of course she could not recover for the inconvenience of traveling the distance she would have had to travel to get to her home or to her mother's if she had got off the train at Poping. It was only the inconvenience and hardship of traveling the additional distance that she had the right to recover for, and the court so limited the right of recovery in the instruction given on the measure of damages. This was a question for the jury, and we do not think the damages awarded are excessive.

The court erred, however, in rendering the judgment for attorney's fees. *St. Louis S. W. Ry. Co.* v. *Knight, supra.*

The judgment as to damages is affirmed, but the judgment for attorney's fees is set aside.

BLAIS v. STATE.

Opinion delivered March 28, 1910.

1. FORGERY—INDICTMENT—CLERICAL MISPRISION.—An indictment for forgery is not bad which describes the instrument forged as "a certain writing *or* paper purporting to be a bank check," where it is manifest that the word "on" was intended. (Page 328.)
2. CRIMINAL LAW—TWO COUNTS—PLEA OF GUILTY.—Where an indictment contains two counts, one of which is good, a plea of guilty as to both counts will be sustained as to the good count. (Page 329.)
3. FORGERY—DESIGNATION OF PERSON DEFRAUDED.—In an indictment for forgery it is unnecessary to state whether the association or company intended to be defrauded was a corporation or a partnership. (Page 329.)

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

Hal L. Norwood, Attorney General, and *Wm. H. Rector,* Assistant, for appellee.

Indictments should not be quashed for clerical misprisons. 75 Ark. 574; 66 Ark. 559; 90 Ark. 123. In an indictment for forgery by signing a company's name, it need not be alleged that the company is a partnership or a corporation. 122 Ala. 100; 25 N. Y. 380; 48 Ark. 94; 71 Miss. 874; 17 Nev. 224; 21 Wend. 409; 1 Johns. 320.

McCULLOCH, C. J. Appellant by this appeal questions the sufficiency of the first count of the following indictment:

"The grand jury of Sebastian County, for the Fort Smith District thereof, in the name and by the authority of the State of Arkansas, accuse the defendant, Charles Blais, of the crime of forgery, committed as follows, towit: The said defendant, in the county and district aforesaid, on the first day of November, 1909, unlawfully, fraudulently and feloniously did forge and counterfeit a certain writing *or* paper purporting to be a bank check, which said writing on paper, in words and figures following:

" 'No. 129. Fort Smith, Ark., Nov. 1, 1909.

" 'Pay to the order of Charles Blais, $16.08, sixteen 08-100 dollars. " 'The Katzung Cigar Company,

" 'By L. F. Katzung.

" 'To the Merchants' National Bank, Fort Smith, Arkansas.'

"Which said bank check so unlawfully, fraudulently and feloniously forged and counterfeited by the said Charles Blais, the defendant, with the felonious intent then and there fraudulently and feloniously to obtain possession of money and property of the Katzung Cigar Company, and L. F. Katzung, and the Merchants' National Bank of Fort Smith, Arkansas, against the peace and dignity of the State of Arkansas."

Second count:

"The grand jury of Sebastian County, for the Fort Smith District thereof, in the name and by the authority of the State of Arkansas, accuse the defendant, Charles Blais, of the crime of uttering a forged instrument, committed as follows, towit: The said defendant, in the county and district aforesaid, on the first day of November, 1909, unlawfully, fraudulently and feloniously did utter and publish as true to S. Winter, a certain forged and counterfeit writing on paper, purporting to be a bank check, which said writing on paper was in words and figures following, towit:

' ''No. 129. Fort Smith, Ark., Nov., 1909.

" 'Pay to the order of Charles Blais $16.08, sixteen 08-100 dollars. " 'The Katzung Cigar Company,

" 'By L. F. Katzung.

" 'To the Merchants' National Bank, Fort Smith, Arkansas.'

"The said forged and counterfeited writing on paper being then and there passed, uttered and published as true by the said Charles Blais to said S. Winter, with the felonious intent then and there unlawfully, fraudulently and feloniously to obtain possession of the money and property of said Winter, he, and said Charles Blais, the defendant, then and there well knowing said writing on paper to be forged and counterfeited, as aforesaid, against the peace and dignity of the State of Arkansas."

We are not favored with a brief on behalf of appellant, but the Attorney General points out and defends against two alleged defects, viz: (1) That the alleged forged instrument is described in the alternative, being described as a "writing *or paper*," (2) that the Katzung Cigar Company is not alleged to be a natural person, a partnership or a corporation.

Answering the first attack on the indictment, we hold that, when the language of the whole count is considered together,

it is manifest that the use by the pleader of the word "or" was a clerical error, and that the word "on" was intended to be used. The latter word was used in the same connection in other parts of the indictment. The defect, if any, is immaterial, and did not tend to the prejudice of any substantial right of the accused person.

But, even if we treat the disjunctive "or" as having been intended to be used, it does not affect the validity of the indictment, for this does not make the description in the alternative. The word "writing" and "paper," when connected disjunctively, clearly amount to the same thing, a written instrument, in the words and figures following.

Appellant entered a plea of guilty to both counts of the indictment, and it is alleged that the instrument was forged with intent to defraud L. F. Katzung as well as the Katzung Cigar Company; so that, if the charge as to the Katzung Cigar Company fails for want of proper designation as a natural person, a partnership or a corporation, it will be treated as surplusage, and the other charge of an intent to defraud L. F. Katzung is sufficient to sustain the indictment. 2 Bishop, Crim. Proc. 425; *Gates* v. *State,* 71 Miss. 874. Moreover, the authorities seem to sustain the view that in an indictment for forgery, unlike an indictment for larceny or kindred offenses, it is unnecessary to state whether the association or company intended to be defrauded was a corporation or a partnership. *Denson* v. *State,* 122 Ala. 100; *Gates* v. *State, supra; Noakes* v. *People,* 25 N. Y. 380.

Judgment affirmed.

GAITHER v. CAMPBELL.

Opinion delivered March 28, 1910.

1. JUDGMENT—CONCLUSIVENESS.—Under Kirby's Digest, § 2754, providing in effect that the value of improvements made upon land adjudged to belong to another shall be paid to the occupant under color of title who made them believing himself to be the owner "before the

court rendering judgment in such proceedings shall cause possession to be delivered to such successful party," *held* that a decree which adjudged the title to land to be in the plaintiff, without awarding the value of improvements made by the defendant, is conclusive at the end of the term, and cannot be re-opened later, so as to render a decree for improvements. (Page 332.)

2. APPEAL AND ERROR—PROCEEDINGS AFTER REVERSAL.—Where the Supreme Court, on reversing a chancery cause, gave specific directions for entering a decree, "and for further proceedings to be therein had according to the principles of equity and not inconsistent with the opinion herein delivered," such directions did not authorize the chancellor to re-open the case and determine questions not specifically designated. (Page 332.)

Appeal from Mississippi Chancery Court; *Edward D. Robertson,* Chancellor; reversed.

J. T. Coston, for appellant.

After lapse of the term, the court had no power to vacate the judgment, except upon complaint filed as provided by law. 52 Ark. 318; 53 Ark. 21. The decree was not authorized by the mandate. 84 S. W. 1046; 91 S. W. 27.

S. S. Semmes, W. J. Lamb and *Flannigan & Rogers,* for appellee.

The trial court is left free to make any order with reference to new matter in a case that has been remanded to it by the Supreme Court not inconsistent with the opinions of the Supreme Court. 16 Ark. 181. The trial court was required by the mandate to adjudicate matters arising that were not settled by the Supreme Court. 36 Ark. 26; 98 S. W. 969.

McCULLOCH, C. J. This is the third appearance here of this case. Plaintiffs (the petitioners, Mrs. Gaither and the Kings) each claiming title to an undivided third of the land in controversy as equal tenants in common by inheritance from W. A. King, instituted an action to quiet their said title to this and other tracts of land. Campbell intervened, and claimed title by adverse possession to a tract of forty acres. The chancery court rendered a decree in Campbell's favor, and this court reversed the decree and remanded the case with directions to permit either party to amend the pleadings and take further proof as to an undeveloped issue. *Gaither* v. *Gage,* 82 Ark. 51.

The cause was heard again by the chancellor on amended pleadings. Among other things, Campbell pleaded that those under whom he claimed title had, while peaceably holding the land under color of title, made improvements thereon to the value of $2,000, and prayed for reimbursement if it should be found that plaintiffs were the owners of the land. No proof was taken to sustain the plea of having made improvements.

The chancellor rendered a decree in the case on March 5, 1908, quieting Mrs. Gaither's title to an undivided third of the land, and in favor of Campbell quieting his title to the other undivided two-thirds claimed by the Kings. The grounds for the decree were that the Kings were barred by limitation, but that Mrs. Gaither was not barred on account of the fact that she was a married woman. Nothing was said in the decree about improvements, and Campbell did not appeal from that part of the decree in Mrs. Gaither's favor. The Kings appealed, and this court decided that Campbell's plea of title by adverse possession was not sustained except as to a small part of the land—about one acre—and reversed the case with directions, stated in the opinion, "to quiet the title to all the forty-acre tract of land in the petitioners, except the portion thereof containing about one acre which was taken possession of and enclosed by Mary E. Hale in August, 1897; and if it shall be necessary to take further proof in order to establish the description of that portion of said land, that can be done." *King* v. *Campbell,* 89 Ark. 450.

The mandate of the Supreme Court followed the language of the opinion, except that the following words were added, "and for further proceedings to be therein had according to the principles of equity and not inconsistent with the opinion herein delivered."

On the remand of the case the chancellor entered a decree in accordance with the mandate, quieting the title of all the plaintiffs to the tract of land in controversy except the one-acre tract mentioned; and further decreed that Campbell recover the value of improvements, and made a reference to a special master to take proof and report the amounts. The master made his report at the next term, finding the value of the improvements, less rents and profits, to be the sum of $571.70, and the court

overruled exceptions to and confirmed the report, and rendered a decree declaring said amount to be a lien on the whole tract. This of course included the undivided interest of Mrs. Gaither and the Kings, all of whom have appealed.

It is clear that the decree declaring a lien against Mrs. Gaither's interest in the lands was erroneous. The court had, at a previous term, rendered a decree quieting her title, and nothing was said therein about the value of improvements. That decree was not appealed from, and became final with the expiration of the term. Thereafter, the court had no power to alter it, and it was a complete adjudication of all the issues presented by the pleadings. This of course included the claim for improvements. The betterment statute provides that the claim of an occupant for improvements shall be adjudicated in the same action in which the title is adjudicated "before the court rendering the judgment shall cause possession to be delivered to the successful party." Kirby's Dig., § 2754 *et seq.* Of course, a trial court may at one term adjudicate the title and withhold possession, reserving for further investigation the question of improvements, etc., in which case the judgment would not be final. *Hargus* v. *Hayes,* 83 Ark. 186; *Brown* v. *Norvell,* 88 Ark. 590. But in the present case the decree in Mrs. Gaither's favor was final, and left no issue undetermined. Nothing was reserved for further determination. Therefore, it could not be reopened later, so as to render a decree for improvements.

The decree against the Kings stands upon a different footing, but it was for another reason equally erroneous, for it was inconsistent with the directions of this court. When the case came to this court on appeal, all of the issues raised in the court below were before us for decision; and, according to the practice in equity cases, when decrees are reversed, we give special directions to the chancery court for entering a decree. Such was done in this case. We gave special directions to enter a decree quieting the title of the petitioners to all except the one-acre tract, permitting further proof to be taken as to the description of that tract. A direction here is conclusive on the lower court unless matters are left open for further proceedings below. *Collins* v. *Paepcke-Leicht Lbr. Co.,* 82 Ark. 1. The distinction is clearly pointed out in the recent case of *Chicago Mill & Lbr.*

Co. v. *Osceola Land Co.,* ante p. 183, as to what matters may be taken up on reversal with directions, and it is there shown that matters which were within the issues raised by the pleadings below are concluded here by a reversal with special directions, except as to matters excluded from the directions.

Nothing is added by the words of the mandate "and for further proceedings to be therein had according to the principles of equity and not inconsistent with the opinion herein delivered;" for any further proceedings affecting the title than to quiet it in petitioners were inconsistent with the directions in the opinion. The case of *Cunningham* v. *Ashley,* 16 Ark. 181, relied on by appellee, is not, we think, in conflict with the conclusion here reached, as in that case the directions made were more general than in the present case. *Cunningham* v. *Ashley,* 13 Ark. 653.

Of course, this court may, and often does, leave matters of rents and profits and improvements open for further determination of the trial court, as in *Rankin* v. *Schofield,* 81 Ark. 440, and *Rankin* v. *Fletcher,* 84 Ark. 156; but in the present case that was not done.

The decree awarding compensation for the value of improvements is reversed, and the cause is remanded with directions to the chancery court to quiet the title of the plaintiffs, free from any lien of the defendant, Campbell.

PORTER *v.* HUIE.

Opinion delivered March 28, 1910.

BILLS AND NOTES—ACCOMMODATION PAPER—SUCCESSIVE LIABILITY OF INDORSERS.—As between themselves, persons who successively indorse a note for accommodation before its negotiation are not co-sureties, nor entitled to contribution from each other, but are liable to one another, in the absence of special agreement, in the order in which their names are indorsed.

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

J. H. Crawford and *T. D. Crawford,* for appellant.

Where a person, not the payee of a note, signs his name upon the back of it without date, it is presumed to have been

done at the inception of the note. 11 Pa. St. 482; 30 Me. 310; 44 Me. 433; 4 Houst. 284; 85 Me. 485; 13 Met. 265; 107 N. C. 565; 1 Dan. Neg. Inst., § 728. Such person is bound as surety as fully as if he had written his name on the face under that of the maker. 24 Ark. 511. He is a joint maker, and not a guarantor. 34 Ark. 524; 40 Ark. 546; 80 Ark. 285. Successive indorsers are co-sureties, and can recover contribution from each other. 1 Ohio 413; 3 O. St. 422; 2 Hawks 590; 118 N. C. 388; 23 Vt. 160; 2 Mackey 420; 74 Cal. 362; 8 App. Cas. 749; 10 C. B. (N. S.) 561.

Callaway & Huie, for appellee.

When the maker of a note gives two indorsers as co-sureties, the one indorsing first is liable to the other for the whole debt. 79 Am. Dec. 568; 32 Am. Dec. 397; 2 Speer's Law 747. There is no contribution between successive accommodation indorsers in the absence of special agreement. 43 Ala. 168; 3 Stew. 247; 2 Mackey 420; 1 McArthur 606; 1 Ga. 205; 6 Blackf. 507; 4 Litt. 436; 15 La. 537; 85 Me. 326; 3 Harr. & J. 167; 98 Mass. 214; 173 Mass. 122; 56 Mich. 187; 102 N. Y. 93; 182 Pa. St. 292; 9 Yerg. 1; 60 Vt. 321; 1 Gres. 234; 42 W. Va. 522; 3 Pet. 470; 21 How. 432.

BATTLE, J. On the 28th day of July, 1888, the Arkadelphia Cotton Mills executed to J. A. Hardage a promissory note as follows:

"$1,000. Arkadelphia, July 28, 1888.

"On July 28, 1889, we promise to pay to the order of J. A. Hardage one thousand dollars at 10 per cent. interest from date until paid. Value received.

"Arkadelphia Cotton Mills,
"By S. R. McNutt, President."

Before the delivery and acceptance of it the note was signed on the back of it by S. R. McNutt, J. C. Saunders and R. W. Huie & Company. The Arkadelphia Cotton Mills paid at different times several amounts, aggregating $300. McNutt paid in his life many sums, amounting in the aggregate to $960. He died, and his executors paid $1,391.35, the balance due thereon. His executors brought suit in equity against R. W. Huie, a member of the firm of R. W. Huie & Company, who was the

last to sign the note on the back thereof, to recover $1,175.67, one-half of the amount paid thereon by McNutt, in his lifetime, and by his executors. The trial court dismissed the complaint for want of equity, and plaintiffs appealed.

In *Killian* v. *Ashley,* 24 Ark. 511, the court held that "where a third party indorses a note in blank at the time it is executed he is bound as security as fully as if he had written his name on the face under that of the makers." And in *Nathan* v. *Sloan,* 34 Ark. 524, this court held that "parties who indorse their names in blank upon an obligation to another at the time it is executed by the maker and for the same consideration are joint makers with him, and not guarantors." To the same effect it held in *Heise* v. *Bumpass,* 40 Ark. 546; *Jones* v. *Bank of Pine Bluff,* 80 Ark. 285; *Lake* v. *Little Rock Trust Co.,* 77 Ark. 53. In all these cases the court was considering the liability of the parties sued to the holder of the notes, and in none of them did it consider the relation of two or more of the indorsers on notes like the one under consideration to each other. In such cases it is held by the great weight of authorities: "When several persons indorse a bill or negotiable note in succession, the legal effect is to subject them as to each other in the order they indorse. The indorsement imports a several and successive, and not a joint, obligation, whether the indorsement be made for accommodation or for value received, unless there be an agreement *aliunde* different from that evidenced by the indorsements. When the successive indorsements are for accommodation of other parties, the indorsers for accommodation may make an agreement to be jointly and equally bound, but whoever asserts such an agreement must prove it." *McDonald* v. *Magruder,* 3 Pet. (U. S.) 470; Daniel on Negotiable Instruments (5 ed.), § 703. In 7 Cyc. 828, the cases on this subject are collected.

In the case at bar McNutt was first indorser, and, as between himself and those whose names follow his, is liable for the whole amount of the note, and, in the absence of an agreement to the contrary, the other indorsers are not liable to contribute anything to him or his estate. No such agreement was alleged or proved.

Decree affirmed.

WESTERN UNION TELEGRAPH COMPANY v. SWEARENGEN.

Opinion delivered March 28, 1910.

1. TELEGRAPHS AND TELEPHONES—NEGLIGENCE—WHO MAY RECOVER.—One whose name was not mentioned in a telegraphic message and whose interest therein was not communicated to the telegraph company cannot recover damages for mental anguish caused by the failure of such company to deliver the message. (Page 337.)
2. SAME—NOTICE OF CLAIM OF DAMAGES.—Where a telegram contained the usual indorsement that the company will not be liable for damages "where the claim is not presented in writing within sixty days after the message is filed with the company for transmission," a notice of a claim of damages, signed by one person, will not inure to the benefit of another person whose claim is not mentioned. (Page 338.)

Appeal from Logan Circuit Court, Southern District; *Jeptha H. Evans,* Judge; reversed.

George H. Fearons, Rose, Hemingway, Cantrell & Loughborough and *Mechem & Mechem,* for appellant.

Appellee, *pro se.*

BATTLE, J. On the 21st day of October, 1908, Ada Swearengen, J. T. Blackburn and George Swearengen brought this action against the Western Union Telegraph Company to recover damages for mental anguish caused by the negligent failure of the defendant to deliver a telegram sent from Magazine, Arkansas, to W. J. Blackburn, at Memphis, Tennessee, announcing the illness of J. T. Blackburn, and requesting him to "come at once if possible."

J. T. Blackburn and W. J. Blackburn were brothers; Ada Swearengen was their sister, and George Swearengen was the minor son of Ada Swearengen, and a nephew of the Blackburns.

The message was sent on the 5th day of November, 1907, and was as follows:

"To W. J. Blackburn,

"No. 235 Memphis, Tenn.,

"Care Elliott & Durke.

"Jim is worse. Come at once if possible can.

"George Swearengen."

Indorsed on the message was the following stipulation: "The company will not be liable for damages or statutory penalty in

any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission."

The only conversation George Swearengen, the sender of the message, had with the agent to whom the message was delivered was, the agent asked George how Mr. Blackburn was, and he replied that he was worse.

The message was filed with the defendant on Tuesday, but was never delivered. W. J. Blackburn came on the Saturday following to his brother's bedside, while he was living, and returned to Memphis before his death.

Among other things the defendant pleaded the claim of plaintiffs for damages was not presented in writing within the sixty days.

The only claim in writing presented to the defendant was the following:

"To Western Union Telegraph Company,
"Magazine Ark.

"We demand and claim damages for your failure to deliver the following message sent from Magazine, Ark., to Memphis, Tenn.:

' "A. Paid 40 cents.
" 'Magazine, 11-5-07.

" 'Mr. W. J. Blackburn,
" 'No. 235 S. Main, Memphis, Tenn.
" 'Care Elliott & Durke,
"Jim is worse. Come at once if possible can.
" 'Geo. Swearengen.'

"The above message having been delivered to you at Magazine, Ark., on the 5th day of November, 1907, damages in the sum of $1,000 are claimed.

"Geo. Swearengen."

This notice was served by a constable on the 17th day of December, 1907.

The action was dismissed as to J. T. Blackburn. Ada Swearengen recovered $300.40, but George recovered nothing, and the defendant appealed.

Ada Swearengen was not mentioned in the message. There was no evidence that her interest therein was communicated to

the defendant, or that she would suffer mental anguish if the message was not delivered, and she was not entitled to recover. *Helms* v. *Western Union Telegraph Co.*, 8 L. R. A. (N. S.) 249, and notes.

Mrs. Swearengen did not present any claim for damages in writing to the defendant within sixty days after the filing of the message according to the stipulation indorsed thereon, and was not entitled to recover. *Western Union Telegraph Co.* v. *Moxley*, 80 Ark. 554. The claim of George was not sufficient to cover hers.

Judgment reversed, and action dismissed.

WINN *v.* CAMPBELL.

Opinion delivered March 28, 1910.

1. JUDGMENT—PRESUMPTION AS TO JURISDICTION.—When jurisdictional facts are required to be stated, but are not stated, in the record, no presumption of jurisdiction will be indulged. Thus, where, in a suit to enforce the State's lien for purchase money for Internal Improvement land, it appears affirmatively that the warning order was not published in the county where the land was situated, as required by Kirby's Digest, § 4849, the decree of foreclosure is void, and may be attacked collaterally. (Page 341.)
2. PROCESS—PUBLICATION OF WARNING ORDER.—Where the record, in a suit to enforce the State's lien on Internal Improvement land, shows affirmatively that the warning order was not published in the county where the land lay, as required by Kirby's Digest, § 4849, this jurisdictional defect will not be aided by a recital of the decree "that publication as required by the statute has been made." (Page 342.)
3. PUBLIC LANDS—BURDEN OF PROOF.—Under Kirby's Digest, § 4852, providing that "the titles to all internal improvement, seminary and saline lands heretofore sold by the State on credit, unless the evidence that the purchase money or some part thereof remains unpaid is clear and conclusive, be, and they are hereby, quieted and made valid," one who attacks the State's deed conveying internal improvement land has the burden of showing that the legal title is still in the State, and must produce the purchase money notes or account for their absence. (Page 342.)

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

E. L. Carter and *J. H. Harrod,* for appellant.

One who purchases land from a patentee of the State is entitled to presume that the patent was issued to the person entitled to receive it. 76 Ark. 525. The patent is sufficient evidence of title. 31 Ark. 609; 39 Ark. 120. A decree of a court of equity cannot be attacked collaterally, but must be attacked by bill of review in a direct proceeding. 43 Ark. 34; 11 Ark. 519; 66 Ark. 1; 72 Ark. 101. This suit is in the nature of a proceeding to confirm a tax title, and the provisions of the statute do not apply. 74 Ark. 253; 75 Ark. 176; 76 Ark. 465; 73 Ark. 27; 76 Ark. 146.

Gaughan & Sifford, for appellee.

The whole record of the case must be looked to, which includes papers filed as well as record entries. 86 Mo. 358; 16 S. W. 831; 52 Ark. 312; 57 Ark. 54; 55 Ark. 35.

WOOD, J. The appellants instituted this suit against appellees for the possession of certain lands in Ouachita County. The lands were granted to the State by the United States on the 4th of September, 1841, and were Internal Improvement lands. The State, through her Commissioner of State Lands, issued her deed to Oscar H. Winn and R. F. Diebel, conveying to them the lands in controversy November 1, 1905, for the consideration of four hundred dollars. Diebel conveyed his interest to Winn, and Winn conveyed to appellant, J. R. B. Moore. This is the title under which appellants claimed.

The appellees admitted that the lands once belonged to the State as Internal Improvement lands, and that the State issued her patent to Oscar H. Winn and Robert F. Diebel. But appellees allege that when the deed was executed to Winn and Diebel in 1905 the State of Arkansas had no title to said lands, for the reason that said lands were conveyed by said State of Arkansas to one William E. Powell, January 30, 1848, and that appellees and their grantors had been in possession of the lands for twenty years, holding by mesne conveyances from Powell.

It appears from the record that the State sold the land in 1848 to one William E. Powell on a credit, taking his notes for

the purchase money. Proceedings were instituted in the chancery court of Pulaski County under the act of the General Assembly of 1887 (Kirby's Digest, § § 4848 and 4849), to enforce the lien of the State for the purchase money, and a decree was entered on the 5th of December, 1887, ordering the lands sold, and the lands were sold under that decree to the State. The State then at the time she sold to appellants Winn and Diebel held under that decree. The appellants must recover upon the strength of their own title. It is not a question of whether appellee, Campbell, has title. He and those under whom he claims show possession from 1866. Appellants to oust him of possession must show title in themselves. Have they shown that the decree of the chancery court of Pulaski County was valid?

The act under which the suit was brought, among other things, provides: "In bringing said suits it shall not be necessary to make the purchaser or purchasers or his or their heirs and legal representatives, or the occupiers of said lands, or any other person defendants, but the complaint shall pray that notice be given of the pendency of the suit, as hereinafter provided, and the suit shall proceed as in actions *in rem.*" Section 4848.

"When the bill has been filed the clerk of the Pulaski Chancery Court shall docket the case, and shall make an entry thereof in his record of the proceedings of the court, which shall state the general object of the bill, etc.; * * * a copy of this entry, duly certified by the clerk, shall be published by four successive weekly insertions in a newspaper printed in Little Rock, and in a newspaper printed in the county in which such lands are situated, the last insertion of such publication being two weeks before the first day of the next term of the chancery court, the same being stated, at which all persons interested shall take notice thereof. And to suits so begun and advertised, if no person shall appear and defend in his or their own rights, the court shall at the term after the notice has been given, as aforesaid, declare the lands subject to the lien of the State that shall be proved to extend over them, and enter a decree of foreclosure and sale." Section 4849, Kirby's Digest.

The publication required by the statute was intended as a substitute for personal service, and, in order to give the court

jurisdiction, compliance with the terms of the statute was imperative.

The statute provides that the "complaint shall pray that notice be given of the pendency of the suit as hereinafter provided." It is after provided that the clerk "shall docket the case and make an entry thereof in his record of the proceedings of the court, which shall state the general objects of the bill, and *what lands it proposes to subject to foreclosure,*" etc., and "a copy of this entry, duly certified by the clerk, shall be published," etc. It will be observed that the statute requires *an entry of record* showing *what lands are to be "subject to foreclosure."* The record entry recites as follows:

"The State of Arkansas has this day filed her complaint in equity to enforce her vendor's lien upon the following described lands, towit: The east half of the southeast quarter of section 2, township 15 south, range 19 west, 80 acres of Internal Improvement land in Columbia County, Arkansas," etc. It then recites the sale to Powell in 1848, and follows with a warning order.

It is unnecessary to set forth in detail the various record entries, from the filing of the bill to the confirmation of the report of the commissioner appointed to make the sale. It suffices to say that, taking the whole record, it shows conclusively that the chancery court proceeded under the belief that the lands against which the State sought to enforce her lien by foreclosure under the terms of the statute were situated in Columbia County, and not in Ouachita County. The record, as a whole, we think, shows affirmatively that the publication was made in Pulaski and Columbia counties, but not in Ouachita County, where the land is situated. When jurisdictional facts are required to be stated, and are stated in the record, no presumption as to jurisdiction will be indulged. It follows that the chancery court of Pulaski County was without jurisdiction to render the decree under which appellants claim title to the lands in controversy. The decree is void, and may be attacked collaterally. Appellants acquired no title from that source.

The case of *McLain* v. *Dunbar,* 57 Ark. 49, was a foreclosure under the same statute, and the court held, under the facts of that case, that the recital "that notice was given as required

by the statute," without specifying how the notice was given, was sufficient; that the decree of the court containing such recital was valid against collateral attack. The record in that case reciting that notice was given, but being silent as to how it was given, the court indulged the presumption that the chancery court found upon proper evidence that notice had been given as required by the statute. The court also held in that case that the statute did not require that the evidence of publication be made a part of the record. But the court did not hold that it was unnecessary for the record to show what lands were to be subjected to foreclosure. That question was not presented in that case. It did not appear affirmatively from the record in that case, as it does in this, that the notice was not given as the law requires, and therein is the marked distinction between that case and this. Here the whole record, taken together, affirmatively shows that the notice was not published in Ouachita County, where the land is situated, as the law requires, and that therefore the recital of the decree "that publication as required by the statute has been made" was in fact untrue. In *Gregory* v. *Bartlett,* 55 Ark. 30, Chief Justice COCKRILL, speaking for the court, said: "If such evidence is not required by the statute to be placed upon the record, and the record recites, or is silent as to, the facts necessary to show jurisdiction, their existence will be presumed; but no presumptions are indulged when the evidence is stated upon the record, or where the statute requires the jurisdictional facts to appear of record, and they are not made so to appear." In the case at bar the evidence is put upon the record in various entries from the filing of the bill to the last entry confirming the report of the commissioner, and these entries clearly show that the lands against which the foreclosure proceedings were instituted were described as "situated in Columbia County, Arkansas." We can not indulge any presumption, in the face of these entries, that the court heard evidence and found that the lands were in fact situated in Ouachita County, and that the publication was also made in that county.

Appellants, on whom was the burden, do not show that, notwithstanding the void decree, the legal title was still in the State at the time of the deed to them. The notes are not pro-

duced by them, and they are not accounted for. The evidence therefore is not clear and conclusive that the purchase money, or some part thereof, remains unpaid. See section 4852, Kirby's Digest.

The judgment of the circuit court is therefore correct, and it is affirmed.

HARSHAW v. STATE.

Opinion delivered March 28, 1910.

1. EVIDENCE—CONFESSION.—Where a confession is shown to have been made freely and voluntarily, it is admissible. (Page 344.)
2. SAME—EXTRAJUDICIAL CONFESSION—CORROBORATION.—An extrajudicial confession may be considered in connection with other evidence tending to establish the guilt of the defendant; but if there is no other evidence of the *corpus delicti*, the defendant cannot be convicted upon such confession. (Page 344.)
3. CRIMINAL LAW—PERMITTING JURY TO TAKE PAPERS.—It was within the court's discretion to permit the jury in a forgery case to take with them for examination the instrument alleged to have been forged. (Page 345.)

Appeal from Crawford Circuit Court; *Jeptha H. Evans*, Judge; affirmed.

Sam R. Chew, for appellant.

Hal L. Norwood, Attorney General, and *Wm. H. Rector*, Assistant, for appellee.

Extrajudicial confessions are admissible if voluntarily and freely made. 28 Ark. 121; 3 Ark. 368; 73 Ark. 407; 63 Ark. 457; 66 Ark. 506; 73 Ark. 495; 72 Ark. 145; 77 Ark. 126; 77 Ark. 426. A confession is sufficient to sustain the verdict, when accompanied with other proof that the crime was committed. Kirby's Dig., § 2385. The discretion of the trial judge in receiving confessions in evidence will not be controlled unless clearly abused. 82 N. C. 631; 67 Vt. 365; 43 S. W. 418; 2 Greenleaf, Ev., § 219 (b). It was not error to allow the jury to take the forged instrument to the jury room with them. 29 Ark. 17; *Id.* 249; 5 Ark. 61.

WOOD, J. The appellant was convicted of forgery. The indictment charged him and Evans & Dugan with the crime of forging a time check. The indictment is the same as that in the case of *Evans* v. *State*, in which the opinion of the court has just been rendered by Judge BATTLE. The indictment is valid for the reasons therein given. The testimony in this case is practically the same as in that, and in addition appellant is shown to have made a free and voluntary confession, which was reduced to writing by a justice of the peace and sworn to by appellant, in which he states that he and Evans and W. H. Dugan had issued several time checks for straw men, among them to one Richard Walsh. Appellant told where the checks were cashed, and how much he and his confederates received. He gave the numbers, names and amounts of the various time checks that had been carried on the rolls and issued to straw men. Appellant turned over $300 to Justice of the Peace Crutcher. It was first turned over as a pledge or bond for his appearance, and later was turned over to the railroad company to apply to appellant's shortage. As the confession is shown to have been made freely and voluntarily, it was admissible. *Ince* v. *State*, 77 Ark. 426; *Hubbard* v. *State*, 77 Ark. 126; *Hammons* v. *State*, 73 Ark. 495; *Brewer* v. *State*, 72 Ark. 145.

Appellant contends that the court erred in giving instruction number 6, which told the jury that the confession of the defendant, accompanied with proof that the offense was committed by some one, will warrant defendant's conviction. This instruction is in conformity with the statute. Section 2385, Kirby's Digest.

It is not essential that the *corpus delicti* be established by evidence entirely independent of the confession, before the confession can be admitted and given probative force. The confession may be considered in connection with other evidence tending to establish the guilt of the defendant. But, if there is no other evidence of the *corpus delicti* than the confession of the accused, then he shall not be convicted alone upon his confession. *Hubbard* v. *State*, 72 Ark. 126; *Meisenheimer* v. *State*, 73 Ark. 407.

We find no reversible error in the other instructions of the court. Other rulings are passed upon in *Evans* v. *State*, *post* p.

400, the forged time check was exhibited to the jury. They had examined it in the jury box, and it was within the discretion of the court to permit them to take it with them to the jury room for further inspection. The jurors would have the right to express their views in regard to the alleged forged instrument after they retired to the jury room to consider of their verdict, and this they could do more accurately and intelligently perhaps with the instrument before them than to depend upon their recollection of how it appeared to them when it was exhibited and passed around among them for inspection while in the jury box. There was no error in this. *Humphries* v. *McCraw,* 5 Ark. 61; *Hurley* v. *State,* 29 Ark. 17; *Palmore* v. *State,* 29 Ark. 249.

Finding no prejudicial error, the judgment is affirmed.

COLEMAN v. BERCHER.

Opinion delivered March 28, 1910.

1. STATUTES—CONSTRUCTION OF CODE OF PRACTICE.—The primary object of the Code of Practice is the trial of causes upon their merits, and that the rights of suitors may not be sacrificed to technical mistakes, omissions or inaccuracies. (Page 347.)
2. PLEADING—AMENDMENT.—Under Kirby' Digest, § 6145, providing for amendment of pleadings at any time in furtherance of justice, a complaint may be amended by permitting plaintiff or her attorney to sign the complaint after defendant moved to strike out the complaint because it was not signed. So an affidavit made by plaintiff's attorney may be amended to show that he made it as her attorney. (Page 347.)

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

Edwin Hiner, for appellant.

The Code of Practice enjoins upon the courts the duty of allowing amendments to pleadings. Kirby's Dig., § § 6145-6148. Under a statute like ours the court may permit the petition to be signed at the return term. 7 Mo. 187. The failure to sign the petition cannot be regarded as a matter of substance, and

therefore does not render the judgment void. 131 Mo. 258; 33 S. W. 6. When a motion is filed to permit the party or his attorney to sign the pleadings, it takes precedence over a motion to reject the pleading for want of signature. 15 N. E. 217. When the complaint is signed, the defect is cured. 13 Ind. 445; 28 Ind. 473; 53 Ind. 484; 99 Ind. 68.

Appellee, *pro se.*

HART, J. Fannie Coleman brought an action of unlawful detainer in the Sebastian Circuit Court, Fort Smith District, against Leo Bercher. The statutory notice was given, and the complaint, affidavit and bond contemplated by section 3634 of Kirby's Digest were filed by plaintiff.

The complaint was not signed, but the affidavit referred to was attached to it, and was signed and sworn to by Edwin Hiner.

The defendant did not file an answer, but made a motion to strike the alleged complaint from the files of the court because it was not signed by the plaintiff, or by any one else in her behalf; and because the verification of the alleged complaint was not signed by the plaintiff or any one purporting to have authority to act for her.

Then Edwin Hiner for the plaintiff asked that he be allowed to sign the complaint as her agent and attorney; and also asked leave to amend the affidavit attached thereto by showing that said Edwin Hiner, who made the affidavit, was at the time of filing and signing it the agent and attorney of the plaintiff. The court denied his request, and dismissed the complaint. The plaintiff has duly prosecuted an appeal to this court.

It is conceded that the action of the court was based upon sections 3634 and 6120 of Kirby's Digest, and the decision of the court in the case of *Carrington* v. *Hamilton,* 3 Ark. 416, in which it was held that an unsigned complaint could not be amended, and should be stricken from the files. It is urged that the act in force at the date of that decision is similar to the general practice act in regard to signing complaints (Kirby's Digest, § 6120), which provides that "every pleading must be subscribed by the party or his attorney," and to section 3634 applicable to actions of unlawful detainer; and that the decision should govern. This decision was rendered many years before the adoption of our Civil Code.

In the case of *Burke* v. *Snell,* 42 Ark. 57, the court said: "The primary object of the Code is the trial of causes upon their merits, and that the rights of suitors shall not be sacrificed to technical mistakes, omissions or inaccuracies." This salutary rule of construction of the provisions of the Code has been steadily adhered to, and has become the settled practice in this State.

Section 6145 of Kirby's Digest provides: "The court may, at any time, in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of any party, or a mistake in any other respect, or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved."

The omission of the plaintiff or her attorney to sign the complaint, and the omission of Hiner in the affidavit attached thereto to state that he was plaintiff's attorney, were mere formal defects or clerical mistakes which could not affect the rights of the parties in a trial on the merits of the case; and the motion to correct the same, having been seasonably made, should have been allowed by the court as a correction of mistake, under section 6145 of Kirby's Digest, and thus have cured the defect.

To illustrate, our Civil Code provides that a complaint must contain the style of the court, but the court has held that the omission to do so is a mere formal error. *McLeran* v *Morgan,* 27 Ark. 148.

Therefore, the judgment will be reversed, and the cause remanded with directions to allow the plaintiff to amend her complaint in the respects asked for.

SIMPSON & WEBB FURNITURE COMPANY *v.* MOORE.

Opinion delivered March 28, 1910.

1. PLEADING—AMENDMENT.—The omission to sign a pleading is a formal defect or clerical mistake which the court should allow to be corrected on motion. (Page 349.)

2. APPEAL AND ERROR—OBJECTION NOT RAISED BELOW.—The objection that a pleading was not signed by the party or by his attorney cannot be raised on appeal for the first time. (Page 349.)

3. PLEADING—SEPARATE ANSWER INURING TO ALL DEFENDANTS.—A separate answer of one defendant will be held to inure to the benefit of all the defendants when it states a defense common to all of them. (Page 349.)

4. SAME—VERIFICATION OF ANSWER.—Where the complaint in a case was verified but the answer was not, in the absence of a motion to require the answer to be verified, judgment upon the complaint will not be rendered as by default. (Page 350.)

5. JUDGMENT—FRAUD IN PROCUREMENT—DEFENSE.—Before a court of equity will relieve against a judgment alleged to have been procured by fraud, the plaintiff must aver and prove that he has a defense to the action on its merits. (Page 350.)

Appeal from Jefferson Chancery Court; *John M. Elliott,* Chancellor; reversed.

W. F. Coleman, for appellant.

The complaint, though verified, was not evidence. The statute requires evidence in such cases. Kirby's Dig., § 6120. By defendant's answer, the basis of appellee's cause of action was put in issue, and their defense inured to the benefit of all. 71 Ark. 1. As appellant was the real party in interest, it had the right to defend for all. Kirby's Dig., § 5999. Appellee's allegation that he did not owe the debt sued on did not entitle him to the relief sought, was only a conclusion of law, and was demurrable. 35 Ark. 104; 32 Ark. 97; 43 Ark. 296; 60 Ark. 606; 72 Ark. 478. The court should disregard such allegations, even though they are not denied. 64 Ark. 39.

HART, J. This is an action instituted in the Jefferson Chancery Court by C. F. Moore and Mrs. C. F. Moore against Simpson & Webb Furniture Company, J. F. Stewart and L. E. Cheek. The complaint, in substance, alleges the following:

That the Simpson & Webb Furniture Company, a corporation organized and doing business under the laws of the State of Arkansas, brought suit before L. E. Cheek, a justice of the peace for Vaugine Township in Jefferson County, Arkansas, against C. F. Moore and Mrs. C. F. Moore for an alleged indebtedness of $98. That prior to the day of trial an agent of said corporation represented to them that the suit would be continued indefinitely, and that they need not attend on the day of trial.

That they relied upon these statements and failed to attend the trial on the return day of the writ, and that, in disregard of its agreement, said corporation obtained judgment against them by default. That they had no knowledge of that fact until the time for taking an appeal had expired. That said corporation procured an execution to be issued and placed in the hands of J. F. Stewart, the constable of said Vaugine Township, to be levied upon their goods to satisfy said judgment. They further allege "that they do not owe defendant the indebtedness sued on or any part thereof and never contracted the same or any part thereof."

The defendant, Simpson & Webb Furniture Company, answered, denying the allegations of the complaint. The defendants, Stewart and Cheek, failed to answer, but made default.

No testimony was taken in the case, but the complaint was sworn to. The decree recites that when the cause was reached on the calendar the plaintiffs "come by their attorneys," and the defendant Simpson & Webb Furniture Company "come by their attorneys," and that the defendants Stewart and Cheek "come not but make default;" and the judgment against plaintiffs in said justice's court was set aside, and the defendants were permanently enjoined from enforcing the same in accordance with the prayer of the complaint herein.

The defendants have appealed to this court.

The plaintiffs have not favored us with a brief. The record shows that the answer of the Simpson & Webb Furniture Company was not signed by it or by its solicitors, but the answer was responsive to the issues made by the complaint, and seems to have been treated by the parties and by the court as the answer of the said defendant corporation. We have held in the case of Fannie Coleman against Leo Bercher, this day decided, that the omission to sign a pleading is a formal defect or clerical mistake, which the court should allow to be corrected on motion. Where no objection is made in the court below on account of such defect, it can not be successfully urged here. *McLeran* v. *Morgan,* 27 Ark. 148.

The answer of the defendant corporation was responsive to the allegations of the complaint, and its answer inured to the benefit of all the defendants, for the reason that it stated a defense common to all of them. *Carpenter* v. *Ingram,* 77 Ark. 299 and cases cited; *Gunnells* v. *Latta,* 86 Ark. 304.

The answer of the defendant corporation was not verified, but no motion was made to require it to do so. The issues tendered by it were, therefore, before the court for judicial determination, and a decree could not be rendered upon the complaint alone, without evidence to support it, although it was duly verified. *Jackson* v. *Reeve,* 44 Ark. 496. See also *Conger* v. *Cotton,* 37 Ark. 286; *Quertermous* v. *Taylor,* 62 Ark. 598.

From the case of *State* v. *Hill,* 50 Ark. 458, to that of *Broadway* v. *Sidway,* 84 Ark. 527, the court has uniformly held that the better established rule unquestionably is that, before a court of equity will relieve against a judgment alleged to have been procured by fraud, the plaintiff must aver and prove that he has a defense to the action on its merits.

In the present case, the allegations of the complaint having been denied by the answer and no evidence having been taken to support the allegations thereof, the complaint must be said to be without evidence to support it, and the decree is erroneous.

The decree will therefore be reversed, and the cause dismissed.

WESTERN UNION TELEGRAPH COMPANY *v.* WEBB.

Opinion delivered March 28, 1910.

TELEGRAPHS AND TELEPHONES—NEGLIGENCE—EVIDENCE.—Where the complaint, in a suit against a telegraph company for negligence in the transmission of a message, alleged that the defendant was negligent in transmitting the message, evidence tending to prove that the defendant was negligent in delivering the message after it was transmitted was improperly admitted.

Appeal from Lonoke Circuit Court; *Eugene Lankford,* Judge; reversed.

STATEMENT BY THE COURT.

The Western Union Telegraph Company has appealed from a judgment rendered against it in the Lonoke Circuit Court in favor of Sidney B. Webb for damages for mental anguish, suffered by him on account of the alleged negligence of appellant in transmitting a telegram sent by him concerning the burial of

his mother. The complaint charges negligence on the part of appellant at Eudora, Arkansas, a relay station of appellant's line, and no allegation of negligence elsewhere is made in the complaint.

The facts, briefly stated, are as follows: The appellee, Sidney B. Webb, lived at England, Lonoke County, Arkansas. His mother was ill at a sanatorium at Shreveport, Louisiana. She died on the morning of the 4th day of December, 1908, and one of his brothers immediately telegraphed him, announcing her death, and notifying him that he would take her body for burial to Pioneer, Louisiana, their old home.

Appellee was in Jefferson County when he received the message, and at once started for Pioneer. When he reached Pine Bluff, Arkansas, he delivered to appellant for transmission about 10 o'clock P. M. the following message:

"Pine Bluff, Ark., Dec. 4, 1908.

"To Jesse and Joe Webb,

"Pioneer, La.

"I will arrive tomorrow, but use your judgment as to burial.

"Sidney."

He informed the agent that his mother was dead. That he was on his way to the place where she was to be buried, and that the message related to her burial. Appellee knew that his brothers did not live at Pioneer, but he knew they would go there with his mother's remains, and expected the message to be delivered to them or to their friends. Appellee at once proceeded on his journey, and on the same night reached McGehee, Arkansas, where he had to lay over until the next morning. On the morning of the 5th inst. he went to Eudora, Arkansas, where he again had to change trains. While there, he went into the telephone office about 12 o'clock M. for the purpose of sending a message to Pioneer, and while there he heard the agent of appellant, whose office was in the same room and who heard him trying to telephone to Pioneer about the burial of his mother, say to a fellow employee: "Here is that message that has been here for several hours. Haven't you got that message down there yet?" Appellee saw the message referred to, and said it was the one he had delivered to appellant for transmission. Appellee arrived at Pioneer about 4 o'clock P. M., and at once proceeded

to the burial ground, which was two or three miles distant, but on the way met his brothers returning from there.

Jesse Webb, for appellee, testified that they did not receive his brother's message until after they had returned from the burial, and that, had they received it in time, he would have awaited appellee's arrival before interring the body. He said the message was delivered to him by W. B. Redmond, a friend, about dark after he returned from the funeral.

The operator of appellant at Pioneer testified that it was a small place of five hundred inhabitants, and he usually kept office hours from 6 A. M. to 7 o'clock P. M., and that he delivered the telegram in question to B. K. Webb, a cousin of appellee, and his brothers between 9 and 10 o'clock on the morning of the 5th day of December, 1908.

Jesse Webb, for appellee, testified that B. K. Webb was at the funeral, and said nothing about having received the message.

George H. Fearons, Trimble, Robinson & Trimble and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

Pleadings are considered amended to conform to the proof only when no objection is made to the proof. 71 Ark. 197; 67 Ark. 142. Plaintiff must show that the addressee was at the destination of the telegram. 93 Ark. 415; 7 So. 419; 41 So. 405; 65 App. Div. (N. Y.) 149; 84 N. Y. S. 54; 32 S. W. 207.

George M. Chapline, F. T. Vaughan and *Palmer Danaher,* for appellee.

The undertaking of the telegraph company was to deliver the message to the addressee. 87 Mo. App. 533; 84 Ind. 176; 54 Mo. App. 391. A motion for a new trial on the ground of surprise is addressed to the sound discretion of the trial judge, and that will not be controlled by the appellate court unless clearly wrong. 34 Ark. 663; 18 Ark. 574; 20 Ark. 62; Hill on New Trials 379. It is not necessary to show that the addressee was at the destination of the telegram. 53 Ark. 434; 41 Ark. 79. Plaintiff is entitled to damages for mental suffering. 77 Ark. 531; 84 Ark. 457; 87 Ark. 303; 82 Ark. 526; 78 Ark. 545. A general objection to an instruction is not sufficient. 65 Ark. 54; 89 Ark. 24; *Id.* 537; 88 Ark. 181; 87 Ark. 396; 84 Ark. 81; 65 Ark. 255; 82 Ark. 555; *Id.* 387; 75 Ark. 325.

HART, J., (after stating the facts). The first and principal ground of reversal urged by counsel for appellant is that the court erred in admitting the testimony of Jesse Webb to the effect that the telegram in question was delivered to him by W. B. Redmond about dark after he had returned from the burial of his mother, and that this was the first time he had seen it. We are of the opinion that the court erred in admitting this testimony. The complaint specifically alleged that the negligence occurred at Eudora, and no charge of negligence elsewhere was made. The appellant joined issue on this alleged act of negligence, and prepared to meet it. In the midst of the trial the testimony referred to was offered. It tended to show negligence on the part of appellant at Pioneer, which was not in issue by the pleadings. Counsel for appellant objected to its introduction on this ground, and claimed that they were taken by surprise, and were not prepared to meet it. They asked that, if the pleadings should be considered amended so as to put it in issue as a new or additional ground of negligence, they be granted a continuance. The court, after some argument on the part of counsel on both sides in regard to the matter, granted leave to counsel for appellee to amend their complaint so as to charge negligence at Pioneer. Counsel for appellee declined to so amend, and the court permitted the testimony to be introduced over the objections of counsel for appellant. Their exceptions to the ruling of the court were saved, and the alleged error constitutes one of their grounds for a new trial. It will be seen that this is not a case where the pleadings will be considered amended to conform to the proof; for counsel for appellant specifically objected to the introduction of the evidence, and counsel for appellee, although granted leave to do so, declined to amend their pleadings so as to charge negligence on the part of appellant at Pioneer. The action of the court was in effect to permit a recovery upon an issue not in the case, and which could not be brought into the case because it had not been pleaded, and appellee specifically declined to plead it when granted leave to do so. We cite as bearing on the question and supporting the rule announced the following cases: *Westmoreland* v. *Plant*, 89 Ark. 147; *Choctaw, O. & G. Rd. Co.* v. *Donovan*, 71 Ark. 197; *St. Louis & S. F. Rd. Co.* v. *Vaughan*,

84 Ark. 311; *St. Louis, I. M. & S. Ry. Co.* v. *Power,* 67 Ark. 142; *St. Louis, I. M. & S. Ry. Co.* v. *Sweet,* 63 Ark. 563.

A recognition of the rule was made in the case of *Western Union Telegraph Co.* v. *Lewis,* 89 Ark. 375, in which we said: "It is insisted that the court erred in refusing to instruct the jury that there was no evidence of negligence at Abbott. There was no prejudice in this. At the conclusion of the testimony of the appellee, all evidence tending to show any negligence on the part of the company at Abbott was withdrawn from the consideration of the jury. The instructions of the court show that the case was submitted to the jury solely on the charge of negligence at Fayetteville. The minds of the jury were directed clearly and explicitly to the question of negligence at Fayetteville, and thus it appears that the question of negligence at Abbott was eliminated from the case."

This was not done in the present case. As we have already seen, the testimony was admitted over the objections of appellant, and after appellee had declined to amend his complaint to allege negligence at Pioneer.

The instructions given at the request of appellee and over the objections of appellant submitted to the jury the question of negligence of appellant generally, and without reference to the particular act of negligence alleged in the complaint.

Inasmuch as appellee on a new trial may elect, and be granted leave by the court, to amend his complaint to put in issue the alleged negligence at Pioneer, we need not consider the other assignments of error.

For the error in the admission of the testimony of Jesse Webb as indicated in the opinion, the judgment will be reversed, and the cause remanded for a new trial.

EL DORADO FARMERS' UNION WAREHOUSE COMPANY *v.* EUBANKS.

Opinion delivered March 28, 1910.

CORPORATIONS—LIABILITY OF SUBSCRIBER.—One who subscribed for a share in a corporation to be formed for the purpose of erecting and operating a cotton warehouse at a certain place cannot be compelled by

reason of such subscription to take stock in a corporation organized for "the purchase, operation and maintenance of cotton compresses, gins, grain elevators, wharves and public warehouses for the storage of any and all kinds of produce and commodities and the purchase and sale of same, and the carrying on of a general warehouse business."

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

W. M. Van Hook and *Powell & Taylor,* for appellant.

The defendant is liable on his subscription. 64 Ark. 637; 70 Ark. 451; 80 Ark. 543; 86 Ark. 287.

Marsh & Flenniken and *Warren & Smith,* for appellee.

Appellant could not sue for subscription after all the shares authorized by its charter had been taken. 24 N. Y. 159.

HART, J. This is an action by the Farmers' Union Warehouse Company, a corporation, to recover from the defendant, C. D. M. Eubanks, twenty-five dollars upon his subscription to stock in said corporation. It was begun before a justice of the peace. The judgment of the circuit court was in favor of the defendant, and the plaintiff has duly prosecuted an appeal to this court.

The facts are undisputed, and involve the single proposition as to the liability of the defendant to pay twenty-five dollars alleged to be due plaintiff on a subscription to stock. The contract was in writing, and recites that defendant subscribed for one share of twenty-five dollars in a corporation to be formed for the purpose of erecting and operating a cotton warehouse at or near El Dorado in Union County, Arkansas.

The corporation was organized, and its charter, among other things, provides:

"Third. The place of business is to be located at El Dorado, Union County, Arkansas, and its office for the transaction of business shall be in El Dorado, Arkansas, or at such other place as the board of directors may select.

"Fourth. The general nature of the business proposed to be transacted by this corporation is the purchase, operation and maintenance of cotton compresses, gins, grain elevators, wharves and public warehouses for the storage of any and all kinds of produce and commodities and the purchase and sale of same, and the carrying on of a general warehouse business."

"A material modification of the plan of a proposed corporation, so that the actual charter differs essentially from the corporation as contemplated by the subscription contract signed before incorporation, releases such of the subscribers as object thereto." Cook on Corporations (6 ed.), § 194; see also 10 Cyc. 405.

"Where the amount and nature of the capital stock, the business the corporation proposed to engage in and the situs of its organization are set out in the contract of subscription, a subscriber may defend an action on such subscription where, without his consent, and in the absence of estoppel or waiver, the corporation organized is different in purpose and character, or has a different capital, or varies in any essential particular, from the corporation described in the subscription contract. On this theory, a subscriber who contracted to take stock in a corporation to be formed for a particular and specified purpose can not, without his consent, be compelled to pay money towards the formation even for an additional and distinct purpose. In an action to enforce a subscription made to a corporation to be organized for a certain purpose, where a subscriber defended on the ground that the corporation had been organized for objects and purposes additional and different from that stated in the contract of subscription, it was claimed on behalf of the corporation that for the purposes of the organization of the corporation the subscribers who met and organized it were the agents of the subscribers not present. 'The answer to this contention,' said the court, 'is that if the subscribers with defendant are to be deemed his agents in the formation of a corporation, the extent of their authority as such agents only went to the formation of such a corporation as had been agreed upon, and when they went beyond the bounds thus set they exceeded, as against the non-consenting defendant, their authority, and their acts as to him were void." 4 Thompson on Corporations (2 ed.), § 3838. Many cases are cited illustrating the rule; but no useful purpose can be served by reviewing them here, for the application of the principle must be applied to the state of facts presented in each case.

In the subscription contract in the present case certain persons were appointed as a board of trustees for the subscrib-

ers, but their authority to act for them was expressly limited to powers therein set forth. The subscription contract provided that they should organize a corporation for the purpose of erecting and operating a cotton warehouse at or near El Dorado, Arkansas. No other purpose was mentioned in the contract, and it is manifest from the language of the instrument that none other was contemplated by the persons executing it. We recognize the well-established rule that when express power is granted to do a particular thing, this carries with it, by implication, the right to do any act which may be found reasonably necessary to effect the power expressly granted; but we do not think it can be said that the new and additional purposes named in the articles of incorporation can be said to be incidental to, or reasonably necessary to, the construction and operation of a cotton warehouse. It may be readily seen that a person might be perfectly willing to pay money and assume the responsibility of a stockholder in a corporation organized for the purpose of erecting and operating a cotton warehouse at a particular place, and still might be unwilling to embark in an enterprise which had for its object the erection of grain elevators at the same or a different place, as the board of directors might elect, or engage in the business of buying and selling grain. Such business is entirely distinct from, and in no sense an aid or adjunct to, the business of a cotton warehouse company. The formation of a corporation for the purpose and object expressed in the subscription contract was a condition precedent to the right of the plaintiff to recover. Instead of complying with the condition, new and additional powers essentially different from that provided in the subscription contract appeared in the articles of incorporation as formed, and thus enlarged the original undertaking and added new responsibilities and new hazards upon the corporation. Such act was a substantial departure from the plan originally contemplated as shown by the subscription contract, and constituted a breach of it, which released the dissenting stockholders from liability on their subscription contract.

Therefore it necessarily follows that the judgment must be affirmed.

T. & C. INSURANCE COMPANY v. FOUKE.

Opinion delivered March 28, 1910.

1. EVIDENCE—OPINION OF EXPERT.—It was not error to permit a witness experienced in the use of a blow lamp which he was using to remove paint from a building, and the negligent use of which by him is alleged to have set fire to the building, to testify that he was using the lamp carefully at the time, if it was impossible to present the facts fully to the jury. (Page 361.)
2. SAME—WHEN HARMLESS.—If it was error to permit a witness to testify that the employee of defendants, whose negligence is alleged to have caused the fire loss, was a skilled workman, such error was rendered harmless by an instruction to the effect that if plaintiff's house was set on fire by the use of a blow lamp in the hands of defendants' employee, then, before they could find for the defendants, they must prove "that said employee was a competent man and used due care in the use of said lamp." (Page 362.)
3. NEGLIGENCE CAUSING FIRE—PRESUMPTION—INSTRUCTIONS.—It was not error to refuse to instruct the jury that if the fire in question was caused from a blow lamp in the hands of defendants' employee then the presumption arose that it occurred by reason of defendants' negligence, and that the burden of proof was upon defendants to overcome this presumption, where the court had instructed the jury that if they found that defendants' employee caused the fire they must return a verdict for plaintiffs unless the defendants showed that their employee used ordinary care to prevent setting fire to the building. (Page 363.)
4. INSTRUCTIONS—WHEN ABSTRACT.—A requested instruction, in an action against painters for negligently burning a house while removing old paint, that if defendants agreed to do the work in a certain manner, and adopted a more dangerous method, then defendants would be liable was properly refused where plaintiffs consented to the method of doing the work and it was the only practical method. (Page 363.)

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

Action by the T. & C. Insurance Company and others against G. W. Fouke and others. From a judgment for defendants plaintiffs have appealed.

Frank S. Quinn and *R. M. Mann,* for appellant.

It was error to admit evidence to show that the lamp was used carefully. 55 S. W. 534; 13 S. E. 459; 11 S. E. 499. As to whether it was used carefully was a question for the jury.

81 Ark. 591; 110 S. W. 99; 67 Ark. 371. It is error to admit evidence of the general skill and competency of an employee. 85 Fed. 353; 115 Fed. 268; 76 Ark. 302; 58 Ark. 454; 3 L. R. A. 363; 54 N. W. 208; 48 S. W. 835. Ordinary care in all cases is proportioned to the danger to be apprehended. 61 Ark. 381; 65 Ark. 255; 84 Ga. 420; 11 S. E. 499; 94 U. S. 454; 69 N. E. 557; 80 S. W. 429; 166 U. S. 617; 89 S. W. 324; 86 Ark. 329; 89 Ark. 522. It is error to submit question to the jury about which there is no evidence. 78 Ark. 553; 72 Ark. 440; 88 Ark. 20.

Webber & Webber, for appellee.

The witness' statement that the lamp was carefully used was properly admitted. Thom. on Neg., § 7750, 7751, 7752, 7753. The *onus probandi* is upon appellant throughout. 163 N. Y. 447; 57 N. E. 751; 82 N. E. 1025; 16 L. R. A. (N. S.) 527. On the doctrine of *res ipsa loquitur,* see 15 L. R. A. 33; 184 Pa. St. 519; 39 L. R. A. 842; 41 L. R. A. 478; 21 L. R. A. 256.

FRAUENTHAL, J. This was an action to recover damages done to a frame dwelling in the city of Texarkana caused, as it was alleged, by the negligent setting out of fire. The house was owned by F. W. Hill, one of the plaintiffs below, and at the time of the fire it was insured against loss or damage from such cause by the other plaintiff, T. & C. Insurance Company, who, under the terms of the policy of insurance, having paid the damage to the house, became subrogated to all rights and claims which said Hill had against the defendant, and joined said Hill in this suit.

The owner employed the defendants to repaint the dwelling, and they agreed to steel brush and sand paper said building to a smooth surface before repainting it. They proceeded with the work, and claimed to have completed same in accordance with the contract. The owner claimed that a portion of the house had not been properly repainted, but made full payment to the defendants for the work. The defendants agreed to repaint this portion of the house, but told the owner that it could only be done by burning off the paint already put on that portion of the house, and the owner assented to the work being done in that manner. In order to remove the paint,

it was necessary to burn it off with a blow lamp. This was done by applying the flames to the paint on the surface of the wood and following it with a knife and scraping off the paint while thus heated by the flames. The defendants sent one of its employees to do the work, and while he was thus engaged the house caught fire. At this time the house was occupied by a tenant who had built a fire in his stove in the house on the same day. There was a conflict in the testimony as to the manner in which the fire occurred. The plaintiff contended that it was caused by the flames from the blow lamp, and the defendants claimed that it was caused by a defective flue in the house. There was sufficient evidence introduced to sustain a finding that the fire had occurred from either cause.

Upon its own motion the court gave the following instruction to the jury:

"B. Under the pleading and evidence in this case the burden is on the plaintiff to show by a preponderance or greater weight of the evidence that the defendants, through agents or employees, set out the fire that caused the destruction of the property in question. If you fail to find that from a preponderance of the testimony, your verdict will be for the defendants. But if you find from a preponderance of the evidence as heretofore told you that the defendants did, through their agents in the execution of this work, set out the fire that caused the destruction of the property in question, then you will find for the plaintiff, unless the defendants have shown, either from their own testimony or from all the testimony in the case, that they used ordinary care in the execution of the work to prevent the setting out of the fire. What is meant by the term 'ordinary care' in the foregoing instruction is that the defendants used such care as an ordinary prudent man would use in the execution of similar work under similar circumstances."

At the request of the plaintiffs it gave the following amongst other instructions:

"6. You are instructed that if you believe from the evidence that the employee of defendants, in burning the paint off said dwelling house mentioned in plaintiff's complaint with a lighted blow lamp, failed to use such care as the nature of the employment and the situation and circumstances required of an

ordinarily prudent person, having had experience and skill in such work, and that by reason thereof the said house was set on fire, by which said house was destroyed or damaged, you will find for the plaintiffs."

At the request of the defendants the court gave the following instruction:

"3. If you believe from the evidence that the house was set on fire by the use of the blow lamp in the hands of defendants' employee, but that said employee was a competent man, and used due care in the use of said lamp, and that such fire was the result of causes beyond his knowledge and control, your verdict should be for the defendants."

The jury returned a verdict in favor of the defendants, and the plaintiffs prosecute this appeal.

The plaintiffs do not contend that there was not sufficient evidence adduced in the trial of the case to sustain the verdict; but they urge that errors were committed by the trial court in the admission of certain testimony and in the giving and refusing certain instructions. The employee of the defendant who was engaged at the work at the time of the fire was a witness in the case. He described in detail the manner in which he was using the lamp and doing the work. The work required skill and expertness in the handling of the lamp, and in obtaining the proper heat when the flames were applied to the wood surface. He testified that he had twenty years' experience in the work, and was skillful in the performance of the duties of the undertaking. Over the objection of plaintiffs, he was asked by counsel for the defendants whether "the lamp was used carefully at the time," to which he replied that it was. Counsel for plaintiffs urge that this testimony was inadmissible because it was but the opinion of the witness. We do not think that the admission of this testimony was erroneous. The witness had testified in detail as to the manner in which he handled the lamp and did the work in order to show the care with which it was done. It was difficult, if not almost impossible, to present the manner in which the lamp was manipulated, as it was done with quick movements; the witness had given all the details to which he could give expression, and these facts were presented to the jury so that they understood

that this inference of the witness was based upon these facts that they were to pass on themselves, and they could not have been misled thereby. It is true that ordinarily the opinion of a witness as to whether or not an act was done carefully is not admissible. But "where the facts are of such a character as to be incapable of being presented with their proper force to any one but the observer himself, so as to enable the tryers to draw a correct or intelligent conclusion from them, without the aid of the judgment or opinion of the witness who had the benefit of personal observation, he is allowed, to a certain extent, to add his conclusions, judgment or opinion." 6 Thompson on Negligence, § 7750.

Furthermore, the witness was giving evidence in regard to a matter that required the aid of an experience outside of that possessed by the jury to fully understand it. The testimony related to a character of work not universally understood, and to the manipulation and working of a mechanical contrivance that is not generally known. The witness possessed special skill and expertness in regard to the matter, and therefore his inferences and conclusions relative thereto were admissible as those of a skilled or expert witness. 1 Greenleaf on Evidence (16th Ed.) 441b; 6 Thompson on Negligence, § 7749; 17 Cyc. 64.

It is also urged that error was committed by the lower court by permitting the witness Faison to testify that the employee who was using the blow lamp at the time of the fire was a skilled workman. But we do not think that this error, if any, was or could have been prejudicial by reason of instruction number 3, which was given to the jury at the request of the defendant. By that instruction the court told the jury, in effect, that if the house was set on fire by use of the blow lamp in the hands of the defendants' employee, then, before they could find for the defendants, they must prove "that said employee was a competent man and used due care in the use of said lamp." The court thus imposed the burden upon the defendants of proving that due care was used by the employee in the use of the lamp in addition to proving that the employee was a competent workman. The error, if any, of permitting testimony to be introduced to show that this employee was a competent workman was rendered harmless by this instruction, which

required the defendants to prove also that the employee was free from negligence at the time of the fire.

The plaintiffs requested the court to instruct the jury, in substance, that if they found that the fire was caused from the blow lamp in the hands of defendants' employee, then the presumption arose that it occurred by reason of defendants' negligence, and that the burden of proof was placed upon the defendants to overcome this presumption. The court refused to give this instruction; and in this ruling we do not think that the court committed prejudicial error. The court gave the above instruction "B" upon its own motion, and therein substantially instructed to the same effect. The court therein told the jury that if they found that defendants' employee caused the fire then they must return a verdict for plaintiffs unless the defendants showed that their employee used ordinary care in the execution of the work to prevent the setting out of the fire. Presumptions relate to matters of evidence, and indicate upon which party rests the burden of proof. By the instruction requested by them the plaintiffs desired the court to tell the jury that if the defendants caused the fire then it would be presumed that it was caused by their negligence, and the burden to overcome the presumption of negligence was on the defendants. Now, negligence is but the want of ordinary care, and if ordinary care has been exercised then there is no negligence. In the instruction given by the court it told the jury that if the defendants caused the fire then they must show that they used ordinary care; otherwise to return a verdict for the plaintiffs. This in effect told the jury that the burden was on the defendants to show that their employee was not guilty of negligence, in event they found that the fire was caused by defendants' employee.

The plaintiffs requested the court to instruct the jury, in substance, that if the defendants agreed to do the work of repainting in a certain manner and adopted another and more dangerous mode of doing the work which caused the fire, then the defendants would be liable. But the undisputed evidence is that the plaintiffs consented that the work of removing the paint should be done by burning it off, and that this was the only practical mode of removing it. The instruction was therefore without the evidence adduced in the case, and was abstract. The court did not commit error in refusing it.

The plaintiffs requested that certain of the instructions given be modified, so that in effect they should tell the jury that proof that the defendants' employee had caused the fire could be made by testimony that was either direct or circumstantial; but we think that this was sufficiently done by the other instructions that were given.

The plaintiffs urge a number of other errors which they claim were committed by the lower court in its rulings upon giving instructions and in refusing other instructions requested by it. We do not think it would serve any useful purpose to further set out these contentions in detail. We have carefully examined into each of these alleged errors, and we do not find that the court committed any prejudicial error in any of its rulings, nor that plaintiffs were deprived of a fair trial of this cause.

This action is the second suit brought by reason of this fire against the defendants. The other case is reported in 90 Ark. 247, under the style of *Nebraska Underwriters Insurance Co.* v. *Fouke*. That case involved the damage to the personal property situated in the dwelling. In that case substantially the same evidence was introduced as in this case; and the same instructions were in effect given, except that the instruction set out in the opinion in that case, and which was refused, was given in this case. In the opinion rendered in that case we did not specifically say that we did not find any error in the trial of the case other than in the refusal to give the instruction therein set out; but we were of the opinion then, and we are of opinion now, that no other error was committed by the court in its rulings upon the instructions in that case. And we are of the opinion that no prejudicial error was committed by the lower court in the trial of this case.

The judgment is affirmed.

RUCKER v. MARTIN.

Opinion delivered March 28, 1910.

1. PLEADING—AMENDMENT—DISCRETION OF TRIAL COURT.—In allowing amendments of pleadings to conform to the proof a large discretion is vested in the trial court, and its action will be sustained upon appeal unless there has been a manifest abuse of discretion, and the complaining party has been materially prejudiced thereby. (Page 366.)
2. SAME—AMENDMENT TO CONFORM TO PROOF.—Where the trial court would have been justified in permitting a pleading to be amended, even after the report of a master had been filed, and where evidence as to the issue was fully developed, and the case was fully tried by the lower court, the cause will be tried on appeal as if the pleading had been amended to conform to the proof. (Page 367.)

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

S. S. Semmes, for appellant.

To entitle defendant to recover for the value of improvements made, he must claim them in his answer. 75 Ark. 146; 15 Cyc., p. 234.

W. J. Lamb and *J. T. Coston,* for appellee.

No variance between the pleading and proof will be deemed material unless it misleads the adverse party. Kirby's Dig., § 6140. The pleadings will be treated as amended to correspond with the proof. 29 Ark. 330; 62 Ark. 434.

FRAUENTHAL, J. This is an appeal from so much of the decree of the lower court as gave to the appellees compensation for the value of improvements made by them upon the land in controversy. The appellants instituted this suit in the circuit court for the recovery of the land, and in their complaint set forth their written evidences of title. The appellees filed an answer, in which they alleged that they were the owners of the land and took possession thereof under certain written evidences of title. In their answer they did not allege that the appellees had made any improvements or paid any taxes on the land, and did not therein pray for any recovery thereof. Without objection the cause was transferred to the chancery court, and that court entertained jurisdiction thereof, and proceeded to try the case without any objection from any of the parties. The cause was heard by the court upon the testimony of a num-

ber of witnesses taken by depositions, and the court entered a decree in favor of the appellants for the recovery of the land; but in the same decree it found that appellees were entitled to recover for the value of the improvements made by them on the land during certain years, and the taxes paid by them less the rents; and it appointed a master to take testimony relative to said improvements, taxes and rents and to state an account as to same. To this finding and decree no objection was made by either party. Thereafter the appellants and appellees introduced witnesses before said master, who gave their depositions relative to the improvements made on the land and their values, the taxes paid and the rents of the land. These matters were fully investigated and developed by this testimony, and the appellants made no objection to the introduction of any of this testimony. At the following term of the court the master made his report, and the appellants filed exceptions thereto, one of which was on the ground that allegations relative to improvements had not been made in the answer. The court approved the report of the master, and entered a decree in favor of appellees for the value of the improvements.

The sole ground presented by counsel for appellants for his contention that the value of the improvements should not be allowed is that the answer contains no allegations of any improvements having been made. He does not claim that the appellants were taken by surprise by the consideration of the issue as to improvements, or that the issue was not fully developed by the evidence taken thereon. He does not contend that the finding of the chancellor as to the value of the improvements is not sustained by the evidence, or that the appellees would not have been entitled to recover their value if the making of the improvements had been alleged in the answer. It is true that in a suit for the recovery of land, if the defendant desires to claim the value of improvements made thereon by him, he should make proper averments relative thereto in his answer; and if he does not do this, no error is made by the lower court in refusing to admit testimony relative thereto. *Carraway* v. *Moore,* 75 Ark. 146; 15 Cyc. 234.

But an entirely different question arises when the lower court has admitted testimony relative to such improvements without objection, and the issue is as fully developed by the evi-

dence as if the allegations relative thereto had been made in the pleading. In such event upon appeal the error, if any, must have been prejudicial, so as to have worked an injustice. It will be deemed then that the pleading has been amended to conform to the proof. The statutes of amendments are remedial, and they should be and are construed and applied liberally in favor of the privilege of amending. By section 6140 of Kirby's Digest it is provided that "no variance between the allegation in the pleading and the proof is to be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." By section 6145 of Kirby's Digest it is provided that the court may at any time in furtherance of justice amend any pleading by inserting other allegations material to the case. And by section 6148 of Kirby's Digest it is provided: "The court must, in every stage of an action, disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

Under these provisions of the statute it has been held by this court that where the parties to a cause have directed their proof to a certain issue consistent with the original claim or defense, but not within some allegations made by the pleadings, an amendment of such pleadings will be allowed to conform to the proof. *Trippe* v. *DuVal,* 33 Ark. 811; *Caldwell* v. *Meshew,* 53 Ark. 263; *McMurray* v. *Boyd,* 58 Ark. 504; *Railway Company* v. *Dodd,* 59 Ark. 317.

And such amendment may be allowed after all the evidence has been admitted, or after a reference to a master or after his report. 1 Enc. Plead. & Prac. 483; 31 Cyc. 401.

The allowance of such an amendment is left largely to the discretion of the lower court, and such action will be sustained upon appeal unless there has been a manifest abuse of discretion and the complaining party has been materially prejudiced thereby. *Mohr* v. *Sherman,* 25 Ark. 7; *King* v. *Caldwell,* 26 Ark. 405; *Atkinson* v. *Cox,* 54 Ark. 444; *McFadden* v. *Stark,* 58 Ark. 7.

In this case, therefore, the lower court would have been justified in permitting the pleading to have been amended by

inserting allegations as to this issue at any time of the proceeding, even after the report of the master had been filed, if it had been asked; but the court seems to have proceeded upon the principle that it would consider the amendment as made, without making a formal order to that effect. In such case where evidence as to the issue omitted from the pleading has been fully developed, and the matter has been fully tried by the lower court, this court upon appeal will consider that the pleading has been amended to conform to the proof. In 1 Ency. Plead. & Prac. 608, it is said: "Defects in the pleadings or proceedings which the trial court would have given leave to amend, had application been made, will be considered as amended in the appellate court in order to support the judgment where the merits of the case have been fully tried." *Hanks* v. *Harris,* 29 Ark. 330; *Texarkana Gas & Elec. Light Co.* v. *Orr,* 59 Ark. 215; *Shattuck* v. *Byford,* 62 Ark. 434; *Bank of Malvern* v. *Burton,* 67 Ark. 426.

In this case an order was made by the court directing a master to take proof as to this sole issue. At the time no objection was made to this order by the appellants; and they and the appellees fully developed upon both sides their evidence as to that issue. The appellants were in no manner misled or prejudiced by the failure to formally amend the answer by inserting allegations as to this issue. The court and the parties considered it so amended, and upon this appeal it will be considered as so amended.

The decree is affirmed.

STATE v. SMITH.

Opinion delivered March 28, 1910.

APPEAL AND ERROR—APPEALS BY STATE IN CRIMINAL CASES.—An appeal by the State in criminal cases where there can be no reversal should not be taken by the Attorney General, under Kirby's Digest, § 2603, unless an opinion of the Supreme Court in such case would serve to secure the correct and uniform administration of the law.

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

Hal L. Norwood, Attorney General, and *Wm. H. Rector*, Assistant, for appellant.

FRAUENTHAL, J. The defendant was indicted by the grand jury of Scott County charged with the crime of libel. He demurred to the indictment on a number of grounds, one of which was that the indictment did not state facts sufficient to constitute the crime of libel; but the lower court overruled the demurrer. He then entered a plea of not guilty to the indictment, and was placed upon trial before a petit jury. A number of witnesses testified in the case, and after both the State and defendant had rested the court directed the jury to return a verdict of not guilty, which was done; and a judgment was entered discharging the defendant. The State, by its prosecuting attorney, then prayed an appeal to this court. By section 2604 of Kirby's Digest it is provided that "a judgment in favor of the defendant which operates as a bar to a future prosecution of the offense shall not be reversed by the Supreme Court." The crime of libel may be punished by imprisonment (Kirby's Digest, § 1851), and therefore a judgment in favor of the defendant upon a trial upon that charge operates as a bar to a future prosecution (art. 2, § 8, Const. 1874), and cannot be reversed by this court. But this appeal has only been taken by the law officers of the State in order to obtain a decision of the Supreme Court upon questions they consider important to the correct and uniform administration of the criminal law. This appeal is taken in pursuance of sections 2602 and 2603 of Kirby's Digest, and the provisions thereof have been duly complied with. Section 2603 provides that "if the Attorney General, on inspecting the record, is satisfied that error has been committed to the prejudice of the State, and upon which it is important to the correct and uniform administration of the criminal law that the Supreme Court should decide, he may, by lodging the transcript in the clerk's office of the Supreme Court within sixty days after the decision, take the appeal."

The object and purpose of this provision of the statute is to obtain the decision of this court upon questions of the criminal law, so that it may serve to secure the correct and uniform administration thereof. But, if the decision of the question presented by the appeal would not serve such purpose, then it

would not be of sufficient importance under this provision of the law to render an opinion thereon, and the appeal should not in such case be entertained. In the case at bar the legal question as to the sufficiency of the indictment was by the lower court decided in favor of the State, from which ruling therefore no appeal has been taken to this court. The appeal is only taken from the ruling of the court that all the evidence introduced upon the trial was not sufficient to convict the defendant of the crime charged. The ruling was therefore rather upon the sufficiency of the testimony than upon a question of law.

It is hardly probable that the testimony that is adduced in any two given cases will be so much alike that a decision upon the facts in one case would serve as an authority in the other. The testimony in cases containing similar charges is usually so different, and the inferences that may be drawn from the facts narrated are so varying, and the circumstances of each case are so peculiar to itself, that we do not think that an opinion given by this court upon the evidence adduced in the trial of a charge would serve any useful purpose as an authority in a case founded only on a similar charge. We do not think, therefore, that it is important to the correct and uniform administration of the criminal law that the evidence adduced in this case should be set out in detail, together with the inferences that might legally be drawn therefrom, and our opinion given thereon as to whether or not it was sufficient to warrant a conviction of the crime charged against the defendant.

The application, therefore, made by this appeal for the decision of the court upon the question presented is denied.

HENDERSON v. DONIPHAN LUMBER COMPANY.

Opinion delivered April 4, 1910.

WATERS—USE OF STREAM—NEGLIGENCE.—A complaint which alleges that defendant negligently placed a large number of logs in a navigable river, and that the death of plaintiff's intestate was caused by a ferry boat in which he was crossing the river being overturned by

such logs, and by the defendant's failure to look after such logs, is *held* to state a cause of action.

Appeal from White Circuit Court; *Hance N. Hutton,* Judge; reversed.

Rachels & Robinson, for appellant.

This court will take judicial notice of the fact that Little Red River is a navigable stream. 11 Wall. 411; 1 Greenl. Ev., § 6; 26 Kan. 682; 28 Ind. 257; 10 Abb. N. C. 107; 64 N. W. 239. The allegations of the complaint are sufficient averments that it is navigable. 39 Ark. 403. A river of sufficient size to float logs in large quantities is a public highway, and is governed by the same rules of law. 39 Ark. 403; 53 Minn. 493; 53 Me. 256; 54 N. H. 545; 25 Fla. 1; 35 N. Y. 454; 42 Wis. 203; U. S. Rev. Stat., § 5251. The logs constituted an unlawful obstruction to navigation. U. S. Comp. Stat. 1901, p. 3540; Kirby's Dig., § 2989; 212 U. S. 406. The complaint states a cause of action. Kirby's Dig., § 6529; 16 Ark. 308; 44 Ark. 414; 63 Ark. 65; 54 Ark. 209; 61 Ark. 381. It was negligence not to give notice to the man in charge of the ferry of the approach of the logs. 75 Conn. 548. Defendant is liable for the damages caused by the logs. 1 Q. B. Div. 314; 54 Ark. 209; 61 Ark. 381; 59 Ark. 215; 16 Ark. 308.

S. Brundidge, Jr., and *H. Neelly,* for appellee.

To recover damages on acount of the unintentional negligence of another, it must appear that the injury was the natural and probable consequences thereof. 69 Ark. 405; 28 S. W. 416; 72 Ala. 411; 53 N. E. 558; 100 Fed. 359; 105 U. S. 249; 57 S. W. 770; 94 U. S. 469; 28 So. 26; 67 N. E. 923; 68 Pac. 608. The allegations of negligence are too remote to constitute a cause of action. 67 N. E. 409; 63 Fed. 400; 42 Atl. 60; 52 N. E. 679; 62 N. E. 349.

McCULLOCH, C. J. This is an action at law, instituted by the administratrix of the estate of Vinson Henderson, deceased, to recover damages sustained by the widow and next of kin of said decedent by reason of his death, which is alleged to have resulted from drowning in Little Red River, on account of the overturning and sinking of a ferry boat, on which he was a passenger. It is alleged that the boat was overturned by loose floating logs, which had been placed in the river by

defendant, and that the accident resulted from defendant's negligence in "placing logs loose in said river in such quantities and in such manner, and with such lack of aftercare and oversight as that the ordinary action of the current in said river caused them to occupy exclusively the surface thereof and to accumulate in jams and completely occupy the river from bank to bank." The court sustained a demurrer to the complaint on the alleged ground that it stated no cause of action, and plaintiff appealed.

The complaint is unnecessarily long, and contains many repetitions and immaterial statements. The court should have required plaintiff to recast the complaint so as to make it conform to the statute, which directs that it shall contain "a statement in ordinary and concise language, without repetition, of the facts constituting the plaintiff's cause of action." Kirby's Digest, § 6091, subdiv. 3. The question now before us for decision is whether or not the complaint stated facts sufficient to constitute a cause of action against defendant. Purged of its surplusage, the complaint sets forth in substance the following state of facts:

That defendant on, and immediately prior to, November 29, 1908, was engaged in the business of transporting logs in large quantities down Little Red River by placing them loose in the water and floating or driving them down stream, and that in so doing on the occasion specified it placed loose logs in the river in such quantities that the ordinary action of the current caused them to accumulate in large jams and completely occupy the river from bank to bank, to the exclusion of all other navigation; that this occurred at a point in the river above a road crossing where there was being operated a public ferry, known as Faulkner's Ferry, which was located just below a bend in the river, so that persons operating the ferry boat could not foresee the approach of dangerous objects above the bend; that defendant was negligent in permitting the loose logs to accumulate in such quantities, and in failing to exercise ordinary care to protect persons and property rightfully on the river from the danger thus created; that the defendant set no watch over the pile or jam of logs, and took no steps to warn other persons of the danger, although it knew, or by the exercise of

ordinary care could have known, that the jam was likely to be broken at any time by the ordinary current of the river and rush down upon and injure other property in the river and persons navigating the river at points below the jam; that defendant knew that the river was rising at that time, and that it would render the jam of logs more dangerous to other navigation, and took no steps to avoid the danger and prevent injury; that defendant knew that below said jam there was the public ferry boat customarily plying the river back and forth from bank to bank, at frequent intervals, and knew, or by the exercise of ordinary care might have known, that the great mass of logs accumulated above the ferry was rushing down and had almost reached the ferrying place, and took no steps to warn those operating the ferry of the approaching danger; that on account of such negligence the ferry boat on which Henderson was a passenger was struck amid stream and overturned by the down-rushing mass of logs, and Henderson was drowned.

We are of the opinion that the complaint stated a cause of action, and that the demurrer should have been overruled. Mr. Farnham in his work on Waters and Water Rights (vol. 1, § 27), says that "the rules which govern the use of a body of water for purposes of navigation are similar to those governing the use of highways in general," and that all who use a stream or body of water for purposes of navigation must do so in such a way as not to unreasonably interfere with the rights of others. What constitutes reasonable use depends on the circumstances of each particular case.

The same author in another place (sec. 33) says: "A person attempting to exercise his right to navigate a public body of water must exercise due care not to injure the property of other persons which may be found upon the water or along the shores." And on the subject of floating logs on navigable waters he makes the following statement of the law (sec. 34): "The floating of logs being one of the uses to which navigable waterways may be put, there is no liability for the result of a careful and reasonable exercise of such use. * * * In the presence of concurrent rights, one to float timber, and the other to have property free from injury by the displacement of water and contact with floating timber, the former must be exercised

with ordinary care that injury should not be done to the latter."

By way of illustration of the above announced rule, the author says (sec. 31): "A slow-sailing tow may not occupy unreasonably the entire channel of the river and thus impede its navigation by all other vessels. A leviathan may not rush through the water with a speed that will overwhelm in its surges all the crafts ordinarily to be found on a river. * * * The navigator of a public river must conduct his craft with ordinary care and caution, and with the same circumspection and in that careful, prudent manner which would seem to be dictated by common sense, and with due regard to the rights, property and lives of others."

The Kentucky Court of Appeals, in a case involving the question of liability for damage caused by floating logs in a stream, said: "Those lawfully using the stream as a highway for transporting their commodities to market must do so with care and due regard for those whose rights are at least of equal dignity with their own. In this way all may fully enjoy the benefits offered by this highway of nature." *James* v. *Carter,* 96 Ky. 378. See also *Sullivan* v. *Jernigan,* 21 Fla. 264; *The Athabasca,* 45 Fed. 651; *Gulf Red Cedar Co.* v. *Walker,* 132 Ala. 553; *Outterson* v. *Gould,* 77 Hun 429; *Field* v. *Apple River Log Driving Co.,* 67 Wis. 569.

Now, applying the principles above stated to the facts set forth above in the complaint, we think a cause of liability for damages is made out. Little Red River is a navigable stream, used mainly for floating logs. Defendant and others have the right to use it for that purpose, even without rafting the logs; but in doing so they must exercise ordinary care to avoid injuring others who rightfully use the river for purposes of navigation. Those who use the river must take notice of defendant's use in floating logs in the usual way, and must exercise care to avoid contact with the logs. The question whether defendant made use of the stream in a careful manner—that is to say, free from negligence under the circumstances of the case—and whether the injured party exercised care under the circumstances for his own safety, are questions for a jury to pass on. According to the allegations of the complaint, defendant placed a large quantity of the logs in the river, and

without protection or warning to others allowed them to accumulate in a great mass or jam under circumstances which it should have known would, in the ordinary course of events, result in injury to others when it was broken by the rising waters and carried down the stream, filling it from bank to bank. If these facts are proved, the question should be submitted to a jury to determine whether or not it constituted negligence under the circumstances. The fact that Congress, which possesses the power, or the Secretary of War to whom Congress has delegated the power, has not prescribed regulations for floating loose timber on streams in which that is the principal method of navigation, does not leave entirely unrestricted the rights of one using such navigable stream. One so using it must exercise care in so doing, even where no regulations are prescribed governing the use.

The judgment is therefore reversed, and the cause is remanded with directions to overrule the demurrer to the complaint.

BARNETT v. GLOVER.

Opinion delivered April 4, 1910.

CONTRACTS—IMPOSSIBILITY OF PERFORMANCE.—Amendment No. 10 to the State Constitution, which was proposed by the Legislature of 1907 to be voted on in 1908, provided that in certain cases bonds could be issued by cities and towns, but that they should not bear a greater rate than five per cent. per annum, and that a special tax not to exceed three mills might be levied. Plaintiff's complaint alleged that he and defendant agreed that if plaintiff would demonstrate that if this amendment was adopted bonds bearing five per cent. interest would mature in one hundred years, bonds bearing four per cent. would mature in fifty years, bonds bearing three per cent. would mature in thirty-three and one-third years, and bonds bearing two per cent. would mature in twenty-five years, defendant would pay plaintiff $500, and that plaintiff had performed the contract. *Held* that the complaint failed to state a cause of action, as the problem was impossible of solution.

Appeal from Hot Spring Circuit Court; *W. H. Evans*, Judge; affirmed.

W. T. Tucker, for appellant.

Any benefit accruing to him who makes the promise, or any trouble, loss, or disadvantage undergone by the other, is a sufficient consideration to sustain a promise. 24 Ark. 201; 1 Ark. 229; 21 Ark. 20; 22 N. H. 248; 5 Pick. 384; 21 Wend. 588; 2 Hill 606; 33 Ark. 97.

E. H. Vance, Jr., for appellee.

McCULLOCH, C. J. The circuit court sustained a demurrer to the following complaint, and the plaintiff appealed:

"Comes the plaintiff, Horatio Barnett, and for his cause of action against the defendant, D. D. Glover, complains and alleges that on the 5th day of March, 1908, the plaintiff and defendant made a verbal contract whereby the plaintiff agreed to produce the figures so arranged that it would show that if Amendment No. 10 was adopted, and bonds issued bearing five per cent. interest, they would mature and pay out in one hundred years, and bonds issued bearing four per cent. interest would mature and pay out in fifty years, and bonds issued bearing three per cent. interest would mature and pay out in thirty-three and one-third years, and bonds bearing two per cent. interest would mature and pay out in twenty-five years, for the benefit of the defendant, D. D. Glover; and for producing the figures so arranged as to show the arithmetic proposition the said D. D. Glover agreed to pay the plaintiff the sum of five hundred dollars. That the plaintiff performed the contract upon his part by producing the figures so arranged as to show the maturity of the bonds, as heretofore alleged. That the agreement was to pay the five hundred dollars promised to be paid when the work was accomplished, which was on the 6th day of August, 1908; and, it not being paid as promised and agreed, the plaintiff on the 5th day of September, 1908, drew on the defendant for the same, and defendant let it go to protest, and the protest fees were $2.65."

Amendment No. 10 mentioned in the complaint manifestly refers to an amendment to the Constitution of the State which was proposed by the General Assembly of 1907, to be voted on at the election held in September, 1908, and the same reads as follows:

"Neither the State nor any city, county, town or other

municipality in this State shall ever loan its credit for any purpose whatever, nor shall any county, city, town or municipality ever issue any interest-bearing evidences of indebtedness, except such bonds as may be authorized by law to provide for the construction and maintenance of public highways in counties, cities and towns, and the construction, purchase and maintenance of public improvements of a general nature in cities and towns. Provided, that bonds or evidences of indebtedness shall not be issued for an amount more than ten per cent. of the assessed valuation of all real and personal property in city town or county proposing to issue same. Such bonds shall not bear a greater rate of interest than five per cent. per annum, and, in order to provide for the payment of such bonds and interest, a special tax not to exceed three mills on the dollar, in addition to the rate of taxation now authorized, may be levied by said counties, cities and towns. And the State shall never issue any interest-bearing treasury warrants or scrip."

The proposition stated in the complaint, aside from its novelty, is incomplete on its face and impossible of solution. The proposed amendment did not fix the amount of bonds to be issued nor the rate of tax levy to pay them. Only the maximum was stated, and either could have been less than the maximum. The omission of the amount of the bonds to be issued, the amount of the assessed valuation of property and the rate of taxation is fatal to the solution of the proposition. We cannot assume that a bond issue up to the maximum amount, and a tax levy up to the maximum rate, was intended. If the agreement to solve the proposition be a valid contract in other respects, we know judicially that the plaintiff did not and cannot perform it. Therefore, the complaint stated no cause of action. The plaintiff may as well have alleged that he undertook for a valuable consideration to fly to the moon and did so.

Affirmed.

BRANCH v. GERLACH.

Opinion delivered April 4, 1910.

1. APPEAL AND ERROR—QUESTION NOT RAISED BELOW.—The objection that a municipal ordinance imposed an excessive fee for a permit to make a sewer connection will not be considered on appeal if it was not raised in the trial court. (Page 379.)
2. MUNICIPAL CORPORATIONS—CONTROL OVER SEWERS.—Under Kirby's Digest, § 5722, *et seq,* giving to cities control over sewer connections, a city is authorized to require a separate connection for each lot. (Page 379.)

Appeal from Pulaski Circuit Court, Second Division; *F. Guy Fulk,* Judge; affirmed.

Moore, Smith & Moore and *H. M. Trieber,* for appellant.

The tax imposed is *ultra vires* and void. 30 Ark. 435. The courts will interfere to correct an unreasonable exercise or a mistaken application of the police power. 34 Ark. 603; 43 Ark. 82; 52 Ark. 201; 56 Ark. 370; 83 Ark. 351; 85 Ark. 590; 90 Ark. 127.

J. W. Blackwood, for appellee.

The ordinance is not void. 26 Ark. 527; 13 N. Y. 427; 167 Mo. 554; 64 L. R. A. 679. The tax is a proper charge. Acts 1889, p. 18; 53 Ark. 300; 90 Ark. 5. The presumption is that the ordinance is just, and the construction of it is for the court. 52 Ark. 301; 70 Ark. 30; 43 Ark. 82; 41 Ark. 485; The ordinance was authorized by the Legislature. Kirby's Dig., § 5722 to 5728; 53 Ark. 302; 90 Ark. 5; 2 Dillon, Mun. Corp., § 805; 54 O. St. 506; 94 Minn. 121; 12 R. I. 310; 175 Mass. 242; 182 U. S. 398; 126 Mass. 431; 177 Mass. 39; 60 S. W. 116.

McCULLOCH, C. J. Appellant prays for a writ of mandamus to compel the city clerk of Argenta to issue permits for sewer connection with houses on his lots. He demanded a permit for one sewer connection with several houses on different lots in the same block, and the same was refused on the alleged ground that the ordinance of the city did not authorize a single permit for houses on more than one lot. The circuit court refused to grant the writ of mandamus, and an appeal was taken to this court.

The ordinance relied on to sustain the refusal to issue the

single permit for connection with more than one lot reads as follows:

"Sec. 2. That no person, company or corporation shall be permitted to connect with any sewer in the city of Argenta, built by the city and not by assessment on the property in the district, now or hereafter constructed, shall be permitted to connect with said sewer or sewers without first paying to the city clerk for such privilege the sum of twenty-five dollars for each connection. The word 'connection' is hereby defined to mean a connection for any residence, shop or place of business, whether occupying a lot or a part of a lot. And where a connection is made on the lines between two houses or places of business, each house or place of business shall be considered a separate connection. Where one party owns one or more lots, and occupies the same with only one residence or place of business, only one charge shall be made for one full lot or fraction thereof unless afterwards other buildings, residences or places of business shall be added, in which case the owner shall take out and pay for a separate permit for each connection. In no event shall one permit contain more than one full lot."

It is argued that the fee imposed by the ordinance is excessive, and that the ordinance is void for that reason. No such question was involved in appellant's demand, nor in the trial below, and it can not be considered here. Appellant offered to pay the sum named in the ordinance for each connection, but demanded a single connection for more than one lot containing houses in a block. The only question raised, therefore, is whether or not the city had the right to require a separate connection for each lot. We hold that it did have such power. It is a reasonable exercise of the police power. Sound reason may be discovered why the houses on different lots should have separate connection with the sewer, so that the supervision may be more effective, and so that the stoppage of one connection will not affect other premises.

The statute confers on cities control over sewer connections. Kirby's Dig., § 5722 *et seq.*

Judgment affirmed.

BOARD OF IMPROVEMENT OF SEWER DISTRICT NUMBER 2 v. MORELAND.

Opinion delivered February 14, 1910.

1. IMPROVEMENT DISTRICTS—LIABILITY.—Improvement districts are *quasi* public corporations, having no powers, duties or liabilities except as expressly conferred by statute, and are not liable for the negligence of their officers or agents whereby an employee is injured. (Page 381.)
2. SAME—LIABILITY UNDER FELLOW SERVANTS ACT.—Acts 1907, p. 162, abrogating the common-law rule that a servant assumes the risk of negligence of his fellow servant, did not create any liability against clases of corporations against whom none existed prior to the enactment of the statute. (Page 383.)
3. SAME—LIABILITY OF MEMBERS OF BOARD.—Under Kirby's Digest, § 5729, providing that no member of any board of improvement shall be liable for any damages sustained by any one in the prosecution of the work under his charge unless it shall be made to appear that he has acted with a corrupt or malicious intent," commissioners of an improvement district, charged with the performance of a public undertaking, are not liable for a negligent injury to an employee of such district, in the absence of a corrupt or malicious intent. (Page 383.)

Appeal from Sebastian Court, Fort Smith District; *Daniel Hon,* Judge; reversed.

Youmans & Youmans, for appellant.

1. Improvement districts are governmental agencies—public *quasi* corporations, and they are not liable for injuries to individuals for negligence, unless so expressly provided by statute. 81 Ark. 391; 55 *Id.* 148; 1 Smith, Mun. Corp., p. 3; 117 Cal. 114; 14 Cyc. 1057; 135 Ill. 269; 2 Dillon, Mun. Corp., § 761-2; Cooley, Const. Lim. 240-7; 55 Ill. 346; 8 Am. Rep. 652; 236 Ill. 36; 121 Cal. 96; 52 Ark. 107; 87 *Id.* 8; 73 *Id.* 447; 56 *Id.* 205; 86 *Id.* 61.

2. Acts 1907, p. 162, does not apply. Black on Int. Laws, 141.

Read & McDonough, for appellee.

1. Improvement districts are agents of the property holders. Private corporations are liable for negligence. 81 Ark. 391; 55 *Id.* 148. Even if public corporations, they are liable in this State under our laws. 27 Ark. 572; 28 Cyc. 1315; 29 Ark. 569; Dill. Mun. Corp., § 764 to 778; 124 Mass. 564; 149 *Id.* 410; 49

Ark. 140; 166 Mass. 403; 3 Abbott Mun. Corp., § 960; 973 subd. a, note 108; Kirby's Dig., § 5672; 42 Ark. 152; 48 *Id.* 386; 121 N. Y. 105; 19 N. J. Eq. 276; 52 Ark. 107; 81 Ark. 286; Beach, Pub. Corp., § § 1086-90, 1140, 1151-2-4; 77 Ark. 383; 84 *Id.* 333.

2. They are liable under the Fellow Servant Act, 1907. 2 Thomp. on Negl., § 5251; 94 Fed. 561; 116 *Id.* 845; 78 Ark. 118.

HART, J. The sole question to be determined in this case is the liability of the Board of Improvement of Sewer District No. 2 of Fort Smith, Arkansas, for an injury sustained by Edward N. Moreland, resulting in his death, which was alleged to have occurred while he was engaged in the work of constructing the sewer and to have been caused by the negligence of said Sewer District.

In the case of *Fitzgerald* v. *Walker,* 55 Ark. 156, the court, speaking through Mr. Justice MANSFIELD, said: "The fact that an improvement district is organized to accomplish a purpose which in a limited sense may be said to be 'municipal' does not make it a 'municipal corporation.'" That case also holds that such district is not the agent of the city or town within which it is organized, but that its powers are derived directly from the Legislature of the State. The purposes for which such districts are created and the manner of their organization are definitely prescribed by statute. The powers, duties and liabilities of the district and of its officers are specifically enumerated in the statutes creating them. The city authorities have nothing to do with the manner in which the work shall be done, and they have no control over the improvement commissioners. The Legislature could have delegated the work to be done to the various municipalities of the State, but it has not seen fit to do so. It must then be regarded as a public work, the expense of which the Legislature has imposed upon the property owners who are benefited by it, as it rightfully could do; and for the accomplishment of which it has provided its own agencies.

We think that the effect of our former decisions on the subject of improvement districts organized within the limits of cities and towns, and of fencing, drainage and levee districts, is to make them governmental agencies, or public *quasi* corporations, which are "purely auxiliaries to the State, and have

no powers, duties or liabilities except as conferred expressly by statute." *Morrilton Waterworks Imp. Dist.* v. *Earl,* 71 Ark. 4; *Altheimer* v. *Board, etc., Plum Bayou Levee Dist.,* 79 Ark. 229; *Stiewel* v. *Fencing District No. 6 of Johnson Co.,* 71 Ark. 17; *Little Rock* v. *Katzenstein,* 52 Ark. 107.

In other words, they are agents of the State to which certain powers and duties of a public nature have been delegated, but which can only exercise the corporate functions which the statute has expressly conferred upon them. Public *quasi* corporations are created with limited statutory powers, and the general rule, as respects the question of liability to individuals for the negligence of their officers or agents, is that no such liability attaches unless expressly provided by statute. 1 Beach on Public Corporations, § § 4, 262, 263; *Mahoney* v. *Boston,* 171 Mass. 427.

In the case of *Elmore* v. *Drainage Commissioners,* 135 Ill. 269, the court said: "A drainage district, however, is organized merely for a special and limited purpose. Its powers are restricted to such as the Legislature has deemed essential for the accomplishment of such purpose, and it is only authorized to raise funds for the specific object for which it is formed, and can do that in no other mode than by special assessments upon the property benefited, which can in no case exceed the benefits to the lands assessed. No funds or means are furnished such district with which to pay damages occasioned to individuals by the tortious or unauthorized acts of the drainage commissioners, and there is no express statutory requirement that it shall be liable for such torts. The duty, then, which was incumbent upon appellee to protect the lands of appellant through which its ditches passed from inundation was a duty of imperfect obligation, and one for the breach of which no action for damages lies against the district. The act under which appellee was organized is a general law, and applicable alike to all parts of the State, and under its provisions drainage districts may everywhere be formed. Appellee is to be regarded as a mere public involuntary *quasi* corporation, and the well established and uniform doctrine is that there is no corporate liability to respond in damages to an individual injured by the negligence or wrongful act of its officers, agents or servants."

"Since the government of a *quasi* corporation is ordinarily imposed by the sovereign, its business and private relations simple, and, further, because it performs solely governmental duties, the universal rule obtains that no liability exists in respect to the performance of its duties and obligations unless one is expressly imposed by statute." 3 Abbott, Municipal Corporations, § § 955, 973.

This doctrine has been too long established to be questioned, and should be regarded as the recognized policy of the State, which the Legislature alone should change. The exemption from liability, in the absence of a statute imposing it, is based upon the sovereign character of the State and its agencies, and upon the absence of obligation.

In the case of *United States* v. *Kirkpatrick,* 9 Wheat. 720, Mr. Justice STORY said: "The Government does not undertake to guaranty to any person the fidelity of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments, difficulties and losses, which would be subversive to the public interest."

It is not contended that there is any statutory liability in this case unless the fellow servant act, approved March 8, 1907 (Acts of 1907, p. 162), imposes the liability. That act abrogated the common-law rule that a servant assumes the risk of negligence of his fellow servant. *Aluminum Co. of North America* v. *Ramsey,* 89 Ark. 522. But it did not create any liability against classes of corporations where none existed prior to the enactment of the statute.

It is also insisted that the members of the board are individually liable. Section 5729 of Kirby's Digest is as follows: "No member of any board of improvement shall be liable for any damages sustained by any one in the prosecution of the work under his charge unless it shall be made to appear that he has acted with a corrupt or malicious intent." There is no allegation or proof that the commissioners acted with a corrupt or malicious intent. Moreover, the commissioners have certain powers and duties which are defined by statute; and if we are correct in holding that the improvement undertaken is a public work, the commissioners are public officers charged with the performance of public duties in carrying it out. It necessarily

follows that the same rule of law which exempts the improvement district from liability in this case also exempts its officers and agents.

For the reason that there is no liability imposed by law for the alleged acts of negligence of the defendant sewer district, or its officers or agents, the judgment will be reversed, and the cause dismissed.

EMERSON v. HOPPER.

Opinion delivered April 4, 1910.

1. CRIMINAL LAW—BOND FOR COSTS IN FELONIES.—As the law does not require a bond for costs from one who institutes a prosecution for felony, a bond executed in such a case is void, and a judgment based thereon is likewise void. (Page 385.)
2. EXECUTION—VOID JUDGMENT.—Though a judgment is void on its face, an execution thereon which is regular on its face will justify the officer in obeying its mandate. (Page 385.)
3. REPLEVIN—PROPERTY IN CUSTODIA LEGIS.—Under Kirby's Digest, § 6854, providing that an order of delivery of property shall not be made in a replevin case until the plaintiff files an affidavit that the property has not been "seized under an execution" against plaintiff's property, an action of replevin will not lie against an officer who has levied upon plaintiff's property under execution regular upon its face, though based upon a judgment void upon its face. (Page 386.)

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

STATEMENT BY THE COURT.

The appellee as constable levied upon a horse under an execution regular upon its face, issued on a judgment rendered against appellant by a justice of the peace, on a cost bond given by appellant to pay all costs that should accrue in a criminal prosecution instituted by the affidavit of appellant charging one James Picklesimer of the crime of slander. The appellant as the owner sought to replevy the horse. The circuit court held that replevin would not lie, and rendered judgment for appellee.

A. Y. Barr, for appellant; *Wm. T. Miles,* of counsel.

The bond was void. 62 Ark. 135; 34 Ark. 529. Replevin will not lie for property *in custodia legis,* and the requirement of an affidavit will not affect the question. 58 Wis. 539; 48 Wis. 371; 16 Fed. 181; 27 Wis. 679; 40 Am. D. 145. But replevin will lie against an officer holding property under a void judgment. 20 Ia. 282; 12 Ia. 27; 21 Ia. 56; 2 Colo. 591; 18 Mich. 233; 100 Am. D. 162; 47 Mich. 502; 11 N. W. 290; 95 Mich. 45; 54 N. W. 713; Fed. Cas. No. 631; 2 Dill. 175; Fed. Cas. No. 99,522; 1 Hempst. 10.

WOOD, J., (after stating the facts). The law does not require a bond to be given by one who institutes a prosecution for a felony. Slander is a felony. Kirby's Dig., § 1861.

The bond was void, and the judgment based thereon was *coram non judice* and void. 5 Cyc. 746; *Williams* v. *Skipwith,* 34 Ark. 529; *Walker* v. *Fetzer,* 62 Ark. 135.

The judgment being void, the execution was also void. But the execution was regular on its face, and justified the officer in obeying its mandate. *Bogert* v. *Phelps,* 14 Wis. 89-92. See *Townsly-Myrick Dry Goods Co.* v. *Fuller,* 58 Ark. 181, 185. Before an order of delivery can issue, the plaintiff in replevin must file an affidavit showing: "That it has not been taken for a tax or fine against the plaintiff, or under any order or judgment of a court against him, or seized under an execution, etc., against his property." Kirby's Dig., § 6854, subdiv. 5th. In *Crowell* v. *Barham,* 57 Ark. 195, the plaintiff sought to replevy property from a purchaser thereof at a tax sale. The plaintiff claimed that the sale for taxes was void, because the officer making the sale (a deputy sheriff) was without authority to distrain and sell for taxes. The court upheld that contention. While the same question is not presented as in the case at bar, the court did construe the section (subdiv. 5th) of the statute, *supra,* as it pertained to a warrant authorizing the taking of property for taxes, and concerning this said: "When the collector of the revenue or his authorized deputy distrains personal property for payment of taxes, under an apparently valid warrant, the person chargeable with the payment of the taxes cannot sue out an order in replevin against him for the possession of the property. * * * That is the policy of our statute,

which demands, as a prerequisite of an order of delivery, an affidavit that the property 'has not been taken for a tax or fine against the plaintiff.'" Precisely the same policy actuated the lawmakers in embracing in the same statute the requirement that the affidavit should also state that the property had not been seized under an execution. This construction was not necessary to the decision in *Crowell* v. *Barham, supra,* but we are of the opinion that it was the correct construction. However, we are aware that many authorities hold that process valid upon its face, but void in fact, is only protection to the officer who has acted thereunder when he is proceeded against as a tortfeasor, and that it is no defense to him, as in an action of replevin, where the only object sought is the recovery of the property and the proceedings are *in rem. Beach* v. *Botsford,* 40 Am. Dec. 45, 1 Douglas, 199. See also note to *Savacool* v. *Boughton,* 21 Am. Dec. 207, where the cases are exhaustively reviewed. But under our statute the proceedings in replevin are not *in rem.* Kirby's Dig., § 6868. Property taken by an officer under process regular upon its face should, as between the officer and the owner from whom it is so taken, be considered as *in custodia legis.* The remedy of the owner in such case, where the process is apparently good but void in fact, is not to sue the officer for the property or for damages, but he may proceed, as was said in *Crowell* v. *Barham, supra,* to attack the process and the proceeding under which it issued "in any form of action the law affords at any time." If the property has been sold under the void proceeding, he can then successfully maintain replevin for it. He is not remediless, even though he may not maintain replevin against the officer under the statute.

The court followed the construction of the statute, as announced in *Crowell* v. *Barham, supra.* The judgment is correct.

Affirm.

EXCHANGE NATIONAL BANK *v.* COE.

Opinion delivered April 4, 1910.

BILLS AND NOTES—TRANSFER AS SECURITY FOR ANTECEDENT DEBT.—One who receives a negotiable note before maturity as collateral security for a pre-existing debt may be a holder for value in due course of business.

Appeal from Jackson Circuit Court; *Charles Coffin,* Judge reversed.

Gustave Jones, W. B. Smith and *D. D. Terry,* for appellant.

Possession with ostensible title makes a *prima facie* case. 13 Ark. 163; 48 Ark. 454; 88 Ark. 98; 1 Dan. Neg. Inst., p. 186 and 806. The holder of collateral taken before maturity is a *bona fide* holder. 102 U. S. 25; 99 Fed. 18; 60 S. W. 1006; 41 Ark. 418; 42 Ark. 22. *Poirier* v. *Morris,* 20 Law & Equity 103. And the United States courts are in accord with the English law on the subject, as laid down in *Swift* v. *Tyson,* 13 Peters 1; 99 Fed. 18; 110 U. S. 288; 2 Fed. 843; 52 Fed. 98; 8 Cal. 260; 18 La. An. 222; 102 U. S. 28; 62 U. S. 432; 26 Vt. 569; 62 Am. Dec. 592. See also 9 Cyc. 932; 1 Am. & Eng. Ann. Cases, p. 272, reporting *Berket* v. *Elward,* 68 Kan. 295, and note thereto on page 275, containing a full collation of the authorities on this subject. Under such circumstances the maker is entitled to no set off. 31 Ark. 20; 60 Fed. 754; 55 S. W. 35; 28 Ark. 336; 2 Dan. Neg. Inst. 1437.

Stuckey & Stuckey, for appellant.

The holder of a promissory note as collateral is not a *bona fide* holder. 13 Ark. 160; 63 Ark. 610.

HART, J. On the 27th day of April, 1906, C. B. Coe executed his note for $600 to the Bank of Newport. The note was made payable to the order of the Bank of Newport at Newport, Arkansas, on November 1, after date. The Bank of Newport was indebted to the Exchange National Bank of Little Rock, Arkansas, in a sum greater than the amount of the note. The indebtedness was due, and the Bank of Newport was being pressed by the Exchange National Bank for payment, or for security for the amount due. On the 28th day of April, 1906, the Bank of Newport indorsed the note in question, and sent it to the Exchange National Bank as collateral security for said in-

debtedness. As such indorsee. the Exchange National Bank brought this suit on the note against C. B. Coe, the maker.

From the judgment rendered against it the plaintiff has appealed to this court.

The evidence on the part of the defendant was sufficient to show such fraud in law on the part of the Bank of Newport as would have been available to him as a defense had the suit been brought by it.

The undisputed evidence shows that the plaintiff had no notice of any such defense as between the original parties to the note.

The sole question, then, raised by the appeal is, can a person who receives a negotiable promissory note before its maturity, merely as collateral security for a pre-existing debt, be held to take it in the usual course of business and be considered a holder for value?

The question has never been decided by this court unless it can be said to have been determined in the cases of *Bertrand* v. *Barkman,* 13 Ark. 163, and *Bank of Commerce* v. *Wright,* 63 Ark. 604.

In the case of *Bertrand* v. *Barkman, supra,* the note was indorsed to the holder after its maturity. For that reason the question of law presented by the record in this case was not properly before the court for its decision, and what was said by the court on the question can be no authority except the persuasive force of the language used and the personnel of the judges sanctioning it.

In the case of *Bank of Commerce* v. *Wright,* 63 Ark. 604, the question was again considered by the court, and the rule announced in the case of *Bertrand* v. *Barkman* was quoted and approved; but the transfer in that case was accompanied by other transactions or promises, which the court held to constitute a new consideration. Hence the proposition of law raised by the record here was not properly before the court in that case, and what was there said will not be treated as a precedent. So, it may be said that the question is now squarely before us for the first time.

The decisions of the Federal, English and Canadian courts are to the effect that the holder of a negotiable note taken as

collateral security for a pre-existing debt is a holder for value in due course of business, and as such is protected against the latent equities of third parties

In the case of *Railroad Company* v. *National Bank,* 102 U. S. 14, the court having under consideration, the precise question said: "The bank did not take the note in suit as a mere agent to receive the amount due when it suited the convenience of the debtor to make payment. It received the note under an obligation imposed by the commercial law to present it for payment and give notice of non-payment in the mode prescribed by the settled rules of that law. We are of the opinion that the undertaking of the bank to fix the liability of prior parties by due presentation for payment and due notice in case of non-payment—an undertaking necessarily implied by becoming a party to the instrument—was a sufficient consideration to protect it against equities existing between the other parties, of which it had no notice. It assumed the duties and responsibilities of a holder for value, and should have the rights and privileges pertaining to that position."

After further discussion the court continued: "Our conclusion, therefore, is that the transfer, before maturity, of negotiable paper as security for an antecedent debt merely, without other circumstances, if the paper be so indorsed that the holder becomes a party to the instrument, although the transfer is without express agreement by the creditor for indulgence, is not an improper use of such paper, and is as much in the usual course of commercial business as its transfer in payment of such debt. In either case the *bona fide* holder is unaffected by equities or defenses between prior parties of which he had no notice."

The decisions of the State courts are in hopeless conflict: some of them adopting the rule of the Federal courts, and others holding that, inasmuch as the indorsee parts with nothing, and is in no worse situation that he was before, he is not a purchaser for value. However, the same argument might be made in the case of the indorsee who takes negotiable paper before maturity in payment of an antecedent unsecured debt. This court has held that one who takes negotiable paper in payment of an antecedent debt before maturity and without notice,

actual or otherwise, receives it in due course of business, and becomes within the meaning of commercial law a holder for value. *Evans* v. *Speer Hardware Co.*, 65 Ark. 210, and cases cited.

The trend of modern decisions is in favor of the rule adopted in the Federal courts as tending to promote uniformity in the different jurisdictions. This is considered important in view of the increased dealings between the citizens of the different States, and because the courts of the National Government do not recognize the decisions of the State courts on the question.

Therefore, we decide that the indorsee of negotiable paper taken before maturity, as collateral security for an antecedent indebtedness, in good faith, and without notice of defenses which might have been available as between the original parties, holds the same free from such defenses. The decisions on the question are collected in a note to 7 Cyc., p. 932, and later cases, in a note to the case of *Birket* v. *Elward*, 1 Am. & Eng. Ann. Cases, p. 272.

For the reason given in the opinion, the judgment will be reversed and the cause remanded for a new trial.

ATLAS INSURANCE COMPANY *v.* ROBISON.

Opinion delivered April 4, 1910.

1. INSURANCE—BREACH OF WARRANTY—PLEADING.—Where a fire insurance company, sued on a policy, relies upon the breach of a warranty therein contained to the effect that the insured had no other insurance upon the property, in order to put in issue such alleged breach of warranty as a defense the facts constituting such breach should be specially pleaded. (Page 391.)
2. APPEAL AND ERROR—QUESTION NOT RAISED BELOW.—A defense not pleaded nor relied upon in the lower court cannot properly be raised on appeal. (Page 392.)
3. INSURANCE—OVERVALUATION OF PROPERTY.—While a contract of insurance procured by making false statements as to the value of the property, with the fraudulent purpose of obtaining excessive insurance, would be void, the rule is otherwise where the false statement was made honestly and in good faith. (Page 393.)

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

Herring & Williams, for appellant.

The policy was void because of the additional insurance. 72 Ark. 306; 100 N. Y. 451; 84 Ark. 186; 69 Ark. 489; 121 S. W. 1046.

J. R. Wilson and *J. E. Bradley,* for appellee.

There is evidence to support the verdict. It should not, therefore, be disturbed on appeal. 84 Ark. 78. The false statements must have been knowingly and wilfully made. 65 Ark. 352; 123 Mass. 280; 106 Ala. 351; 2 May, Ins. 477.

FRAUENTHAL, J. This was an action instituted by the plaintiff below, P. J. Robison, to recover upon an insurance policy for the loss of and damage to certain personal property caused by fire. On April 8, 1907, the Atlas Insurance Company issued to plaintiff its policy of insurance by which for a term of three years from that date it insured plaintiff against loss or damage by fire on property, consisting of household and kitchen furniture, beds, bedding, etc., in an amount not exceeding $1,500. On October 1, 1908, about 4 o'clock P. M., the property was partially destroyed and damaged by fire. A verdict was returned in favor of the plaintiff for $561.30; and from the judgment entered thereon the defendant prosecutes this appeal.

There are two assignments of error specially urged by counsel for appellant upon this appeal why the judgment should be reversed. It is contended that by the terms of the policy it was provided that the entire policy should be void if the insured has or shall make or procure other and additional insurance on the property; that under the uncontroverted evidence there was other insurance on the property at the time of the fire, and that thereby the policy was avoided. The sole evidence upon which reliance is placed for this contention is the testimony of the plaintiff. The plaintiff testified that about two months prior to the issuance of the policy involved in this suit he was insured on this and other property in other companies, and at that time the agent of defendant solicited this insurance. He testified that he had three policies: one on his house and one on furniture and a policy in the Atlas Insurance Company. This is the full

extent of the evidence by which, it is now claimed, it is proved that at the time of the fire plaintiff had other insurance on the property. The plaintiff was not asked any more definitely as to these three policies; but his testimony was given in response to a question asked on his direct examination as to whether his insurance was solicited by the agent of defendant or sought after by himself. No question was asked of him relative to these policies upon cross examination; and he was not asked, either upon cross examination or upon the direct examination, whether at the time of the fire he carried these three policies or other insurance on this property. After carefully examining his testimony, we are of the opinion that the plaintiff was referring to policies carried by him on his property prior to the issuance of the policy involved in this case when he speaks in his evidence of other policies, and that his testimony does not prove that he had other insurance on the property involved in this suit at the time of the issuance of the policy by defendant thereon or at the time of the fire.

Furthermore, we are of opinion that this question or contention was not raised or presented in the lower court. In its answer the defendant did not plead specifically as a defense that the plaintiff had or procured other insurance on the property, and that thereby the policy was avoided. It only denied generally that plaintiff had fulfilled or complied with the conditions or warranties of the policy. Where the defendant relies upon a breach of a warranty or condition in such a contract as this, it should allege the warranty or condition which it claims was violated, and should state the facts constituting such violation. In order to put in issue such alleged breach of the contract as a defense, the facts constituting such breach should be specially pleaded. 19 Cyc. 936; *Kansas City & Gulf Rd. Co.* v. *Pace,* 69 Ark. 256; *Missouri & N. A. Rd. Co.* v. *Pullen,* 90 Ark. 182.

Not only did the defendant fail to set out in its answer this alleged violation of the policy, but upon the trial it did not request any instruction thereon, nor was any instruction given to the jury on this question. This issue is now made for the first time in this court. A defense not pleaded or relied upon in the lower court cannot properly be raised and relied upon

in this court. *State Mutual Ins. Co.* v. *Latourette,* 71 Ark. 242; *St. Louis, I. M. & S. Ry. Co.* v. *Boback,* 71 Ark. 427; *Shirey* v. *Clark,* 72 Ark. 539; *Newton* v. *Russian,* 74 Ark. 88; *Greenwich Insurance Co.* v. *State,* 74 Ark. 72; *Schenck* v. *Griffith,* 74 Ark. 557; *Planters' Mutual Ins. Co.* v. *Hamilton,* 77 Ark. 27.

We do not think that the issue that the policy was violated because plaintiff had or procured other insurance on the property involved in this suit was raised or relied on in the lower court, nor are we of the opinion that such an issue was sustained by the evidence adduced upon the trial of the case.

The defendant alleged in its answer as a defense to a recovery that the plaintiff had knowingly and wilfully made false representations as to the value of the property in order to obtain excessive insurance thereon. This issue was submitted to the jury on appropriate instructions. The evidence on the part of the plaintiff tended to prove that, prior to the issuance of the policy, the agent of defendant had seen the furniture and property covered by the policy. At the time the insurance was written the agent stated that in his opinion the property was of the value of $2,000, and plaintiff thought it was of the value of $1,500. The jury was warranted in finding from the testimony in the case that the plaintiff did not misstate the value of the property; or, if he did, that he was honest in his estimate of its value. If the insured should secure the contract of insurance by reason of false statements made by him relative to the value of the property with the fraudulent purpose of obtaining excessive insurance, the policy may by such fraud be avoided; but an overvaluation made by him honestly and in good faith could not have such effect. 19 Cyc. 688. *German Ins. Co.* v. *Brown,* 75 Ark. 251.

There are other assignments of error suggested by counsel for appellant, but we do not think that any of these is founded upon merit; and we do not think that it would serve any useful purpose to here set them out or to discuss them. We think that there is sufficient evidence to sustain the jury in their finding as to the amount of the loss and damage.

The judgment is affirmed.

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

Opinion delivered March 21, 1910.

1. INTERSTATE COMMERCE—STATE'S POWER TO REGULATE.—Where Congress or the Interstate Commerce Commission has prescribed regulations upon a subject relating to interstate commerce, the same are exclusive; but where they have not done so, a State may enforce regulations which do not directly burden such commerce. (Page 395.)
2. INTERSTATE COMMERCE—DEMURRAGE STATUTE.—The demurrage statute (act of April 19, 1907) is not invalid, so far as it applies to interstate commerce, but will be enforced as to interstate business, in the absence of any regulation upon that subject either by Congress or by the Interstate Commerce Commission. (Page 398.)
3. CIRCUIT COURT—JURISDICTION.—The circuit court has no jurisdiction of an action for the recovery from a railroad company of an overcharge of ten dollars for car service, as the cause of action is not to recover damages to personal property nor to recover a penalty. (Page 399.)

Appeal from Faulkner Circuit Court; *Eugene Lankford*, Judge; reversed.

Lovick P. Miles and *Thomas B. Pryor*, for appellant.

1. The act is invalid as to interstate shipments. 89 Ark. 468; 76 Ark. 82; 204 U. S. 553.

2. The court was without jurisdiction of the amount sued for in the second count of the complaint.

R. W. Robins, for appellee.

The act imposes no burden upon an interstate shipment. It is a mere police regulation, which applies to a shipment after it has arrived at its destination within the State. 7 L. R. A. 295; 32 Fed. 849. But, even though a State statute does incidentally affect interstate commerce, if it regulates a matter upon which Congress has failed to legislate, and imposes no unreasonable burden upon traffic between the States, the statute will be sustained. 77 Ark. 482; 15 L. R. A. (N. S.) 733; 211 U. S. 611.

McCULLOCH, C. J. This is an action to recover a penalty under the act of April 19, 1907, known as the demurrage statute. We passed on the validity of that statute, and upheld it in *Oliver* v. *Chicago, R. I. & P. Ry. Co.*, 89 Ark. 466. In that case the penalty was imposed for failure to furnish cars on demand for

a shipment of freight. In the present case a penalty is sought to be recovered for failure to give notice of the arrival of a carload of grain at its destination in this State, the same having been shipped from a point outside of the State. It was an interstate shipment, and the question presented is whether or not the statute can be applied. In the Oliver case an intrastate shipment was involved, and we found it unnecessary to decide whether or not the statute applied to a failure to furnish cars for an interstate shipment.

The section of the statute bearing on the present controversy reads as follows: "Sec. 3. Railroad companies shall, within twenty-four hours after the arrival of shipments, give notice, by mail or otherwise, to consignee of the arrival of shipments, together with the weight and amount of freight charges due thereof; and where goods or freight in carload quantities arrive, such notices shall contain also identifying numbers, letters and initials of the car or cars, and, if transferred in transit, the number and initials of the car in which originally shipped. Any railroad company failing to give such notice shall forfeit and pay to the shipper, or other party whose interest is affected, the sum of five dollars per car per day, or fraction of a day's delay, on all carload shipments, and one cent per hundred pounds per day, or fraction thereof, on freight in less than carloads, with a minimum charge of five cents for any one package, after the expiration of the said twenty-four hours; provided, that not more than five dollars per day is charged for any one consignment not in excess of a carload."

There are other sections of the statute imposing demurrage charges on consignees for failure to remove freight, thus making the burden of the whole statute reciprocal.

It is contended that the demurrage charge is a burden on interstate commerce, which cannot be imposed by State legislation, and that the statute is to that extent void. We have not been able to discover any attempt on the part of the Interstate Commerce Commission to fix or regulate reciprocal demurrage, and counsel in the case do not call our attention to any. In fact, the commission, in an opinion delivered in 1907 (12 I. C. C. 61), disclaims the existence of any such power in the commission. That opinion was based on a claim made by a shipper

on a shipment made prior to the enactment in 1906 of the Hepburn amendment, which was in force at the time of the decision; but we understand the opinion to relate to the powers of the commission under the Hepburn amendment. The text writers on this subject seems to so construe that opinion. 1 Drinker on Interstate Commerce Commission Act, § 277.

Whether the Interstate Commerce Act of Congress, or any of its several amendments, do confer such power on the commission we need not further inquire, as it is sufficient for the purpose of determining the question before us that the power has not been exercised, even if it has ever been conferred. Mr. Justice Brewer, speaking for the Supreme Court of the United States in the recent case of *Missouri Pac. Ry. Co.* v. *Larabee Mills*, 211 U. S. 612, said: "The fact that Congress has intrusted power to that commission does not, in the absence of action by it, change the rule which existed prior to the creation of the commission. Congress could always regulate interstate commerce, and could make specific provisions in reference thereto, and yet this has not been held to interfere with the power of the State in these incidental matters. A mere delegation by Congress to the commission of a like power has no greater effect, and does not of itself disturb the authority of the State. It is not contended that the commission has taken any action in respect to the particular matters involved. It may never do so, and no one can in advance anticipate what it will do when it acts. Until then the authority of the State in merely incidental matters remains undisturbed."

That case involved an effort on the part of the State to control or prevent discrimination between shippers in the matter of switching or delivering cars for the shipment of goods. Answering the contention that it directly affected interstate commerce transactions, the learned justice said: "This common-law duty the State, in a case like the present, may, at least in the absence of congressional action, compel a carrier to discharge."

In *Chicago, M. & St. P. Ry. Co.* v. *Solan,* 169 U. S. 133, a statute of Iowa was upheld providing that "no contract, receipt, rule or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of

a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made or entered into;" and Mr. Justice Gray, in delivering the opinion of the court, said: "The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits."

In *Western Union Tel. Co.* v. *James,* 162 U. S. 650, the court, passing on a statute of Georgia imposing a penalty of $100 on telegraph companies for failure to transmit and deliver telegrams with diligence and impartiality, held that the statute was valid, and did not burden or interfere with interstate commerce. Speaking through Mr. Justice Peckham, the court said: "The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and it is in no wise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing this general duty of the company. The direction that the delivery of the message shall be made with impartiality and good faith and with due diligence is not an addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general laws of the land is a regulation of or an obstruction to interstate commerce within the meaning of that clause of the Federal Constitution under discussion? We think not."

We understand the rule established by the various decisions of the Supreme Court of the United States to be that where Congress, or the commission created for that purpose, prescribes regulations upon a particular subject relating to interstate commerce, the same are exclusive in their operation, and the States

no longer have power to make regulations on that subject; but that, until Congress or the commission has acted upon a particular matter of regulation, a State may enforce its regulations, which do not directly burden interstate commerce. There being no regulation, as we have seen, either by Congress or by the Interstate Commerce Commission on the particular subject now under consideration—that is, of reciprocal demurrage—the test as to the validity of the State regulation is whether it is a direct burden upon or is in aid of commerce.

Aside from any statute on the subject, the duty rests upon a public carrier, as a part of its contract, to make delivery to the consignee of the freight intrusted to it for transportation, and "every delivery must be made to the right person at a reasonable time, at the proper place and in the proper manner." 2 Hutchinson on Carriers, § 664. The authorities are in conflict on the question whether, in the absence of a statute, a carrier by rail is required to give notice to the consignee of the arrival of freight; but it cannot be doubted that such a requirement, in aid of a speedy delivery of freight, is a reasonable regulation and may lawfully be imposed. It is in no sense a burden on commerce, but is in aid of it. *Bagg* v. *Wilmington, C. & A. Rd. Co.*, 109 N. C. 279. It does not in any degree affect the contract of carriage, as did the Georgia statute which was condemned by the Supreme Court of the United States in *Central of Georgia Ry. Co.* v. *Murphey*, 196 U. S. 194. The statute thus condemned provided that it should be the duty of the initial or any connecting carrier, within thirty days after application made by the shipper, consignee or their assigns, to trace lost, damaged or destroyed freight and inform said applicant when, where, and by which carrier said freight was lost, damaged or destroyed, etc., and that on failure to do so said carrier should be liable for the value of the freight lost, damaged or destroyed as if the same had occurred on its line.

In a very recent case, however, the Supreme Court of the United States, distinguishing it from the Murphey case, upheld a similar statute except that it applied only to carriers on whose lines property was when lost or damaged. The court held that the statute was not an unlawful interference with interstate

commerce. *Atlantic Coast Line Railroad Co.* v. *Mazursky,* 216 U. S. 122.

In *Little Rock & Fort Smith Ry. Co.* v. *Hanniford,* 49 Ark. 291, this court upheld a statute which made it unlawful for railroad companies to endeavor to collect from the owner or consignee a greater sum than that specified in the bill of lading, and prescribed a penalty for a refusal to deliver freight upon payment of the charges specified in the bill of lading. The court held that the statute was for the purpose of requiring the prompt delivery of freight, and was in aid of, and not a burden upon, commerce. It is true that in the later case of *Spratlin* v. *St. Louis S. W. Ry. Co.,* 76 Ark. 82, following the decision of the Supreme Court of the United States in *Gulf, C. & S. F. Ry. Co.* v. *Heffley,* 158 U. S. 98, we held that the statute above referred to had been abrogated or suspended by the conflicting act of Congress on that particular subject. But that does not lessen the force of the Hanniford case in so far as it holds that the statute was in aid of commerce.

In *Arkansas So. Ry. Co.* v. *German Nat. Bank,* 77 Ark. 482, this court held that the statute imposing a penalty on railroads for delivering freight except on surrender of bill of lading is not a burden on interstate commerce, but is in aid thereof, and is enforcible, in the absence of Congressional legislation inconsistent therewith.

We conclude that the statute under consideration is valid and enforcible.

In a separate paragraph of the complaint another cause of action is set forth for the recovery of $10, alleged to have been unlawfully charged for alleged car service, which was paid under protest, and a recovery of that amount is sought. The court overruled a demurrer and rendered judgment for the amount, as well as for the demurrage. The amount claimed is not within the jurisdiction of the circuit court, as the cause of action set forth in that paragraph is not to recover damages to personal property nor to recover a penalty. The judgment of the circuit court is affirmed except as to the $10 recovered under the last paragraph of the complaint, and as to that the judgment is reversed and the cause dismissed.

FRAUENTHAL, J., disqualified.

EVANS v. STATE.

Opinion delivered March 28, 1910.

1. FORGERY—SUFFICIENCY OF ALLEGATION OF TENOR.—An indictment for forgery of a certain writing which alleges that the writing "is in substance as follows," and the writing is thereupon set out so minutely and in detail as to exclude the idea that the substance merely is set out, it will be taken that the writing is set out according to its tenor. (Page 403.)
2. SAME—IMMATERIAL VARIANCE.—An indictment for forgery of a railway time check which fails to set out the following words: "Agent will affix station dater stamp here," is not fatally variant. (Page 404.)
3. EVIDENCE—TELEPHONE CONVERSATION.—It was competent to prove that some one who represented himself to be the defendant called up a witness over the telephone and induced him to cash the time check alleged to have been forged, where there was other evidence tending to connect defendant with the alleged crime. (Page 404.)

Appeal from Crawford Circuit Court; *Jeptha H. Evans*, Judge; affirmed.

Sam R. Chew, for appellant.

Hal L. Norwood, Attorney General, and *Wm. H. Rector*, Assistant, for appellee.

In charging the forgery of an instrument, it is not necessary to set out matter which is not necessary to the validity of the instrument. 2 Bish. Crim. Prac., § 410; 58 Ark. 242; 77 Ark. 543; 90 Ark. 123; 86 Ark. 126; 14 O. St. 55; 53 Am. D. 652; 69 Ind. 485; 47 Ill. 152; 33 Vt. 261; 129 Va. 147; 38 N. W. 519; 108 Ind. 444. The test as to the validity of an indictment is that it is to be measured by the statute. 63 Ark. 613. Evidence of offenses similar to one charged are competent for the purpose of showing knowledge, intent or design. 1 Wig. on Ev., § 300; 72 Ark. 586; 75 Ark. 427; 84 Ark. 119; 168 N. Y. 264; 87 Ark. 17. The making of an instrument in the name of a fictitious party with intent to defraud another is forgery. 10 L. R. A. 779; 32 U. S. 132; 93 Mo. 88; 11 Ky. Law Rep. 424.

BATTLE, J. The grand jury of Crawford County, in this State, indicted C. A. Evans, L. D. Harshaw and W. H. Dugan for forgery. The indictment, so far as it affects Evans, omitting caption, is as follows:

"The grand jury of Crawford County, in the name and by the authority of the State of Arkansas, accuse C. A. Evans of the crime of forgery, committed as follows, towit: The said C. A. Evans, in the said county and State aforesaid, on the fifteenth day of January, A. D. 1909, fraudulently and feloniously did forge and counterfeit a certain writing on paper, purporting to be a statement of service, which said writing on paper is in substance as follows:

"'Roll 1299. Time Check. No. 26416.

"'Payable at Fort Smith, Ark.

"'There will be returned upon January, 1909, pay rolls of St. Louis, Iron Mountain & Southern Railway Company, for service of Richard Walsh, as machinist at Van Buren, Ark., on Central Division, 19.9 days work, at $3.80 per day. $75.60.

"'Deduction account hospital fee .....$ .50

"'Deduction account insurance company .—

"'Deduction account board due ..... .50

"'Total $75.10

"'C. A. Evans,

"'Master Mechanic in charge of work.

"'Approved: W. A. BeDell, Superintendent.'

"'C. A. E.

"'Received January 10, 1909, of St. Louis, Iron Mountain & Southern Railway Co. the sum of seventy-five and 10-100 dollars, in full for services rendered in the month of January, 1909, as above stated.

"'Richard Walsh.

"'Witness: A. T. Sanders.'

"Said statement is indorsed on the front thereof as follows:

"'Not good for more than $100.00.

"'Not negotiable. (See back).'

"Said statement is indorsed on the back thereof as follows:

"'This time check is not transferable, and only the person named on its face will be recognized.

"'Paid January 20, 1909, by local treasurer the Mo. Pac. Ry. Co.

"'Mo. Pac. Ry. Co. Received January 9, 1909.

"'Master Mechanic's Office, Van Buren, Ark.'

"With felonious intent then and there fraudulently to obtain

possession of the property and money of the St. Louis, Iron Mountain & Southern Railway Company, a corporation organized under the laws of the State of Arkansas, and doing business in the State of Arkansas, against the peace and dignity of the State of Arkansas."

The defendant, Evans, demurred to the indictment, which was overruled. He was then, on his motion, tried separately.

W. A. BeDell testified in the trial in behalf of the State, in part, as follows: He was master mechanic of the St. Louis, Iron Mountain & Southern Railway Company, at Van Buren, in this State, in the year 1909. There was in his office a chief clerk, a time keeper and a stenographer. In January, 1909, C. A. Evans, the defendant, was chief clerk; L. D. Harshaw was time keeper, and Miss McKee was stenographer. The chief clerk had charge of all the work in the office, and the employees under him, and in the absence of the master mechanic discharged the duties of that office. He identified the forged check. It was correctly copied in the indictment, except the words, "Agent will affix station dater stamp here," which appears in the original after the words copied in the indictment are omitted. He testified that the body of the check is made out in the handwriting of Harshaw, and the name W. A. DeBell, with "C. A. E." beneath it, is in the handwriting of the defendant, Evans. The receipt for $75 in the forged writing is also filled out in the handwriting of Harshaw. The check was a forgery, and no man named Richard Walsh, machinist, was in the employment of the St. Louis, Iron Mountain & Southern Railway Company in the month of January, 1909.

Evidence was adduced which tended to prove that the pay rolls made out in the office of Evans for January, 1909, contained names of persons who were not in the service of the railway company in that month, and a part of the records in his office for that time was mutilated. After the foregoing evidence was adduced A. T. Sanders testified substantially as follows: "I live at Fort Smith, Arkansas. Am passenger ticket agent for the Iron Mountain. I cash time checks sometimes for accommodation. A party representing himself over the 'phone as Mr. Evans, about the fifteenth of January, 1909, told me that one of the employees had been called home on account

of sickness; that the agent at Van Buren did not have enough money to cash the check, and he asked me if I would cash it, and I told him I would. The party said his name was Evans, at DeBell's office. I did not know him. A time check was presented and paid at our office that day. It is the check introduced in evidence. I am not positive whether I cashed it, or whether the clerk at the depot cashed it. That is my signature there, however, as a witness. I kept it in the safe until the time to remit it to the treasurer on the following day."

The defendant moved to exclude so much of this testimony of Sanders as relates to the telephone conversations, which was overruled, and the testimony was admitted.

Much testimony in addition to the foregoing was introduced. The jury returned a verdict against the defendant, finding him guilty, but failed to assess his punishment, which the court fixed at two years' imprisonment in the penitentiary, and rendered judgment accordingly, and the defendant appealed.

Should the demurrer have been sustained? In *Crossland* v. *State,* 77 Ark. 537, it was held that "an indictment for forgery of a bank check should set forth the instrument according to its tenor, and should purport to do so, and it will not suffice to set it forth accurately in fact if it does not purport to set forth its tenor."

Sections 2241 and 2243 of Kirby's Digest provide that "the words used in a statute to define an offense need not be strictly pursued in an indictment, but other words conveying the same meaning may be used;" and that the indictment must contain "a statement of the acts constituting the offense, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended." The indictment before us alleges that the defendant forged a writing on paper, purporting to be a statement of service, "which said writing on paper is in substance as follows." The words following show that these words mean more than substance. They show that the indictment undertakes to and does set forth the writing according to its tenor. The writing is set forth so minutely and in detail as to exclude the idea that the substance was set out, and to show that it was set out according

to its tenor. The statement that the writing is set out in substance in the indictment is negatived by those words which appear in the copy: "Said statement is indorsed on the front thereof as follows;" and "Said statement is indorsed on the back thereof as follows," which mean according to tenor. So construing the indictment as a whole, it clearly means that the copy of the writing is set out according to its tenor.

In *Crossland* v. *State, supra,* there are no words used in the indictment which mean or imply according to tenor, and the close of the description of the writing is as follows: "And having indorsed on the back thereof James G. Frizzell," without purporting to give the whole indorsement or to state it as follows, and does not contradict that part of the indictment which says the writing "is in substance as follows." The demurrer was properly overruled.

The variance between the indictment and the original writing is immaterial. The words, "Agent will affix station dater stamp here," are no part of the instrument forged, and need not have been set out in the indictment. *Crossland* v. *State,* 77 Ark. 537; *Teague* v. *State,* 86 Ark. 126; 2 Bishop's Criminal Procedure, § § 407, 410.

The testimony of Sanders as to the conversation over the telephone was properly admitted. A foundation was laid for it in the testimony we have stated, in part, in this opinion, as well as in other testimony which appears in the record. This evidence tended to throw light upon the conversation, and, in connection with the fact that the forged check was presented at the office of Sanders on the day of and after the conversation, tended to verify what was said over the telephone, and make it admissible for the consideration of the jury in connection with the other evidence in the case. The case of *Stokes* v. *State,* 71 Ark. 112, 116, cited by appellant, is unlike this case. In that case "one Willis Martin testified that about a week before the killing he heard two strangers talking at a store across the railroad. One said to the other, 'Everything all right now, except Scott.' The other said 'Do away with him.' The defendant certainly favored one of them, but he did not pay particular attention to them." Nothing was shown to precede or succeed this occasion that tended to prove that the stranger

the defendant favored was the defendant in that case. The stranger did not pretend to be the defendant. As said by the court in that case, "in the absence of other and better evidence of the identity of the defendant as one of the parties who made the remarks about Scott, the testimony was irrelevant and prejudicial."

The evidence was sufficient to sustain the verdict.

Judgment affirmed.

ALLEN v. MORTON.

Opinion delivered April 4, 1910.

STATE UNIVERSITY—APPOINTMENT OF TREASURER.—Under the statute (Kirby's Dig., § 4284) which provides that the board of trustees of the University shall elect a treasurer, without designating how the election shall be conducted, the appointment of a treasurer does not become final until the meeting at which it was made terminated, and may be set aside and another appointment made, at least until the appointee is notified and has accepted.

Appeal from Washington Circuit Court; *J. S. Maples,* Judge; reversed.

Walker & Walker, for appellant.

If Morton received only four votes on the first ballot, he was not elected on that ballot. 53 Conn. 76; 55 Am. 65; 63 Atl. 512. But, even if Morton were elected, the action of the board in proceeding to a second ballot was equal to a removal, and the person thereafter elected would be entitled to hold the office. Kirby's Dig., § § 4284 to 4291; 41 Am. St. R. 236; *Id.* 606; 97 N. W. 887. Morton was not entitled to a hearing before removal. 127 Cal. 388; 78 Am. St. 66; 136 Cal. 580; 81 Pac. 674. The appointment was not irrevocable. 78 Conn. 636; 63 Atl. 512; 53 Conn. 76; 22 Atl. 686; 55 Am. 65; 1 Cranch 137; 44 Conn. 601; 133 Mass. 204.

R. J. Wilson and *McGill & Lindsay,* for appellee.

Morton was elected on the first ballot. 121 Ind. 206; 6

L. R. A. 315; 25 N. E. 136; 62 N. H. 383; 13 Am. St. 576; 113 Ill. 137; 55 Am. 405.

BATTLE, J. W. H. Morton commenced an action against D. M. Allen in the Washington Circuit Court to recover the office of treasurer of the University of Arkansas, and for the salary of the office. The facts in the case are substantially as follows: At the regular annual meeting of the board of trustees of the University of Arkansas held in the city of Fayetteville, in this State, on the 8th day of June, 1909, the time fixed by law for the election of treasurer of the university, an election by ballot was held by such trustees for that officer. The result of the first ballot was announced as follows: Four votes were cast for W. H. Morton, two for D. M. Allen, one for F. P. Hall, and one was cast without a name on it. The second ballot was announced as follows: Four votes were cast for Morton and four for Allen; and, the vote being a tie, the Governor, who is *ex officio* a member and president of the board, voted for Allen, and declared him elected treasurer. Five of the trustees testified, in the trial of the issues in this action, that they voted for Morton on both ballots. No one of the trustees objected to or protested against the result of the ballot as announced, or to the appointment or election of Allen treasurer. In due time he qualified, and entered upon the duties of treasurer.

The court found that Morton was elected treasurer, and so declared, and ousted Allen from office; and the defendant appealed.

The statutes of this State provide that a treasurer of the university shall be elected by the board of trustees, but do not provide the manner in which he shall be elected, but leave that within the discretion of the board. Kirby's Digest, § 4284. While providing that he shall be elected, they speak of his selection as an appointment. They provide: "The board of trustees of the University of Arkansas at the first meeting after April 1, 1893, shall elect a secretary of the board and a treasurer of the university, who shall hold their offices two years and until their successors are *in like manner appointed* and qualified." Correctly speaking, his selection is an appointment. It is immaterial how he may be appointed if he is selected

by a majority of the board at a meeting authorized by law to do so. The mode of selection does not make it more or less than an appointment by the board. The appointment does not become final until the meeting at which it was made terminates, and until then it is subject to reconsideration by the board, and can be set aside and another made as often as they see fit. *Wood* v. *Cutter,* 138 Mass. 149; Throop on Public Officers, § § 84 and 89; 23 Am. & Eng. Encyclopedia of Law (2 ed.) 346, and cases cited. But we do not decide whether the board can deprive themselves of their power of reconsideration by communicating their appointment to the appointee and by his acceptance before the meeting closed, or otherwise. That was not done in this case, and is not a question before us.

In this case the defendant, Allen, was declared elected treasurer, and the whole board concurred in the declaration. No one objected. He was lawfully appointed treasurer of the university, and is entitled to the office.

Judgment reversed and action dismissed.

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

Opinion delivered April 4, 1910.

1. CARRIERS—LIVESTOCK—NOTICE OF DAMAGE.—A contract for the carriage of livestock which stipulates that the notice of any claim of damages to the stock shall be given at an intermediate station distant from the destination of the stock is unreasonable within Acts 1907, c. 239, § 3, and should be so declared by the court as a matter of law. (Page 413.)
2. INSTRUCTION—SPECIFIC OBJECTION.—A mere ambiguity in an instruction should be reached by a specific and not a general objection. (Page 413.)
3. SAME—WHEN HARMLESS.—An instruction, in an action for injuries to live stock *en route,* that if the jury found from the evidence that defendant's agents at Coffeyville *or elsewhere* negligently injured the live stock they should find for plaintiffs was not prejudicial; though the injuries were alleged to have occurred at Coffeyville, if there was no evidence tending to prove that negligence was committed elsewhere. (Page 413.)

4. CARRIERS—INTERSTATE COMMERCE—LIMITATION OF LIABILITY.—A contract for an interstate shipment which limits the liability of the carrier to a certain maximum sum in case of loss is void. (Page 414.)

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

STATEMENT BY THE COURT.

H. B. Dunn and Bob Stewart, partners under the name of Dunn & Stewart, brought a suit against the St. Louis, Iron Mountain & Southern Railway Company for injuries to eight (8) horses which were contained in a carload shipped from Kansas City, Missouri, to Pine Bluff, Arkansas.

It was alleged that the horses were shipped under a contract by which appellant contracted to deliver the horses at Pine Bluff, Arkansas, to be carried thence to Hampton, Arkansas. That appellant negligently and carelessly "hitched the carload of horses to a switch engine, at Coffeyville, Kansas, and ran same back and forth in making up the train for a period of two hours or longer, that during that time appellee's horses were knocked down by the striking of the cars against each other, that the horses tramped upon and bruised each other, and by this negligent handling of the horses they were injured and appellees damaged in the sum of $255.

Appellant, answering, denied all the material allegations of the complaint, and set up that the shipment of horses and stock mentioned in the complaint from Kansas City Stock Yards, Kansas City, Missouri, if a shipment was made at all, was by, through and under a written contract, by the terms of which on account of reduced rates appellees assumed certain risks in said written shipper's contract mentioned and specified, and agreed therein to give notice to some agent of the company within one day after said stock had arrived at the destination, which appellees failed entirely to do, and failed entirely to comply with any of the conditions in said contract contained on account of said reduced rates and assumed risks.

The appellees replied to the answer of appellant setting up waiver.

The contract under which the horses were shipped among other things provided:

"That, for the considerations and the mutual covenants and conditions herein contained, the said first party will transport for the said second party the live stock described below, and the parties in charge thereof, as hereinafter provided, viz: One (1) car, said to contain twenty-seven (27) head of horses, consigned to Dunn & Stewart, Pine Bluff, Arkansas, from Kansas City station to destination, if on this railway or its leased or operated lines, and there delivered to consignee or to the proper junction, if the destination is on another road, and there delivered to a connecting common carrier, care R. I. at the rate of * * * per f. o. b., subject to minimum weights and lengths of cars provided for in tariff, said rate being less than the rate charged for shipments transported at carrier's risk, for which reduced rate and other considerations it is mutually agreed between the parties hereto as follows:

* * * * * * * * * * * * * * * *

"Fifth. That as a condition precedent to the recovery of any damages for any loss or injury to live stock covered by this contract for any cause, including delays, the second party will give notice in writing of the claim therefor to some general officer, or to the nearest station agent of the first party, or to the agent at destination, or some general officer of the delivering line, before such stock is removed from the point of shipment or from the place of destination, and before such stock is mingled with other stock, such written notification to be served within one day after the delivery of the stock at destination, to the end that such claim may be fully and fairly investigated; and that a failure to fully comply with the provisions of this clause shall be a bar to the recovery of any and all such claims, and to any suit or action brought thereon."

There was testimony which tended to prove that the horses of appellees were injured through the negligence of appellant at Coffeyville, Kansas, in the manner alleged in the complaint, and that appellees were damaged thereby in a sum that warranted the amount of the verdict returned by the jury. There was testimony tending to prove that the carload of horses was waybilled to Hampton, Arkansas. The freight was paid at Hampton, Arkansas, for the shipment from Kansas City, Missouri. Although the written contract specified "1 car said to

contain 27 head of horses consigned to Dunn and Stewart, Pine Bluff, Arkansas," the testimony showed that this was a mistake, and that the car was really consigned to Dunn & Stewart at Hampton, Arkansas. The train book of the freight conductor who handled the train on which this carload of horses was shipped shows as follows: "Missouri Pacific 5324, 27 horses, Harrell, Arkansas, *via* Cotton Belt at Pine Bluff, loaded 6 A. M. 9-24 at 829, that is Argenta. Dunn & Stewart, Harrell, Arkansas." This car No. 5324 was transported September 24, 1908, and appellee Stewart testified that he received a car that day, and that was the only car of horses he received from Kansas City, that Hampton was the only place to which the car was consigned.

The testimony of one of the appellees who made the contract of shipment with appellant shows that the horses were billed through to Hampton, Arkansas. It is clear that "Harrell," Arkansas, as shown by the train record *supra,* really meant Hampton, Arkansas. The witness says: "They won't give you a contract further than their road, but they will bill me clean on in. The billing went on, you know, but the contract stopped at Pine Bluff, and then I had to get a new contract at Pine Bluff with the Cotton Belt." This witness was asked and answered questions as follows:

"Q. They did actually contract with you, though, to carry them to Hampton and take your money for it? A. Yes. Q. You paid the freight at Hampton, didn't you? A. Yes. Q. You didn't pay the people in Kansas City any money at all, did you? A. No, not for freight. Q. You paid it at Hampton when you got down there? A. Yes. Q. By the Court: Did you pay the freight from Kansas City to Pine Bluff at Pine Bluff? A. No, sir; I paid it at Hampton."

At the request of appellees the court granted the following prayers:

"1. You are instructed that if you find from the evidence that Thornton & Alexander Railroad was the delivering line of said stock at their final destination at Hampton, and that the plaintiffs notified the agent of said delivering line at Hampton within one day after the arrival of said stock at Hampton of their intention to claim damages for the injuries herein com-

plained of, that was a compliance with clause 5 of the contract of shipment, and you will find for the plaintiffs.

"2. You are instructed that if you believe from the evidence in this case that the defendant, St. Louis, Iron Mountain & Southern Railway Company, received of the plaintiffs, Dunn & Stewart, a carload of horses, the property of plaintiffs, at Kansas City, Missouri, in good condition, and contracted to deliver said horses at Pine Bluff, Arkansas, then it was their duty to use reasonable care not to injure said stock; and if you find from the evidence that the agent or agents of the defendant, while at Coffeyville, Kansas, or elsewhere on the route from Kansas City, Missouri, to Pine Bluff, Arkansas, did carelessly and negligently, while in charge of said car loaded with plaintiffs' horses, hitch same to a switch engine and run them back and forth in making up trains for a period of two hours, or any other length of time, unnecessarily, and that plaintiffs' horses were damaged by such careless and negligent handling, then you will find for the plaintiffs.

"3. You are instructed that if you find from the evidence that plaintiffs' horses were negligently damaged by the defendant as charged in the complaint, then, in arriving at the amount of damages to which they are entitled, you must consider the difference in the market value of the stock at their destination or place of delivery, if they had been delivered in an uninjured condition, and their market value as delivered in their injured or damaged condition, *i. e.*, the difference in the market value of the stock at the place of delivery uninjured and the market value in their injured or damaged condition is the measure of the damages to which plaintiffs are entitled to recover, if they are entitled to recover anything."

A general objection was made to the ruling of the court in giving each of the above prayers, and exceptions were duly saved.

The jury returned a verdict in favor of appellees for $200, and from a judgment entered against appellant for that sum this appeal is duly prosecuted.

W. E. Hemingway, E. B. Kinsworthy, E. A. Bolton and *James H. Stevenson,* for appellant.

If an erroneous instruction covers the entire case, it does not matter that other *correct* instructions were given. 45 Ill. App. 447; 1 Blashf. Inst. to Juries, § 104; 25 Ark. 490; 30 Ark. 362; 51 Ark. 88; 2 How. 486; 24 Ala. 651; 4 S. W. 300; 38 N. W. 213; 52 Mo. 35; 85 Mo. 96; 91 Am. D. 309; 55 Ark. 393; 57 Ark. 203. A clause in the contract of shipment fixing the value of the property shipped at the point of shipment is valid if there is a consideration for it. 50 Ark. 397.

Thornton & Thornton, for appellee.

If the instructions, taken as a whole, present the law of the case, they are not erroneous. 89 Ark. 24; 87 Ark. 298; 83 Ind. 61. Contracts are construed most strongly against the party who prepares them, and for whose benefit they are made. 90 Ark. 88; 73 Ind. 338; 74 Ark. 41; 90 Ark. 256. There was a waiver of notice. 89 Ark. 24; *Id.* 154; *Id.* 111. A general objection to an instruction is not sufficient. 87 Ark. 475; *Id.* 298.

WOOD, J., (after stating the facts). There was evidence to warrant a finding by the jury that the destination of the shipment was Hampton, Arkansas, on the Thornton & Alexandria Railroad as the delivering line. That being true, the notice given to the agent at Hampton in accordance with the provisions of the contract was sufficient. If, however, the agent at Pine Bluff was the "agent at destination," so far as appellant is concerned, then the provisions requiring written notification to be served within one day, etc., is unreasonable and void. The purpose of giving such notice as expressed in the provision is: "To the end that such claim may be fully and fairly investigated" by an examination of the stock before same are removed from the point of shipment or place of destination, and "before such stock is mingled with other stock." Now, appellant had notice that the ultimate destination of the stock on that shipment was Hampton, Arkansas. It billed the stock through to Hampton. Knowing this, it was unreasonable to require appellee, as a condition precedent to recovery, to give notice to the agent at Pine Bluff. The horses were not unloaded from the car at Pine Bluff. They could not be mingled with other stock there. The appellees had no opportunity to ascertain the full extent of the injury to their horses until they were unloaded at their final destination.

The provision as to notice must be reasonable or it is void. The evidence is undisputed that the horses were billed through to Hampton by appellant. If the contract required the notice to be given the agent at Pine Bluff, we are of the opinion that the notice was unreasonable, and there was no issue therefore to be submitted to the jury. See act of April 30, 1907, p. 558, § 3. The court should have so declared it, in this view of the contract, as matter of law.

There was no prejudicial error in any of the instructions on the question of notice. They were more favorable to appellant than the undisputed evidence warranted.

While the instructions under consideration told the jury to "find for the plaintiff" if they found that notice was given, etc., it is evident, when all the other instructions are considered, that the court meant to tell the jury by the first instruction that they would find for the plaintiff on the issue raised by that instruction if they found certain facts, etc. The court did not mean to tell the jury to find generally for the plaintiff on all issues of fact presented if they found in favor of plaintiff on the proposition of notice. If appellant conceived such to be the meaning of the instruction, in fairness to the court specific objection should have been made to it on this ground. *St. Louis, I. M. & S. Ry. Co.* v. *Rogers,* 93 Ark. 564; *St. Louis, I. M. & S. Ry. Co.* v. *Carter,* 93 Ark. 589; *Rock Island Plow Co.* v. *Rankin,* 89 Ark. 24; *Arkansas Midland Rd. Co.* v. *Rambo,* 90 Ark. 108.

There was no error in the giving of instruction number 2 at appellee's request. True, the instruction was abstract on the question of appellant's negligence elsewhere than at Coffeyville, Kansas. There was no evidence of negligence elsewhere than at Coffeyville. But, as the jury were required to base their finding of negligence on the evidence, we do not see that they could have found that appellant was negligent elsewhere than at Coffeyville, and appellant is therefore not prejudiced by the prayer.

There was evidence to warrant the court in submitting to the jury whether appellant was negligent at Coffeyville, Kansas, in the manner charged in the complaint. The instruction was not erroneous in that it ignored the question of notice, for the

reasons already announced in passing on instruction number one.

There was no prejudicial error in giving the third prayer of appellees. It was an interstate shipment, and the contract limiting the liability in case of loss to a certain maximum sum was void. *Chicago, R. I. & P. Ry. Co.* v. *Miles,* 92 Ark. 573; *St. Louis S. W. Ry. Co.* v. *Grayson,* 89 Ark. 154; *Kansas City S. Ry.* v. *Carl,* 91 Ark. 97.

What we have already said determines the other questions presented by appellant against its contention. There is no reversible error, and the judgment is affirmed.

DAVIS v. LIDDELL.

Opinion delivered April 4, 1910.

APPEAL AND ERROR—HARMLESS ERROR.—A decree sustaining the report of a master appointed to state an account between the parties should not be set aside at a subsequent term because the master did not consider a certain deposition if nevertheless such report was based on the weight of the evidence, including such deposition.

Appeal from Craighead Chancery Court; Western District; *Edward D. Robertson,* Chancellor; reversed.

Hawthorne & Hawthorne, for appellant.

J. F. Gautney and *H. M. Cooley,* for appellee.

HART, J. In December, 1906, insolvency proceedings were commenced in the Craighead Chancery Court against the Crescent Commission Company, a corporation duly organized and doing business under the laws of the State of Arkansas, and by consent of the parties interested W. P. Liddell was appointed and qualified as receiver, and in such capacity took possession of the assets of the company.

C. H. Davis, a creditor of the corporation, filed his intervention for the purpose of establishing his claim against it. The record recites that on April 22, 1908, a day of the April term, 1908, of the Craighead Chancery Court, Western District, the cause came on to be heard "upon the complaint of the in-

tervener, Charles H. Davis, the depositions of Herman Riedel, A. B. Jones, Charles H. Davis, Rudy Copeland, "and a stipulation in regard to the change of the name of the corporation."

The decree further recites that, after hearing the evidence, the court referred the claim to William Liddell for a statement of the account, and that said Liddell filed a statement of the account between the parties.

The court, after due consideration of the same, entered a decree in conformity with the statement filed by Liddell. At the November term, 1908, of said court, a motion was filed to set aside the decree rendered at said April term, 1908, on the ground that the master had adopted as his statement of the account one prepared by the solicitor of the intervener, Charles H. Davis, which is alleged to have been a fraud upon the court. The intervener filed his response to the motion, and additional evidence was taken by both parties. The cause was heard on the 20th day of November, 1908, a day of said November term, and the decree entered at the April, 1908, term was vacated, annulled and set aside. The court then appointed W. M. Taylor special master to state an account between the parties.

C. H. Davis, intervener, has duly prosecuted an appeal from this decree, and the cause appears on our docket as No. 1076, C. H. Davis, intervener, appellant, *v.* W. P. Liddell, receiver, appellee.

W. M. Taylor as special master was impowered to take evidence, and after doing so he made a statement of the account as directed by the court, and duly made report of same to the court. Exceptions were taken to the special master's report, and the exceptions were overruled by the court, and the report of special master Taylor was confirmed. A decree was entered in conformity with said report at the April term, 1909, of said court, and each party prayed an appeal to this court, and the case appears here as No. 1074, Crescent Commission Company *et al.*, appellants, *v.* C. H. Davis, appellee. The cases are docketed separately, but are properly the same case, and the issues involved will be considered together as one appeal.

The testimony is very voluminous, but the view we have taken of the case renders it unnecessary for us to abstract it.

The motion to vacate and set aside the decree entered at the April term, 1908, of the Craighead Chancery Court must be considered with reference to the testimony as it existed at the time the decree was entered. It is insisted by counsel for appellee that Liddell, the special master, instead of preparing a statement of the account from all the evidence as directed by the court, only read and considered the evidence on the part of the intervener, C. H. Davis, and that he merely adopted and filed as his report one prepared by counsel for Davis without the knowledge of the court or of counsel for the receiver in the original case, and that the court adopted this report without knowledge that it was prepared by counsel for Davis. The master testified that he read all the testimony except that of Copeland and the exhibit thereto. The testimony he did read and consider supports the report he made. Hence it can not matter that he did not consider the testimony of Copeland unless that would contradict the report as made by him. We have examined the testimony of Copeland, which was taken before the decree was entered at April term, 1908, of said court, and are of the opinion that, after giving it due consideration, the statement as made by the master is supported by the weight of the evidence. The decree which was entered recites that the chancellor considered the exhibit to Copeland's deposition in making his findings and confirming said report. The record shows that the solicitors for both parties were present when the report was passed upon by the court, and it was the duty of the court to pass its own judgment upon the findings of the master in the light of the evidence adduced. *Carr* v. *Fair,* 92 Ark. 359. Having reached the conclusion that the weight of the evidence, as shown by the record at the time the decree of the April term, 1908, was entered, supported the finding of the master, the fact that he did not consider Copeland's testimony could work no prejudice to the rights of appellee, and the decree should not have been set aside. In support of their motion to set aside the decree, counsel for appellee again took the deposition of Copeland, and in that deposition he went more into the details of the transaction, and this deposition tended strongly to contradict the testimony of the appellant, but, as above stated, in considering whether appellee was prejudiced by the action

of the master, we must consider the state of the record as it existed when the case was determined, and not as it was strengthened on the motion to set aside the decree. In short, we hold that, taking the record as it stood at the time the original decree was rendered, a preponderance of the evidence supported the decree, and therefore it was not erroneous, and should not have been vacated. Having reached this conclusion, it necessarily follows that all the subsequent procedings were *coram non judice* and void.

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

INDUSTRIAL MUTUAL INDEMNITY COMPANY *v.* HAWKINS.

Opinion delivered April 4, 1910.

1. CONTRACTS—CONSTRUCTION.—In construing a contract the true object is to arrive at the intention of the parties, to be ascertained by considering the object and purpose of the parties in making the agreement. (Page 419.)
2. INSURANCE—CONSTRUCTION OF INDEMNITY POLICY.—A contract of indemnity insurance will be construed most strongly against the insurer, and a construction will not be adopted which will defeat a recovery if it is susceptible of a meaning that will permit one. (Page 420.)
3. INSURANCE—INDEMNITY POLICY—TOTAL DISABILITY.—Under a policy of insurance obligating the insurer to make certain weekly payments if the insured should be wholly disabled and prevented "from the prosecution of any and every kind of business for a period of not less than one week," the insured is entitled to receive indemnity when he is so injured that he is wholly prevented from prosecuting any business in which he is capable of engaging. (Page 420.)

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

Carmichael, Brooks & Powers, for appellant.

The liability of the defendant is determined from the language of the contract. 46 Ia 631. The provisions may limit total disability to the inability to carry on any and all kinds of business. Under such clause the insured must be unable to

carry on, not only the duties of his usual occupation, but the duties of any other occupation. 79 Ill. App. 145; 46 Ia. 631; 25 Tex. Civ. App. 366; Joyce on Ins., § 3032; Bacon, Ben. Soc., § 395a.

Whipple & Whipple, for appellee.

Wherever any contract contravenes any established interest of society, it is void, as being against public policy. 22 Cal. 340; 61 Mo. 115. The courts will not tolerate a contract which is calculated to be prejudicial to the public welfare. 63 Ark. 318. An absolute physical disability ought not to be meant in all cases. Joyce on Ins., § 3031; 97 S. W. 240; 54 Mo. App. 468; 69 Minn. 14. The contract should receive a reasonable construction. 80 Me. 249; 86 S. W. 492; 111 Mo. App. 504.

FRAUENTHAL, J. This was an action instituted upon a policy of insurance to recover indemnity for the time that plaintiff was unable to prosecute any business by reason of an injury received by him. On March 4, 1907, the defendant issued its indemnity policy of insurance, whereby it agreed that if the plaintiff received an injury "which shall, independently of all other causes, immediately and wholly disable and prevent the insured from the prosecution of any and every kind of business for a period of not less than one week," it would make certain weekly payments to him during the continuance of such disability. The plaintiff was a day laborer, and on September 3, 1908, when the policy was in full force, he was injured while engaged in tearing up old machinery at the shops of the St. Louis, Iron Mountain & Southern Railway Company. The testimony on the part of the plaintiff tended to prove that the injury consisted of a contusion and abrasion of the right knee, and that he was wholly incapacitated and disabled by reason thereof from work of any and every kind from the date of the injury until October 5, 1908. The testimony also tended to prove that his disability did not render him so helpless that he could not have done some other kind of business if he had been possessed of the mental capacity. The evidence showed that plaintiff was uneducated, and was not capable of earning a livelihood in any other work or business except by manual labor.

The sole question involved in the case for determination

is whether or not, under the above provision of the policy, the plaintiff was injured to such an extent as to entitle him to a recovery. Upon that question the court instructed the jury that the plaintiff would be entitled to recover:

"If you believe from the evidence in the case that the plaintiff sustained an injury which of itself wholly disabled and prevented him from doing any and every kind of work pertaining to his occupation, or within the scope of his ability, for a period of over one week. * * * If, on the other hand, you find from the evidence that the plaintiff's injury was not such as to wholly disable and prevent him from doing any and every kind of work pertaining to his occupation, within the scope of his ability, for a period of over one week, your verdict will be for the defendant."

And the court refused to instruct the jury at the request of defendant as follows:

"The jury is instructed that, unless they find from the evidence that the injury sustained by the plaintiff was such as to wholly disable and prevent the plaintiff from the prosecution of any and every kind of business, you will find for the defendant."

A verdict was returned in favor of plaintiff, and defendant has appealed to this court.

The right of the plaintiff to recover in this case depends upon the interpretation of the language of the contract describing the extent of the disability under which he must suffer from the injury, and what would constitute a total disability, within the meaning of the policy. In the construction of all contracts the true object is to arrive at the intention of the parties; and in order to do that it is necessary to take into consideration the purpose of the parties in making the agreement. In construing such a provision as is involved in this policy that meaning should be given to the language which will be consistent with the fair import of the words used, having reference to the object and purpose of the parties in making the contract. The contract sued on is like any other insurance policy, and its provisions should therefore be construed most strongly against the insurer. As the language employed is that of the defendant, a construction will not be adopted which will defeat a recovery if it is susceptible of a meaning that will permit one. *American*

Bonding Co. v. *Morrow,* 80 Ark. 49; *Title Guaranty & Surety Co.* v. *Bank of Fulton,* 89 Ark. 471.

The general object of such contracts as the one involved in this case is to furnish to the insured an indemnity for the loss of time by reason of the injury which prevents him from prosecuting business. Its evident purpose is to secure him means of living during the time that he is unable to earn a livelihood. The language employed in this provision of the policy is for the purpose of defining what will constitute a total disability to earn a livelihood. Mr. Kerr in his work on Insurance, § § 385, 386, defines a total disability within the meaning of this character of policy of indemnity insurance as follows: "Total disability does not mean absolute physical disability on the part of the insured to transact any kind of business pertaining to his occupation. Total disability exists, although the insured is able to perform occasional acts, if he is unable to do any substantial portion of the work connected with his occupation. It is sufficient to prove that the injury wholly disabled him from the doing of all the substantial and material acts necessary to be done in the prosecution of his business, or that his injuries were of such a character and degree that common care and prudence required him to desist from his labor so long as was reasonably necessary to effect a speedy cure." 4 Joyce on Insurance, § 3031.

Total disability is necessarily a relative matter, and must depend chiefly on the peculiar circumstances of each case. It must depend largely upon the occupation and employment and the capabilities of the person injured. In the case of *McMahon* v. *Supreme Council,* 54 Mo. App. 468, where a policy provided to give relief where the insured was "totally and permanently disabled from following his usual occupation," it was held that the total disability would occur where the party was prevented from following an occupation whereby he could obtain a livelihood, and that, in determining whether such a disability exists in a given case, both the mental and physical capabilities of the insured should be considered. The following cases are to the same effect: *Young* v. *Travellers' Ins. Co.,* 80 Me. 244; *Lobdill* v. *Laboring Men's Mutual Aid Asso.,* 69 Minn. 14; *Turner* v. *Fidelity & Casualty Co.,* 38 L. R. A. 529; *Walcott* v. *United Life & Accident Ins. Assoc.,* 28 N. Y. St. 481.

In the case of *Wall* v. *Continental Casualty Co.,* 86 S. W. 491, the policy provided "that the insured to become entitled to indemnity for loss of time must be disabled 'from doing or performing any work, labor, business or service or any part thereof.'" In that case the court held that if the insured was disabled to do such work as, considering his ordinary employment, qualifications for affairs and station in life, could have been expected of him he was totally disabled within the meaning of the policy and should recover. See also *Foglesong* v. *Modern Brotherhood,* 97 S. W. 240; *Hutchinson* v. *Knights of Maccabees,* 68 Hun 355; *Gordon* v. *Casualty Co.,* 54 S. W. 98. There are some cases which hold that a literal effect should be given to the language employed in such provisions of the policy, and that where the total disability is limited to doing any and all kinds of business the insured must be unable to perform not only the duties of his usual occupation, but the duties of any other occupation. *Supreme Tent of Knights of Maccabees* v. *King,* 79 Ill. App. 145; *Lyon* v. *Ry. Pass. Assur. Co.,* 46 Iowa 631. But we think the provisions of contracts similar to the one involved in this case, like the provisions in all insurance policies, should be construed most favorably toward those against whom they are meant to operate; and they should be interpreted so as to carry out the plain purpose of the agreement. That construction should be given to the language which would not make it inoperative from its very inception, but which would, if at all consistent with the words employed, make an effective undertaking. In the case at bar the total disability occurred when the insured was prevented by the injury "from the prosecution of any and every kind of business." The use of the word "prosecution" indicates that the parties intended to mean that the insured was wholly disabled from doing that business which he had the capabilities to prosecute. Otherwise he could not recover unless he sustained an injury that rendered him absolutely helpless both mentally and physically. The plaintiff was an uneducated day laborer. He had no ability to do any business of any kind except that of manual work. He could not practice law or medicine or perform the duties of a banker or bookkeeper. He did not have the ability to follow these lines of business; and yet he was not so totally disabled

that he could not follow these avocations if he had possessed the ability to do so. It is, in effect, contended by defendant that by the terms of the contract he could theoretically, if not practically, do some kind of business, and therefore he cannot recover. Such a construction of the contract would virtually make it ineffective for any purpose at its very execution. Under such an interpretation the insured would scarcely, if ever, be entitled to indemnity. But we are of opinion that it was the intention of the parties that the plaintiff should under some circumstances receive indemnity; for that protection he was making stated payments, and the defendant received such payments. It was manifestly the intention of the parties that he should receive indemnity when he was so injured that he was wholly and totally disabled and prevented from the prosecution of any business which, without the injury, he was able to do or capable to engage in; and we think that this interpretation of the contract is not inconsistent with the above provision defining the nature of the disability as contemplated by the policy. We conclude that this is the reasonable and proper construction of the provision of the contract involved in this case. The lower court therefore did not err in its rulings upon the instructions in this case.

The judgment is affirmed.

GARLAND POWER & DEVELOPMENT COMPANY v. STATE BOARD OF RAILROAD INCORPORATION.

Opinion delivered April 4 ,1910.

1. STATUTES—CONSTRUCTION.—In order to conform to the legislative intent, errors in an act may be corrected or words rejected and others substituted. (Page 426.)
2. WATERS—INCORPORATION OF POWER COMPANIES.—The Act of May 13, 1905, providing that "the State Board of Railroad Commission" is authorized to grant a franchise to any corporation organized to produce power for manufacturing, etc., intended that the power to issue such franchises should be intrusted to the State Board of Railroad Incorporation. (Page 426.)

3. MANDAMUS—EXERCISE OF DISCRETION.—While mandamus will not be granted to review the exercise of discretion by any board or officer, it may be invoked to compel a board or officer to exercise such discretion. (Page 426.)

Appeal from Pulaski Circuit Court, Second Division; *F. Guy Fulk,* Judge; reversed.

Moore, Smith & Moore and *H. M. Trieber,* for appellant.

It is within the power of the court to alter the phraseology of a legislative act when such alteration is necessary to carry out the intention of the legislature. End. Int. Stat. § § 295, 319; 34 Ark. 263; 35 Ark. 56; 58 Ark. 113; 128 Pa. St. 593; 63 N. J. L. 291; 56 Wis. 425.

FRAUENTHAL, J. This is an appeal from a judgment of the lower court sustaining a demurrer to a petition for a writ of mandamus. The appellant alleged in its complaint "that it is a corporation organized under the general laws of the State of Arkansas providing for the incorporation of manufacturing and other business corporations, and that the chief and main business to be conducted by said corporation is the producing and manufacturing of electricity and electric current by water power for the purpose of furnishing power for manufacturing or reduction plants, for mining, milling or jigging operations, public utilities, and for furnishing light, heat and power;" that it owned a natural and principal power dam in Garland County, Arkansas, and had procured a charter for the development and operation of a water power. It further alleged that it had fully complied with the requirements of the act of the Legislature entitled "An Act to develop the Water Powers of this State," which became a law on May 13, 1905 (Acts 1905, p. 769); and in detail set forth the facts showing a compliance with the provisions of said act. It applied to the State Board of Railroad Incorporation for a franchise to erect such dam or dams in pursuance of said act of the Legislature; and it alleged that said Board of Railroad Incorporation refused to grant such franchise, basing its refusal upon the ground that it did not have the power under said act to grant such franchise. It asked in effect for a writ of mandamus directed to said Board of Railroad Incorporation requiring said board to exercise its

power and jurisdiction to entertain and pass upon the application of appellant for said franchise.

By section 2 of said act of the Legislature entitled "An Act to develop the water powers of this State," it is provided that "the State Board of Railroad Commission is authorized to grant to such corporation the franchise of erecting such dam or dams, which franchise shall state the maximum compensation per horse power to be received by such corporation for the use of the power generated; such power to be furnished at its principal power house or central station." In this State it appears that there is no board or commission which is designated by the name of "The State Board of Railroad Commission," and the principal question involved in the determination of this appeal is what board or commission did the Legislature intend to designate as authorized to issue franchises of the character applied for by appellant. It is obvious that the Legislature did not intend to create some new board or commission with power to grant such franchise, for nowhere in the act is any provision made for such creation or the membership of such board or commission. It is therefore apparent that the Legislature intended to confer this power on some board or commission already in existence, and to add to it this new duty. There are and were at the time of the passage of said act only two boards or commissions in the State to which this power could have been given, towit: "The State Board of Railroad Incorporation" and "The Railroad Commission of Arkansas." In order to arrive at the intent of the Legislature as to which of these boards or commissions it desired to name by this act, it is well to consider the duties imposed upon and the powers given to each of them by statute at the time of the passage of the act. For it is but reasonable to presume that the Legislature, in adding this duty to the board or commission then in existence, intended to place it with the board or commission having similar duties to perform. At the time of the passage of this act the principal duty of the "Railroad Commission of Arkansas" was to make reasonable and just rates of freight, express and passenger tariffs by persons or corporations operating railroad or express business in the State and to make rules and regulations therefor. It did not have the power nor was any duty imposed upon it

to grant any franchise to any corporation. It was, however, at the time of the passage of this act the principal duty of the "State Board of Railroad Incorporation" to grant charters to railroads and thus to issue franchises. The duty imposed by the act of May 13, 1905, to issue franchises of the character herein applied for was similar to the duties that were then performed by the "State Board of Railroad Incorporation." It is true that in this act it is also provided that the maximum compensation or rate per horse power shall be stated and fixed, and the duties of the "Railroad Commission of Arkansas" related to the regulation of rates of tariffs. But we are of the opinion that the issuance of the franchise was the primary object of this act in designating the board or commission that should perform this duty, and that the naming of the maximum charge for the use of the power was secondary; and that the State Board of Railroad Incorporation was, under the other requirements imposed upon the corporation seeking such franchise, equally if not better prepared to pass upon the same.

The Secretary of State was by law made the secretary of the State Board of Railroad Incorporation. By section 2 of this act of May 13, 1905, it was provided that the corporation should file with the Secretary of State a plat of survey showing the location of its principal power damsite, the stream above such site, and the lands necessary for its development. The information relative to the character and extent of the business of such corporation was placed in the hands of the secretary of the State Board of Railroad Incorporation by the terms of this act; and it is from this plat, survey and data that the board or commission would receive information upon which it would act in passing upon the application for the franchise. The placing of this data in the office of the secretary of the State Board of Railroad Incorporation would tend to indicate that it was the body intended by the Legislature to pass upon the application for the franchise. The name of the body designated by this act to issue this franchise does not conform with either of said two boards or commissions then in existence, and in the verbiage used it might apply equally to either. But because at the time of the passage of this act the duty to issue franchises was intrusted with the "State Board of Railroad Incorporation," we

are of opinion that the Legislature intended to add to that board the duty to issue franchises of the character applied for by appellant. In order to conform to the legislative intent, errors in an act may be corrected or words rejected and others substituted. 26 Am. & Eng. Ency. Law, 604; *Haney* v. *State,* 34 Ark. 263; *Reynolds* v. *Holland,* 35 Ark. 56; *Lancaster County* v. *Frey,* 128 Pa. St. 593; *State* v. *Timme,* 56 Wis. 425; Endlich on Interpretation of Statutes, § 319.

We are of the opinion that the words in the act, the "State Board of Railroad Commission," were intended to and should be the "State Board of Railroad Incorporation."

The writ of mandamus, however, will not be granted to review the exercise of any discretion of any officer or board. It can only be invoked to compel the officer or board to exercise such discretion. *Gunn* v. *Pulaski Co.,* 3 Ark. 427; *Brem* v. *Ark. County Court,* 9 Ark. 240; *Willeford* v. *State,* 43 Ark. 62; *Danley* v. *Whiteley,* 14 Ark. 687; *Howard* v. *McDiarmid,* 26 Ark. 100; *Black* v. *Auditor,* 26 Ark. 237; *McCreary* v. *Rogers,* 35 Ark. 298; *Branch* v. *Winfield,* 80 Ark. 61; *Rankin* v. *Fletcher,* 84 Ark. 156; 19 Am. & Eng. Ency. Law, 732. In this case it is alleged that the board refused to take any action upon the application made to it for the franchise because the members of the board were of opinion that they were not the body designated by this act to perform that duty. We are of the opinion that the Legislature had the right to add to the State Board of Railroad Incorporation the duty to issue the franchise, and by this act that board was designated to perform that duty and to exercise within its proper discretion that power. The court therefore erred in sustaining the demurrer to the petition.

The judgment is reversed, and this cause is remanded with directions to overrule the demurrer.

JACKSON *v.* JONES.

Opinion delivered April 11, 1910.

1. BILLS AND NOTES—TRANSFER—NOTICE OF FRAUD.—One who receives information, before his purchase of a note, of fraud practiced by the

payee is not an innocent purchaser, even though he was not informed of the circumstances under which the fraud was practiced. (Page 428.)

2. SAME—TRANSFER—NOTICE OF FRAUD.—In a suit upon a note to which the defense was interposed that it was procured by fraud, it is competent to prove that fraudulent misrepresentations were made by the payee and that notice of the fraud sufficient to put the holder of the note upon notice was communicated to the latter before he purchased the note. (Page 428.)

3. SAME—FRAUD—EVIDENCE.—Where, in a suit on a note, the defense was that there was fraud in the sale of the goods for which the note was given, it was competent to prove the fraud by showing statements made by the vendor to the vendee at the time of sale, though made in plaintiff's absence, if he had sufficient notice of such fraud to put him on notice before he purchased the note. (Page 429.)

Appeal from Sharp Circuit Court, Northern District; *John W. Meeks,* Judge; affirmed.

Sam H. Davidson, for appellant.

The production of the note and proof that the indorsement was made before maturity raised the presumption that plaintiff was a *bona fide* holder. 48 Ark. 454; 50 Ark. 289; 32 S. W. 357; Dan. Neg. Inst., § 814; 94 U. S. 753; 128 Ga. 504; 57 S. E. 869; 90 Pac. 1090; 97 S. W. 1232; 114 La. 883; 38 So. 594; 101 Minn. 30; 111 N. W. 730; 130 Wis. 326; 110 N. W. 192. Abstract instructions should not be given. 2 Ark. 360; 90 Ark. 78. Appellant is entitled to recover unless he participated in the fraudulent transfer of the instrument. 86 Ark. 191; 61 Ark. 81; Dan. Neg. Inst. 771-775; Tied. Com. Pap. 289. The fact the paper was purchased at a discount raises no presumption of bad faith. 67 Pac. 59; 14 Ohio St. 409; 11 Neb. 506.

McCULLOCH, C. J. Plaintiff Jackson sued defendants Jones and Wilson to recover on a negotiable promissory note executed by Jones as principal and Wilson as surety to one W. E. Smith, which note had been transferred before maturity by Smith to plaintiff. The defendants answered, setting forth facts sufficient to constitute a defense against Smith, the original payee, on account of alleged fraud and deceit in the sale of merchandise; and alleged further that plaintiff was not an innocent purchaser of the note for value, but purchased the note from Smith with notice of the facts constituting their defense. The circuit

court sustained a demurrer to certain paragraphs of the answer, and on appeal this court reversed the judgment and remanded the cause with directions to overrule the demurrer and proceed with the trial. *Jones* v. *Jackson,* 86 Ark. 191.

On the remand of the case, defendants filed an amended answer setting out more concisely the facts held by this court to constitute a defense. A trial before a jury resulted in a verdict in favor of the defendants. Plaintiff appealed.

The evidence was sufficient to warrant the verdict. Error of the trial court is assigned in the refusal to give the following instruction:

"1. You are instructed that the production of a note indorsed in blank, and proof that the indorsement was made before maturity of the note, raises the presumption that the holder of the note paid value for it, that he is an honest holder, and acquired the note in due course of business; and if you find from the evidence in this case that the plaintiff has produced in evidence the note sued on, that it is indorsed in blank, and that such indorsement was made before the note was due, you should find for the plaintiff in a sum equal to the principal and the interest on said note, unless you further find by a preponderance of the evidence that the note from its inception was so infected with fraud, false pretense or intimidation perpetrated upon defendant Jones, by Smith, the payee, as to destroy the title of Smith, and that Jackson was informed before he purchased the note that it was fraudulently obtained, was without consideration, was warned not to trade for it, and of the circumstances and fraud practiced by Smith in obtaining the note, and also that Jones would not pay it."

This instruction was inaccurate in stating that fraud on the part of the payee in obtaining the note would not be a defense against a purchaser for value unless the latter was informed *of the circumstances* and fraud practiced by the payee. If he received information before his purchase of fraud practiced by the payee, he was not an innocent holder, even though he was not informed of the circumstances under which the fraud was practiced. Notice that fraud had been perpetrated was sufficient to put him on notice as to the circumstances, and he purchased at his peril. However, the court gave other instruc-

tions which fully covered the subject-matter of the refused one; so there was no error in refusing it, even if it be treated as correct.

It is contended that the following instruction is erroneous, and should not have been given: "1. You are instructed that one who purchases a bill or note from the payee, with knowledge of circumstances amounting to a valid defense, stands in precisely the same position of the payee, and in such a case the defendant is entitled to all the defense he would have as against the original holder of the note." The contention is that the instruction is abstract because there was no evidence that plaintiff was informed of the *circumstances* amounting to a valid defense. The defendants testified that they told plaintiff before he purchased the note that it had been procured by fraud, and that they would not pay it. This was sufficient to warrant the instruction. *Jones* v. *Jackson, supra;* Tiedeman on Commercial Paper, § 300; 1 Daniel on Negotiable Instruments (5th Ed.), § 799. Other instructions correctly stated what would constitute a valid defense against the payee or purchaser with notice.

The next assignment of error is the ruling of the court in refusing to withdraw from the consideration of the jury the testimony of defendant Jones as to certain statements made to him at the time of the sale of the goods and execution of the note by the payee Smith, and by one McNeil who was interested in the sale. These statements constituted the fraudulent misrepresentations and concealments which induced the execution of the note, and formed the basis of the defense against liability. They were made at the time of the sale and execution of the note, and constituted part of the transaction. It was necessary to prove them in order to establish a defense, and it was competent testimony for that purpose. It was not necessary that these statements should have been communicated to the plaintiff, for he had general notice of the fraud sufficient to put him upon inquiry. *Jones* v. *Jackson, supra.*

There are other assignments of error, not of sufficient importance to discuss. No error was committed, and the judgment is therefore affirmed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* PRATT.

Opinion delivered April 11, 1910.

1. CONTINUANCE—AMENDMENT.—Refusing a continuance asked on account of an amendment of the complaint which does not change the cause of action, but states it more definitely, was not error where it appears that all of the witnesses to the occurrence were present and testified. (Page 431.)
2. MASTER AND SERVANT—NEGLIGENCE—EVIDENCE.—Proof tending to prove that a fellow servant negligently threw a switch, and caused an engine to strike plaintiff while he was unaware of its approach, and without giving him any warning, was sufficient to justify a finding of negligence on the part of the fellow servant. (Page 432.)

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

Thomas S. Buzbee and *George B. Pugh,* for appellant.

The court erred in refusing a continuance. 71 Ark. 197; 67 Ark. 142. The evidence is not sufficient to support the verdict, because it fails to show that the injured person was discovered in time to avoid the injury. 86 Ark. 306; 82 Ark. 522; 79 Ark. 608; *Id.* 225; 72 Ark. 572; 61 Ark. 549.

Davis & Pace, for appellee.

The evidence is sufficient to support the verdict. 79 Ark. 621. It is for the jury to determine all disputed questions of fact. 67 Ark. 531; 65 Ark. 116; *Id.* 255; 67 Ark. 433. The verdict is not excessive. 19 Kan. 488; 81 Ia. 1; 89 Wis. 257; 51 Ill. App. 543; 63 *Id.* 172; 90 Ill. 142; 58 N. Y. S. 640; 83 Ga. 512.

McCULLOCH, C. J. This is an action to recover damages for personal injuries sustained by the plaintiff on account of being struck by a moving switch engine operated by defendant's servants. The original complaint stated that plaintiff was employed as a car inspector in defendant's yards at Ruston, La., and that "the yardmaster in charge of the railroad yards of said corporation in the town of Ruston, State of Louisiana, was engaged in making a flying switch, in order to place certain cars on a certain sidetrack in said yards, and that, while so engaged in making said flying switch, he negligently and carelessly caused the engine attached to said cars to be run over

plaintiff, knocking him to the ground, breaking two of his ribs and his right arm above the elbow, inflicting serious and painful wounds upon his head, his hips and back and his legs, and injuring plaintiff internally."

Defendant moved the court to require plaintiff to make his complaint more definite and certain by stating in what manner the yardmaster was negligent in making the flying switch, and by giving the name of the yardmaster, so that defendant could prepare its defense. Plaintiff then amended the complaint by inserting a further allegation as to the manner in which his injury occurred, as follows: "That plaintiff was standing upon the sidetrack, near to the switch, wholly unconscious of the fact that the engine was to be turned into the switch where he was standing, and that W. J. Horton, an agent and employee of said defendant, seeing him, and realizing his peril, failed to warn him, but carelessly and negligently, and without warning, suddenly threw the switch, running the engine upon the sidetrack, thereby negligently and carelessly causing the engine attached to said cars to be run over plaintiff, knocking him to the ground," etc.

Defendant then moved for a continuance, on the ground that the amendment completely changed the cause of action set forth in the complaint as originally filed, and that since the change defendant had had no opportunity to procure the attendance of witnesses. The motion was overruled, and defendant answered, denying the allegations of negligence. A trial resulted in a verdict in plaintiff's favor in the sum of $8,000, and defendant appealed.

The principal assignment of error is as to the ruling of the court in refusing a continuance. The amendment did not change the cause of action set forth in the original complaint, but stated it more definitely. No prejudice resulted from the refusal of the court to postpone the trial, for it appears that the witnesses to the occurrence were all present and testified. Defendant introduced Horton and the trainmen who were present. It is not shown that the attendance of any other material witnesses could have been procured by the postponement of the trial. No prejudice, therefore, resulted. *St. Louis S. W. Ry. Co.* v. *Jackson,* 93 Ark. 119.

It is contended that there was not sufficient evidence to sustain the charge of negligence upon the part of the yardmaster, Horton, after his discovery of plaintiff's perilous position. The plaintiff was a car inspector, but was not engaged in inspecting cars when he was injured. He and two other employees, Hair and Holloway, were walking through the yards going to another part of the yards, and Horton was having some switching done. The main track runs north and south, and there are two side-tracks—one called "the compress track," running off from the east side of the main track, and the other called "the Y track," running off from the west side of the main track. The two switches on the main track are about 140 feet distant from each other.

Plaintiff and his two companions were going down the main track, and had passed the compress switch, and were approaching the Y switch, when Horton, who was standing near the Y switch, called to one of them, and directed him to go back and throw the compress switch. An engine with cars attached was then coming up the main track from below the Y switch, and the Y switch was, according to the plaintiff's testimony, lined up for the engine to go on up the main track. They were then walking along a path between the main track and the Y switch, which at that place were only three or four feet apart, and stepped over on the Y track in order to get out of the way of the approaching engine, which they supposed was to pass on up the main track; and, in obedience to Horton's directions, Holloway ran back to the compress switch to throw it. Plaintiff and Hair turned their faces toward Holloway, and, supposing that a flying switch was to be made so as to kick the cars on the compress track, they called out to Holloway not to throw the switch until the engine passed. They did not know that the Y track was to be used, as the switch for that track was lined up for the engine to pass on up the main track. Their backs were turned toward Horton, and, as the engine approached, Horton threw the Y switch, the engine passed in on the Y track, and struck plaintiff before he was aware of its approach. Hair also narrowly escaped being injured.

Plaintiff and Hair were standing on the Y track about forty feet distant from the switch, and in full view of Horton. Hor-

ton testified that when he called to plaintiff and the other two men to throw the other switch, he had already thrown the Y switch so that the engine would go in on the Y track, and was standing by the switch ready to throw it back as soon as the engine passed, and thus let the detached cars pass on up the main track and turn in on the compress track. In this he is contradicted by the plaintiff, who says that the Y switch was lined up for the main track at the time they stepped over on the Y track. He is also contradicted by witness Carpenter, who testified that Horton was standing within five or six feet of the Y switch, and, *after* he called to the others to throw the compress switch, he stepped over and grabbed hold of the Y switch to throw it.

It is true, as contended by the defendant's counsel, that the direct evidence fails to show that Horton was looking at plaintiff and Hair when he threw the switch; but the testimony does show that only a moment before he was looking at them and saw them step over on the Y track and turn their backs toward him and the approaching engine, and that he immediately threw the switch so as to turn the engine in on the Y track where plaintiff and Hair were standing, apparently unconscious of their danger. He gave no warning at all, and the jury were warranted in finding that Horton was aware of plaintiff's perilous position and of the latter's unconsciousness of the danger. We think the evidence was sufficient to sustain the finding of the jury.

The evidence was also sufficient to warrant the recovery of the amount of damages assessed by the jury. The verdict was not excessive.

Judgment affirmed.

CASEY v. DORR.

Opinion delivered April 11, 1910.

1. MALICIOUS PROSECUTION—PROBABLE CAUSE.—The finding of an indictment by a grand jury is only *prima facie* evidence of probable cause, and such presumption may be rebutted in an action for malicious prosecution. (Page 436.)

2. SAME—SUFFICIENCY OF COMPLAINT.—A complaint which alleges that defendants did wilfully and maliciously and without probable cause induce the grand jury to find an indictment against plaintiff, and did wilfully and maliciously and without probable cause instigate, aid and abet, advise and encourage the prosecution of the charge thereunder, states a cause of action. (Page 437.)

3. PLEADING—INDEFINITENESS.—The objection that a complaint for malicious prosecution is defective in failing to state the means by which the finding of the indictment in question was procured and the prosecution instigated should be reached by a motion to make the complaint more definite and certain, and not by a demurrer. (Page 437.)

Appeal from Independence Circuit Court; *Charles Coffin*, Judge; reversed.

Z. M. Horton, for appellant.

Indefiniteness in pleading must be reached by motion, and not by demurrer. 71 Ark. 564; 70 Ark. 161; 66 Ark. 480; 56 Ark. 629; 52 Ark. 378; 49 Ark. 277; 71 Ark. 422.

Charles F. Cole and *McCaleb & Reeder*, for appellee.

If the complaint shows a conviction of the plaintiff, the presumption of probable cause is rebutted. 15 L. R. A. (N. S.) 1143; 46 Kan. 550; 12 B. Mon. 555; 120 U. S. 141; 99 Mo. 183; 19 R. I. 338; 33 Atl. 525; 14 R. I. 609. Even binding to await the action of the grand jury is *prima facie* evidence of probable cause. 76 Ark. 41. When a complaint contains material facts which constitute a defense, it is bad on demurrer. 13 N. E. 51; 10 N. E. 100. In an action for malicious prosecution, the petition should state facts and conclusions. 90 Mo. 377. An answer which sets up only conclusions of law is demurrable. 43 Ark. 296; 57 Ark. 284.

McCULLOCH, C. J. Appellant sued appellees to recover damages for malicious prosecution, and the court sustained a demurrer to the complaint, which is as follows:

"That on the 8th day of April, 1904, the grand jury of Independence County, Arkansas, presented to and filed in the circuit court of said county an indictment against this plaintiff in words and figures as follows, viz: (Here follows copy of indictment returned against appellant for the crime of embezzlement).

"That the allegations of said indictment were and are ab-

solutely false. That the prosecution thereon continued from time to time, from said day and date, until the October term, 1907, of the Independence Circuit Court, at which term of said court the plaintiff herein was put upon his trial on said indictment, and upon a trial by a jury in said court found 'not guilty' and completely exonerated from all charges and imputation of guilt included and contained in said charge. That at and before the finding of said indictment, and at the finding thereof, and conducive to and causing the finding thereof, the defendants, and each of them, jointly and severally conspiring together and desiring and agreeing among themselves to wilfully, maliciously and without probable cause to inspire them thereto, did wilfully and maliciously induce said grand jury to find and present said indictment, being prompted thereto by malice towards this plaintiff and without probable cause to believe this plaintiff guilty of the charges contained in said indictment. That the said defendants wilfully, maliciously and without probable cause to believe the plaintiff guilty, caused said indictment to be found and presented by said grand jury and instigated, aided, abetted, advised and encouraged, and procured the institution, continuance and prosecution of said indictment, and the charges therein contained against this plaintiff from time to time until the October term of said court, 1907, at which term of said court said cause was tried at the instigation of said defendants, resulting in an acquittal of this plaintiff as aforesaid. That by the instigation of said prosecution, the finding of said indictment, the continuing of said cause from time to time upon the docket of the Independence Circuit Court, * * * he has been damaged in the sum of one hundred thousand dollars. That the instigation, backing up, prolonging said prosecution and keeping said case in court, was done by the defendants wilfully, maliciously and for the purpose of extorting money from this plaintiff, and without probable cause on the part of the defendants to believe this plaintiff was guilty of the charges contained in said indictment."

It is contended by appellees, in support of the court's ruling, that, as the complaint alleges the finding of an indictment by the grand jury, there must be an additional averment, in order to show affirmatively the absence of probable cause, to

the effect that the indictment was procured by fraud, perjury or other unfair conduct on the part of the defendants.

The rule seems to be established by the weight of authority that a judgment of conviction by a court of competent jurisdiction is conclusive evidence of the existence of probable cause, even though the judgment be subsequently reversed and set aside, unless it be shown that the judgment was procured by fraud or undue means. *Carpenter* v. *Sibley* (Cal.), 15 L. R. A. (N. S.) 1143 and note; *Crescent City Live Stock Co.* v. *Butchers' Union,* 120 U. S. 141.

In *Wells* v. *Parker,* 76 Ark. 41, it was urged upon this court that the binding over by a committing magistrate to await the action of the grand jury was conclusive evidence of the existence of probable cause, but we declined to so hold, and decided that such was only *prima facie* evidence of probable cause. We find no authorities which go to the extent of holding that the mere finding of an indictment, which is only an accusation and not an adjudication of guilt, is anything more than *prima facie* evidence of the existence of probable cause for the prosecution. The Kentucky Court of Appeals, in a recent case, stated the following rule on the subject, which we conceive to be sound: "The finding of an indictment by the grand jury is *prima facie* evidence of probable cause, and the acquittal of the person indicted is evidence of his innocence; but the acquittal does not of itself show evidence of malice or the want of probable cause, and therefore the plaintiff in an action for malicious prosecution must prove some other facts tending to establish a want of probable cause for the prosecution, and, when he has introduced evidence of this character, malice on the part of the prosecutor will be inferred." *Jones* v. *Louisville & N. Ry. Co.,* 96 S. W. 793.

Now, since the finding of an indictment is only *prima facie* evidence of probable cause, this may be overcome, when the prosecution has been terminated by an acquittal or by a dismissal of the indictment, by proof adduced to the effect that there was in fact no probable cause for the prosecution. The finding of an indictment cannot be given any greater force in establishing the existence of probable cause for the prosecution than the binding over of a committing magistrate; and, since

this court held that in the latter case it was only *prima facie* evidence, we consider that decisive of the question that the returning of an indictment was only *prima facie* evidence. To hold otherwise would be to give the same degree of probative force and conclusiveness to the finding of an indictment as to a judgment of conviction by a court of competent jurisdiction.

The following cases support the views we now express, and are precisely in point: *Flackler* v. *Novak,* 94 Iowa 634; *Raleigh* v. *Cook,* 60 Tex. 438; *Bell* v. *Pearcy,* 33 N. C. 233.

The North Carolina court, in the above cited case, after announcing the rule that a judgment of conviction by a court of competent jurisdiction is conclusive of the existence of probable cause, said: "The finding of a grand jury has not this conclusive effect, and an acquittal opens the question, so as to give the party an opportunity to offer evidence to repel the presumption, growing out of the action of the grand jury."

In *Flackler* v. *Novak, supra,* the court said: "The action of the justice and of the grand jury undoubtedly tended to show probable cause, but would not be conclusive proof of it. If the defendants knew that the real facts did not authorize the action taken, there was no probable cause." The court in that case held that it would have been improper to instruct the jury that the defendants had probable cause for instituting the proceedings unless the plaintiff shows that the action of the grand jury in finding the indictment, and of the justice in binding over, was procured or caused by fraud or false or perjured testimony.

The complaint alleges that appellees did willfully and maliciously, and without probable cause, induce the grand jury to find an indictment against appellant, and did willfully and maliciously, and without probable cause, instigate, aid and abet, advise and encourage, the prosecution of the charge under said indictment. We are of the opinion that the complaint stated a cause of action. The allegation should have been made more specific by stating the means by which the finding of the indictment was procured and the prosecution instigated; but this defect should have been reached by a motion to make the complaint more definite and certain. *Johnson* v. *Douglass,* 60 Ark. 39; *Bush* v. *Cella,* 52 Ark. 378.

The court might properly have treated the demurrer as a

motion to make the complaint more definite and, after sustaining it, given appellant an opportunity to amend. But that is not what the court did. It decided, by sustaining the demurrer, that no cause of action was stated at all, and therefore appellant was not called on to make his complaint more definite.

Reversed and remanded.

WOOD, J., dissents.

ALEXANDER v. ALEXANDER.

Opinion delivered April 11, 1910.

DIVORCE—DESERTION—CONDONATION.—The fact that, after a wife voluntarily abandoned her husband, he contributed money to defray her expenses during her illness and showed himself anxious to receive her, should she return, was not a condonation of her desertion.

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

STATEMENT BY THE COURT.

Appellee sued appellant for a divorce April 28, 1909, alleging that he was married to appellant in Little Rock, Arkansas, April 10, 1908, that he and his wife went to Carlisle to live, and that the next day appellant willfully abandoned him without cause, and has so continued to willfully desert him for a period of more than one year.

Appellant answered, denying that she had willfully deserted and abandoned appellee without reasonable cause. She states the facts to be that:

It was against appellant's will and desire to separate, and has ever been so, and is now her desire to live with appellee, ever ready and willing to return to appellee if he would permit her, and she has repeatedly so informed him, and he refused to give his consent and treated her with silent contempt. That her absence has been caused by will of appellee and against her will and over her protest. She performed her duty as wife, and gave him no cause to refuse her his home, and that the

alleged abandonment and desertion is on his part. She prays that divorce be denied, and the complaint dismissed. She also moved the court in writing for suit money and alimony.

The appellee filed what he termed an answer to appellant's cross complaint, in which he denies all its material allegations, and he sets up, in answer to the motion for alimony, the fact that a suit had been instituted by appellant on the 17th day of July, 1908, against appellee for separate maintenance and alimony; sets out as exhibits to his answer the record of the proceedings in that cause, including all the pleadings and depositions and the final order showing her complaint for maintenance dismissed for want of equity and pleads *res judicata* as to this. The appellant moved that this answer to the so-called cross complaint be dismissed, which was overruled.

The court, after hearing all the evidence, rendered a decree in favor of appellee for divorce, and denied appellant alimony and attorney's fees.

Kerby, Midyett & Tucker, for appellant.

The court below should have allowed alimony and attorney's fee. 44 Ark. 46. Asking for expense money was a defense, and not a cross complaint. 66 Ark. 93. There can be no reply to a defense. Kirby's Dig., § 6108; 44 Ark. 293; 34 Ark. 613. And, when improperly filed, should be stricken out. 48 Ark. 243; 33 Ark. 56; *Id.* 593; Newman, Pld. & Pr. 627. To leave for medical treatment is not a desertion. 62 Ark. 613. To establish a desertion, it must appear that defendant left of her own accord and against the will of the other party. 13 N. J. Eq. 38.

Trimble, Robinson & Trimble and *Robertson & Demers,* for appellee.

A motion setting up cause and praying for affirmative relief constitutes a cross complaint. 12 Colo. 504. There was no consent for her to remain away. 62 Ark. 615.

WOOD, J., (after stating the facts). It was proper for the court to consider the record in the suit for maintenance as a part of the evidence in this case. We gather from the entire record that appellant, who had been twice married, "put matrimonial ad. in Democrat month or two after" she arrived from

Parsons, Kansas, where she had formerly lived, and "got forty answers." Like the suitors to "fair Portia," "from the four corners of the earth they came to kiss this shrine." Appellee (Dr. Alexander) was among the many who answered her advertisement; she liked his letters. He "visited her once or twice a month, and wrote "a letter every week, except when he was sick;" she was "very well impressed with him." He represented himself as a man of means, having property worth $17,000. He said he had given other wives $1,000 on marriage, and would give appellant more. She thought he was a man of honor, and relied upon his representations. She did not know of his drinking before marriage, and thought she would be proud of him. These were the visions of happiness that came to appellant as she contemplated marriage with appellee. But alas! scarcely had the word been spoken that joined them in wedlock, before "a change came over the spirit" of her dream. For he began to drink before they had left Little Rock, and was dazed with liquor, and "smelt so of whisky that it almost made appellant sick as he sat beside her" on the train to Carlisle. When she reached the doctor's home, she found a beautiful yard and a house that looked real well on the outside." "The porch was covered with roses," but within (according to her version) was reeking with filth. For she "had a notion to hollo, and went through the room as fast as she could go." There was no oil in the cruse, and no meal in the barrel. "Two eggs and a little piece of bacon meat" was the provision he had made for the wed ding feast. The tableware was meagre, old and broken. The household and kitchen furniture was scanty, dilapidated and filthy. The stench was so great she "went out on the porch and cried." Then the appellee's stepson came, and invited them to supper. They went, and, while waiting for supper, appellant went to the drug store and came back in a dazed condition. His stepdaughter said he was drinking, and that "no decent woman could live with him." After supper they again went to the doctor's house to spend the night, and when bed time came he was helpless. "She helped him to bed;" "he went to sleep in a stupor," got up at 1 A. M., drank half of glass of alcohol, and then "kept pulling and hauling at me," she says, "until 4 A. M., then up, drank a dose of medicine, which he said he had to take

to quiet his nerves so that he could sleep, went back to bed and "to sleep again in a dazed condition," and remained so until eight or nine o'clock in the morning. When morning came, she appealed to Walker, stating to him that the doctor said he had taken strychnine, and she was alarmed. She was informed by Walker: "That is nothing; takes worse than that." She said on account of his condition would return to Little Rock, refused to go to his house with him, got sick "seeing him the way he was all night," and Mrs. Walker telephoned her daughter to come out that evening. He was drunk Sunday evening; she could not stay with him acting like that; told him she would go. He pleaded with her to stay, saying he would not drink any more; but she left, saying: "If you will do all right, I'll come back."

The above is the picture, before and after, of the matrimonial venture between appellant and appellee, as graphically portrayed by appellant herself. It shows that appellant abandoned the bed and board of appellee after an experience of only one day and night. She said if she had known that the doctor drank before marrying him she would not have married him. She testified in the suit for maintenance that "if the doctor would quit drinking and fix up his house so it would be comfortable and decent," she did not think she could live with the doctor.

The chancellor was warranted in reaching the conclusion from appellant's own testimony that she had abandoned the appellee forever. She left him, according to her own evidence, with supreme disgust for his person and his home.

If the facts were as horrible as she depicted, she was not without excuse for leaving him temporarily. And if the conditions were as she described on the wedding night, and there was no reformation, she was warranted in leaving him permanently. For no wife would be expected to endure a continuation of the indignities and indecencies which she relates as having occurred the first night. Such conduct, continued, would be a ground for divorce. *Craig* v. *Craig*, 90 Ark. 40; *Rie* v. *Rie*, 34 Ark. 37. The chancellor, however, doubtless concluded, from the testimony on behalf of appellee, that the facts with reference to appellee's person, habits and his home surroundings

were not as repulsive as portrayed by appellant. The appellee himself denied categorically the charges of drunkenness on his wedding night and the other occurrences which she says took place at his home and at Walker's, his stepson's. He admitted that his carpets were old, and that his furniture was not new and elegant, but maintained that his home was as well equipped with the comforts and conveniences of ordinary domestic life as one of his financial ability could be expected to provide. He showed that his stepdaughter and another lady had thoroughly cleansed and prepared his house for their homecoming after the wedding. He proved that he was not in the condition of intoxication at Mrs. Walker's that appellant described. He showed that he protested against her leaving him, and with tender and affectionate letters invited her to return after she had gone, promising to make the home as inviting and comfortable as possible for her. But she declined the invitation. While there was testimony in the record to the effect that appellee would get on occasional sprees and be drunk during those sprees, there was no testimony except the testimony of appellant that he was on such spree on the occasion of his marriage. Witnesses testified on behalf of appellee that he was an upright, honorable gentleman, and that no one in the community was more respectable. Witnesses in his behalf testified that appellant made inquiry about the condition of his property while at Carlisle, whether he had any money in bank, and whether his land was under mortgage, and one witness said when appellant was told that appellee was under mortgage and did not have any money, "her hopes fell right then."

True, appellant testified that she wanted to return to appellee, and repeatedly wrote him letters to that effect, which letters she says he ignored, and treated with silent contempt. But the only letters she exhibits in the record, protesting her desire to return, were written after the divorce suit was instituted, and after her suit for separate maintenance had been tried, and her complaint dismissed for want of equity. The chancellor did not believe that she was sincere in wishing to return to appellee, but doubtless concluded that her desertion of him from the beginning was without any justifiable provocation, and that, notwithstanding his earnest and affectionate entreaties for her

return (as shown by his letters), she continued to willfully absent herself from him until one year had passed, and his cause for divorce was complete.

The fact that appellee, notwithstanding her desertion, contributed money to defray her expenses during illness, and showed himself anxious to receive her, should she return, was not a condonation of her dereliction in remaining away from his home, but on the contrary only served to emphasize her delinquency in so doing. *Reed* v. *Reed,* 62 Ark. 615; *Craig* v. *Craig,* 90 Ark. 40.

Affirm.

JONES v. GRAHAM.

Opinion delivered April 11, 1910.

APPEAL AND ERROR—INCONSISTENT POSITIONS.—Where a mortgage sale conducted by a commissioner was set aside by the chancellor and the purchase money refunded to one of the two purchasers, who were partners, the other partner is not in a position to ask this court to confirm the sale of the land.

Appeal from Ashley Chancery Court; *Zachariah T. Wood,* Judge; affirmed.

STATEMENT BY THE COURT.

The facts of this case, so far as it is necessary to state them, are substantially as follows: Benjamin Graham, trustee for the American Freehold & Mortgage Company, brought suit in the Ashley Chancery Court to foreclose a deed of trust executed by Princehouse & Barr to the Mortgage Company on certain wild lands, to secure an indebtedness to the company. The suit progressed to a decree of foreclosure, and appellee Hendrix was appointed commissioner to sell the lands and report his proceedings to the next term of the court.

On the 18th day of November, 1907, the commissioner filed his report with the clerk of the Ashley Chancery Court, wherein he reported that as such commissioner, after giving due and

legal notice of the time, place and terms, as provided by the original decree herein, he made sale of said lands to Jones & McCarver, they being the highest and best bidders at said sale, offering the price of $1,000, said sale being made on the 27th day of July, 1907; the purchasers electing to furnish the said sum of $1,000, the amount of their bid, in cash, in lieu of giving bond for the purchase money.

At the November term, 1907, of the Ashley Chancery Court, the original plaintiff, Benjamin Graham, filed exceptions to the commissioner's report, and asked that the report of the commissioner be stricken from the files because—

1. That the decree was erroneously entered because the plaintiff had agreed to accept a deed conveying the land from defendant in full settlement of claim under decree.

2. That the commissioner sold the lands for grossly inadequate price.

3. That lands were erroneously described in decree as being in range 4, instead of range 5.

S. S. McCarver and W. B. Jones were allowed to intervene and file what is designated an answer to the exceptions of the plaintiff, Benjamin Graham, to the commissioner's report. They set up that J. M. Hendrix as special commissioner proceeded to execute the order of foreclosure by selling the lands described as follows: Southeast quarter, southeast quarter, section 20, southwest quarter section 21, all of section 28, in township 18 south, range 5 west; that he sold the above lands in obedience to the orders of the court, and that McCarver & Jones purchased same, paying to the commissioner the purchase money; that the commissioner had made his report of sale to the court setting forth facts and showing a compliance with the decree of the court ordering foreclosure. They further set up, that on the 19th day of November, 1907, in open court the plaintiff in the original suit filed exceptions to said report, stating, in substance, that after the decree herein, and before the day of sale, the original defendants herein had executed a deed to one John M. Rose in full satisfaction of the said debt, which deed they allege was made on the 16th day of July, 1907, and recorded on August 8, 1907. These interveners say that John M. Rose was one of the attorneys of the plaintiff in the orig-

inal suit, is now, and was at the time of the deed referred to. They deny that this deed was made as stated on the 16th day of July, 1907. They deny that there was a previous agreement between the parties before said decree was entered that this deed should be made.

These interveners further state that they purchased said land in good faith, and have paid for same; that said sale was fair, and that the report should be approved by this court and the commissioner required to execute deed. They further deny that said land was sold at a grossly inadequate price. That, as to exceptions Nos. 4 and 5, these are matters which the court can and should correct by *nunc pro tunc* order, making the record speak the truth in this: that the land ordered to be sold was to satisfy a judgment of $3,500, with interest at eight per cent. from date of contract, said land being situated in range five instead of range four, as shown by decree.

On the hearing of the issue raised by the exceptions to the report of the commissioner and the answer thereto of McCarver & Jones, it appeared that, pending the foreclosure suit, certain negotiations were had between the parties to the foreclosure suit whereby it was agreed that the defendants, the debtors, would convey one of the tracts of land included in the suit to J. M. Rose, as trustee for the mortgage company, the plaintiff, in satisfaction of the debt that was secured by that particular tract. This agreement was pending, but the attention of the court was not called to it, and the decree of foreclosure embraced the tract that the parties defendant had agreed to convey to the mortgage company, the plaintiff, and was sold and purchased as set forth in the report of the commissioner by McCarver & Jones. The deed was executed in accordance with the agreement of the parties. It was shown by the attorneys for both parties that the decree embracing the lands sold to McCarver & Jones was entered through inadvertence, that it was not intended that this tract should be embraced in the decree. The chancellor, after hearing the evidence, took the matter under advisement until the next term of the court. In the meantime, in view of the fact that Jones & McCarver had actually paid their bid in cash, there was an understanding or agreement that, as soon as the chancellor should reach a conclusion, he was

to notify the attorneys for the respective parties without waiting until the next term of the court. The object of this understanding was to permit the commissioner to return the money to the purchasers at once, and not keep them out of the use of it until the next term of court, if the sale was to be set aside. In a short while the chancellor notified the parties that the sale would not be confirmed, and the commissioner paid the thousand dollars over to McCarver, a member of the firm of Jones & McCarver. He filed a report of the transaction, to which he attached a receipt for the money signed by Jones & McCarver, by S. S. McCarver. Jones filed a motion asking the court to require the commissioner to bring the money into court and praying that in default of such payment into court the sale to Jones & McCarver be approved and confirmed. The court made an order requiring the commissioner to bring the money into court.

Considerable testimony was taken on the question as to whether the commissioner should have paid the money to McCarver of the firm of McCarver & Jones, which we deem it unnecessary to set out in detail. The court on this issue found that the commissioner had paid the money "to the parties entitled thereto," and discharged the commissioner from any liability therefor.

The final decree of the court was that the sale be not confirmed, and that the report thereof be stricken from the files of the court. Jones excepted, and prayed an appeal, which was granted.

J. E. Bradley, for appellant Jones.

A sale will not be set aside for inadequacy of price unless the inadequacy be so gross as to shock the conscience or raise a presumption of fraud. 78 Ark. 218; 56 Ark. 240; *Id.* 502; 20 Ark. 318; 117 U. S. 180; 108 Ala. 140; 9 Bush 285; 61 Miss. 78; 44 Ark. 502; 3 Fed. 689; 67 Ill. 513; 11 Okla. 429; 132 Ala. 650; 32 So. 718; 107 Pa. 717; 77 N. W. 515; 36 Kan. 437; 10 Wis. 132; 2 Paige 99; 9 Paige 259; 183 Pa. 88; 24 Col. 382; 139 Mo. 190; 40 S. W. 764; 67 Vt. 563; 80 Md. 247; 165 Pa. 248; 82 Ind. 649; 54 Kan. 622; 32 S. W. 1088.

John M. Rose and *Coleman & Lewis,* for appellee Graham.

Jones necessarily had to turn loose either the money or the land. He could not hold both. 83 Ark. 306; 57 Ark. 638; 64 Ark. 213; 75 Ark. 51.

George & Butler, for appellee.

WOOD, J., (after stating the facts). Jones appeals from the decree of the court refusing to confirm the report of sale of the commissioner and striking the report from the files. He does not appeal from that part of the decree approving the report of the commissioner showing that the money paid by the firm of McCarver & Jones for the purchase of the land had been returned to McCarver, a member of that firm, while the partnership still existed. The receipt of the money by McCarver bound Jones. He did not appeal from the decree of the court exonerating the commissioner for paying over the money to McCarver (of the firm of McCarver & Jones) and discharging the commissioner from all liability on that account. The money which his firm paid for the land having been returned, Jones is not in an attitude to ask that the sale of the land also to his firm be confirmed. He can not have both the money and the land. He cannot "eat his cake and have it," too. Another view of the case is that Jones moved to have the commissioner bring the money into court for the purpose of having that money turned over to him, instead of McCarver. The testimony before the chancellor on Jones's motion to have the money brought into court shows that he was claiming the money as his own, and that the commissioner should have paid same to him, instead of to McCarver. By his motion then, conceding that he has appealed from the ruling of the court on that issue, he is here insisting that the one thousand dollars be paid over to him for his individual benefit, and at the same time he is also insisting that the sale of the commissioner be confirmed. His positions are inconsistent. *French* v. *Vanatta,* 83 Ark. 306; *McDonald* v *Hooker,* 57 Ark. 638; *Cox* v. *Harris,* 64 Ark. 213; *Cook* v. *Martin,* 75 Ark. 51.

The decree is affirmed.

ROACH v. WHITFIELD.

Opinion delivered April 11, 1910.

SALE OF CHATTEL WITH RESERVATION OF TITLE—LOSS BY FIRE.—Where a vendor of chattels retained title merely for the purpose of securing payment of the purchase money, and before it was paid the property was destroyed by fire without fault on the vendee's part, the vendor is entitled to recover the purchase price.

Appeal from Sevier Circuit Court; *James S. Steel,* Judge; reversed.

STATEMENT BY THE COURT.

The appellant sued appellees on account for goods alleged to have been sold by appellant to appellees. Appellees answered, denying that they were indebted to appellant in the sum sued for. They set up that they were merchants, and entered into an agreement with appellant whereby she was to ship to appellees such goods as might be necessary and required by appellees on consignment to be paid for when sold, the appellees acting as the agents of appellant in making the sale. They allege that in the transactions out of which the suit grew they were acting as the agents of appellant in making the sale of goods furnished them for that purpose by appellant, and that the account on which appellant sues was for goods in their possession for her, and that the goods while being so held were destroyed by fire without any negligence on the part of appellees. The appellant replied to the answer, denying that appellees acted as her agents in making sale of the goods, and reiterated her allegation that the goods were sold outright to appellees.

The testimony on behalf of appellant tended to prove that she sold the goods to appellees absolutely, and not on consignment to be disposed of by them as her agents. The testimony in her behalf tended to prove that when she shipped goods under a consignment she had a written consignment agreement; that in such cases she retained title for the purpose of securing the purchase price only. The goods furnished appellees were not on consignment. Under the consignment contracts she retained title in the goods solely for the purpose of procuring the purchase price, but had no control over the goods nor did

she direct what price they should be sold for. The appellees were never her agents in any way.

The testimony on behalf of appellees as to the contract under which the goods were furnished them as given by one of the firm was as follows:

"These goods were shipped to us on consignment, and some shipped bill of lading attached. Those that were shipped on consignment were shipped that way for the purpose of securing the purchase price of the goods, and that was the understanding between us. We bought the goods for sale for the purpose of making a profit on them, and did not have to do anything except pay for the goods in order to own them. I understood that the goods would be ours at any time I sent a check to cover the invoice, and that she only retained title as security for the purchase price. I understood that I had absolute control of the goods. I had them in my house for sale, to sell at any price I wanted to, and the only title Roach had in the goods was to secure the purchase price. Roach did not undertake to check up the goods, but I did the checking up myself, reported all goods that had been sold, and gave them either a check or money to cover the amount. The memorandum of the lists of goods burned was made up from the invoices. I charged them up with the total amount of the feedstuff included in the two invoices. I bought this stuff to hold, for we were satisfied that such stuff was going up."

The court refused the following prayer of appellant for instruction:

"Fourth. The jury are instructed that, even though you may find from the evidence that the goods in question were shipped to the defendants on consignment and that the title thereto was retained in the plaintiff, and that such goods were, without fault of the defendants, destroyed by fire, yet, if you further find from the evidence that such goods were delivered to the defendants at a fixed price, to be by them retailed in due course of trade as merchants at any price fixed by them, and that the title was retained by the plaintiff solely as security for the purchase price, and that upon the payment of the purchase price title was to vest in the defendants, then the loss must fall on the defendants."

Otis T. Wingo, for appellant.

Collins & Collins and *J. S. Lake,* for appellees.

Where the contract is one of pure agency, the title remains in the vendor until the goods are sold to a *bona fide* purchaser. 22 L. R. A. (N .S.) 850; 150 Mass. 238; 82 Mo. 23; 111 Pa. 589; 105 Pa. 74. A bailee for mutual benefit is not liable for loss of goods if he has exercised ordinary care. 23 Ark. 61; 68 Ark. 284; 64 Ark. 284; 27 L. R. A. 733; 3 L. R. A. (N. S.) 348, note.

WOOD, J., (after stating the facts). The refusal of the court to grant appellant's prayer number 4 was reversible error. The prayer was warranted by the testimony both on the part of appellant and appellees. The appellant, a wholesale dealer, sold to appellees the goods at a fixed price named at the time. Appellees obtained, the moment the goods were delivered to them, absolute control over them. They resold them at their own price. The title was retained in appellant only for the purpose of security, but for no other purpose. So far as the appellant was concerned, she had done all she could do to pass the title when the goods were shipped to appellees. Nothing remained for her to do. The goods were on delivery under the complete dominion of the appellees to do with them as they chose, and to resell upon their own terms. The facts in this case do not make it a "bailment for mutual benefits." Cases of that character have no application here. Here, although the witnesses speak of the contract as a consignment, yet the facts detailed by them tend to show that, when the goods consigned to appellees were received by them, they became the principal debtors to appellant. The title passed immediately to them on the payment of the purchase price. They were not merely intermediaries to pass the title from appellant to some third parties as the ultimate purchasers. At least, appellant was entitled to an instruction on the specific facts as set forth in the above testimony, telling them if they found the facts to be as recited in prayer number four presented by appellant that the loss must fall on appellees. We think that, according to the weight of authority and the best considered cases, where the title is retained solely for security and passes immediately to the vendee upon the payment of the purchase money, he in the meantime

having the absolute control and dominion over the property, the rule is that the loss falls upon the vendee, and the vendor may recover the purchase price undiminished by such loss. *Lavalley* v. *Ravenna,* 2 L. R. A. (N. S.) 97; *Osborn* v. *South Shore Lumber Company,* 91 Wis. 526, 65 N. W. 184; *Marion Mfg. Co.* v. *Buchanan,* 99 S. W. 984; *Phillips* v. *Hollenberg,* 82 Ark. 9, and authorities there cited.

The testimony tending to prove what appellant did in certain bankruptcy proceedings against certain third parties had no connection with this suit, and was therefore incompetent. It is unnecessary to decide whether under the whole case as developed it was also prejudicial.

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

SMITHWICK *v.* OLIVER.

Opinion delivered April 11, 1910.

1. LANDLORD AND TENANT—WHEN RELATION EXISTS.—The relation of landlord and tenant existed when the life tenant of land rented it to another for a portion of the crop. (Page 452.)
2. SAME—WHEN ADMINISTRATOR OF LIFE TENANT ENTITLED TO RENT.—Where a life tenant died before the day when rents upon the land held for life become payable, her administrator, under Kirby's Dig., § 4688, is entitled to recover such proportion of the rent as accrued before her death. (Page 452.)

Appeal from Clay Circuit Court, Western District; *Frank Smith,* Judge; reversed.

F. G. Taylor and *J. L. Taylor,* for appellant.

Whoever owns the reversion when the rent falls due is entitled to receive the whole sum. 108 Ind. 21; 8 N. E. 636. After the death of the life tenant the lessee holds by the acquiescence of the remainderman. 21 N. Y. 280; 24 Ark. 545; 38 Ark. 413; 36 Ark. 572; 82 Ark. 244.

G. B. Oliver, for appellee.

The crop in the ground at the time of the death of the life

tenant goes to the administrator. 2 Blackstone 122; 3 Kent 471; 1 L. R. A. 427; Kirby's Dig., § 2732.

HART, J. J. J. Smithwick, a resident of Clay County, Arkansas, died intestate, owning certain lands in said county. He left surviving him his widow, Casa A. Smithwick, and his son, W. R. Smithwick, as his sole heir at law. On January 13, 1902, by agreement in writing, certain of said lands were set apart to Casa A. Smithwick for her natural life for her dower and homestead, and she entered into possession of same. For the year 1908 she rented a part of said lands for $380, evidenced by a promissory note payable to her order on or before the 25th day of December, 1908. The remaining part of the land she rented for one-third of the corn and one-fourth of the cotton raised on it for the year 1908. On the 15th day of July, 1908, she indorsed said note to W. R. Smithwick, and delivered same to him. She died intestate on the 16th of July, 1908. W. R. Smithwick collected said note when it fell due. About 175 bushels of corn, worth 50 or 60 cents per bushel, and cotton of the value of $94.54 were also delivered to him as rent.

This suit was brought by G. B. Oliver, administrator of the estate of said Casa A. Smithwick, deceased, against W. R. Smithwick to recover the amount of said rent note and the rents so collected by him.

There was a trial before a jury, and they returned a verdict for the administrator for the amount of the proceeds of the crop rent, and for W. R. Smithwick for the amount of the note. Judgment was rendered upon the verdict. W. R. Smithwick has appealed from the judgment rendered against him.

Hence, the judgment of the circuit court with reference to the rent note being in favor of W. R. Smithwick, and no appeal having been taken therefrom, the consideration of it is not before us. The only question raised by the appeal is as to the question of the crop rent. On this question the court instructed the jury to return a verdict in favor of the administrator. In this the court erred. The record shows that Mrs. Casa A. Smithwick rented the land to one Catt for a portion of the crop. This created the relation of landlord and tenant between them. *Neal* v. *Brandon,* 70 Ark. 79.

Sec. 4688 of Kirby's Digest is as follows: "The executor

or administrator of any tenant for life who shall have demised any lands or tenements so held, and shall die before the day when any rent on such demise shall become payable, may recover:

"*First.* If such tenant for life die on the day the rent becomes due, the whole rent.

"*Second.* If he die before the day on which the rent becomes due, such proportion of the rent as shall have accrued before his death."

In the present case the undisputed facts are that Casa A. Smithwick was a tenant for life. She rented the lands for the year 1908 for a portion of the crop, and died on the 16th day of July, 1908, before the rent became due. Therefore the court should have instructed the jury to apportion the rent as to time between W. R. Smithwick and G. B. Oliver, administrator of the estate of Casa A. Smithwick, deceased, and for the error committed in not doing so the judgment must be reversed and the cause remanded for a new trial.

WALKER v. FILES.

Opinion delivered April 11, 1910.

1. REPLEVIN—JUDGMENT AGAINST SURETY—JURISDICTION.—One who signs a delivery bond in a replevin suit becomes a party to the suit, and judgment may be rendered against him thereon. (Page 456.)
2. PRINCIPAL AND SURETY—LIABILITY OF SURETY'S PROPERTY FOR PRINCIPAL'S DEBT.—Where judgment is obtained against a debtor and his surety, the creditor may cause the property of either to be levied upon and sold under execution to obtain satisfaction of his judgment. (Page 456.)
3. EXECUTION—IRREGULARITY.—Where an execution was issued against a principal and his surety, and was levied on the property of the surety, the omission of the principal's name in the notice of sale is at most a mere irregularity, which could not affect the validity of the sale under the execution. (Page 457.)
4. EQUITY—ADEQUACY OF REMEDY AT LAW.—A mere irregularity in the conduct of a sale under an execution in an action at law will not be ground for relief in equity, as the law court had supervisory jurisdiction over its own process. (Page 457.)

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

STATEMENT BY THE COURT.

The plaintiff, A. W. Files, instituted this suit in the Ashley Chancery Court against the defendants, Floyd Walker, sheriff of Ashley County, J. W. Simpson and George Norman. The complaint alleges, in substance, the following:

That on the 10th day of May, 1907, George Norman brought suit in replevin against R. F. Manning and J. W. Simpson to recover possession of a lot of staves, and that A. W. Files became the surety on the bond of said Norman to obtain the delivery of said property. The case was tried at the January term, 1908, of the Ashley Circuit Court, and the jury returned a verdict in favor of the defendant for the return of the staves in controversy or $250, their value, with interest thereon at the rate of 6 per cent. per annum from the 10th day of May, 1907. Whereupon the court rendered judgment in accordance with the verdict in favor of the defendant, J. W. Simpson, against the plaintiff, George Norman, and A. W. Files, the surety on his bond. That on the 17th day of November, 1908, said J. W. Simpson procured an execution to be issued on said judgment, directed to the sheriff of Ashley County, and the same was placed in the hands of Floyd Walker as such sheriff. That said Walker as such sheriff, on the 5th day of December, 1908, levied said execution on certain real estate of said A. W. Files in Ashley County, and advertised the same for sale on the 31st day of December, 1908. That said George Norman promised said A. W. Files to prosecute an appeal to the Supreme Court from the judgment in said replevin suit, but wholly failed and neglected to do so. That no demand was made of said A. W. Files to pay the judgment in said replevin suit, and that the first information that he had of the existence of said execution was on the 12th day of December, 1908, when he read the notice of the levy and sale. That he had no notice that judgment in said replevin suit had been rendered against him until December 19, 1908. That said George Norman is perfectly solvent, and has abundant property subject to levy and sale under execution to satisfy the judgment in said replevin suit. That

plaintiff has demanded in writing of said Walker as such sheriff to levy said execution on the property of said Norman, and has pointed out to him sufficient of Norman's property subject to levy and sale to satisfy said execution, but that said Walker as such sheriff has refused to comply with his demands in that respect. That there is collusion between said Simpson, in person and by attorney, and said Norman and said Walker as such sheriff to compel plaintiff unjustly to pay said judgment in said replevin suit, interest and costs, and to protect and relieve said Norman from the payment thereof.

Plaintiff further alleges that his relief can only be had in a court of equity. His prayer was for a temporary restraining order, which on final hearing is asked to be made perpetual.

A temporary restraining order was issued. The defendant Norman filed an answer to the complaint. This need not be abstracted for the reason that the issues made by it between him and the plaintiff have not been determined by the chancery court.

The defendants, J. W. Simpson and Floyd Walker, sheriff, as aforesaid, interposed a demurrer to the complaint. On the 25th day of May, 1909, the chancery court overruled the demurrer of said defendants, and made the temporary restraining order perpetual, or until said sheriff shall have levied upon the property of said Norman and have exhausted his remedy against him. Said defendants, Simpson and Walker, have duly prosecuted an appeal to this court.

George & Butler, for appellants.

When the appellee signed the bond as surety, he became a party to the proceeding, and was entitled to no further notice of the future progress of the suit. Kirby's Dig., § 6870; 68 Ark. 320; 66 Ark. 183. The creditor cannot be compelled to exhaust his remedy against the principal before proceeding against the surety. 22 Am. St. 39. Equity will not interfere in the absence of an allegation of fraud. 85 Ark. 508. Or an allegation of valid defense. 32 Ark. 438; 74 Ark. 292; 76 Ark. 582. The circuit court could have made any order necessary to protect appellee's rights. Kirby's Dig., § 3224; 34 Ark. 354; *Id.* 291. The surety, after paying the judgment, has a cause

of action against his principal for the amount thereof. 16 Ark. 72; 32 Ark. 530.

Appellee, *pro se.*

Judgments may be enjoined for matters arising after the rendition thereof. 33 Ark. 161. The issuance of an injunction is an act of judicial discretion. 26 Ark. 613; 26 Ark. 510; 39 Ark. 82.

HART, J., (after stating the facts). The judgment against the plaintiff, A. W. Files, was rendered against him in the replevin suit pursuant to section 6871 of Kirby's Digest. When he signed the bond of Norman to obtain delivery of the property under section 6857 of Kirby's Digest, he became a party to the replevin suit, and the judgment against him was not without jurisdiction. *Glenn* v. *Porter,* 68 Ark. 320.

The demurrer admits the allegations of the complaint to be true. Stripped of its verbiage, the complaint presents only one real question for our determination, and that is, if a judgment creditor sees fit to levy upon and sell the property of the surety of the judgment debtor first in satisfaction of his judgment, upon what principle will a court of equity prevent him?

We have no statute prescribing that the property of the principal of the surety be first exhausted. The relation of principal and surety between Files and Norman created rights and duties as between themselves; but the question upon which we are called to pass is, does it affect third persons? As we have already seen, when the judgment in the replevin suit was rendered against Norman, the court, pursuant to section 6871, Kirby's Digest, upon the motion of the defendant, Simpson, also rendered judgment against Files. Thereby Files became a joint debtor in the judgment and execution, and was under the same obligation as Norman to pay the judgment creditor. It was therefore, in the absence of a statute to the contrary, competent for the judgment creditor to cause the property of either to be levied upon and sold under execution to obtain satisfaction of his judgment. Whatever the equities between Norman and Files may be, it could not affect the judgment creditor in the pursuit of his rights, and he clearly had the right to sue out

an execution and have the same levied upon the property of either.

The rule at common law is that the "judgment creditor is at liberty to levy first upon the property of the surety if he choose to do so." 32 Cyc. p. 143 and notes.

If, as we have already held, Files became a joint debtor with his principal and liable as such, he is equally subject to an execution, and the question of collusion between Simpson, the judgment creditor, and Norman and the sheriff does not arise, and is not an issue in the case; for the reason that Simpson has only adopted the means he is legally entitled to pursue to effect satisfaction of his judgment. For the same reason the allegation that Norman has property subject to execution sufficient to satisfy the judgment and that he neglected to take an appeal from the judgment in the replevin suit does not entitle the plaintiff, Files, to relief in equity.

It is contended by appellee that the sale should be enjoined because the name of Simpson does not appear in the notice of sale. The execution was directed against both Simpson and Files, and the omission of Simpson's name in the notice of sale was at most a mere irregularity, which could not affect the validity of the sale under the execution. It is well settled that an injunction will not issue because of a mere defect in the notice of sale. 6 Pomeroy's Equity Jurisprudence, § 674; 2 Freeman on Executions (2 ed.), § 259.

Moreover, the circuit court had general supervisory jurisdiction over its own process, and the court out of which the execution issued or its judge in vacation could have made any order necessary to protect appellee's rights. Kirby's Digest, § 3224; *Shaul* v. *Duprey,* 48 Ark. 331, and cases cited.

It necessarily follows that the decree must be reversed, and the cause remanded with directions to sustain the demurrer, and dismiss the complaint for want of equity.

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

Opinion delivered April 11, 1910.

1. ANIMALS—PERMITTING STOCK TO GO AT LARGE.—The owner of stock in this State is not negligent in permitting them to run at large upon the uninclosed premises of another. (Page 459.)
2. NEGLIGENCE—PERMITTING FLOW OF COTTON SEED OIL—INJURIES TO ANIMAL.—Where defendant permitted raw cotton seed oil in large quantities to escape along the road side where cattle were accustomed to stray, and made no effort to prevent them from drinking the oil, and plaintiff's cow drank thereof and was poisoned, defendant was guilty of negligence. (Page 459.)

Appeal from White Circuit Court; *Hance N. Hutton,* Judge; affirmed.

W. E. Hemingway, E. B. Kinsworthy, P. R. Andrews and *James H. Stevenson,* for appellant.

The owner of land is under no obligation to inclose it to prevent entry by others. Cooley on Torts, § 337; Waterman on Trespass, § § 858-873; 3 O. St. 172; 4 O. St. 425; 63 N. C. 346; 1 C. C. R. 272; 97 E. C. L. 271; 11 East 60; 1 Cowen 78. He who suffers his cattle to go at large takes the risk incident thereto. 6 Pa. St. 472; 66 Mo. 325; 47 Ill. 333; 39 Ill. 168; 66 Ill. 327; 57 Pa. St. 129; 100 Ind. 221; 14 Conn. 1.

S. Brundidge, Jr., and *H. Neelly,* for appellee.

It is not contributory negligence to turn one's cows out on the commons. 37 Ark. 562; 46 Ark. 207.

FRAUENTHAL, J. One of appellant's freight trains was wrecked at Bald Knob, and several tank cars, containing raw cotton seed oil, were damaged to such an extent that they leaked. These tank cars were hauled to Judsonia, Ark., and left there for several days, during which time the oil ran out of them in a steady flow. The cars were first placed near a road crossing, and later a short distance therefrom, and the oil ran down into the ditches by the sides of the track and road, and stood in great pools in these ditches and in the road. The grounds at which the cars were placed were uninclosed, and cattle were accustomed to pass over them at will, and there graze at times. A number of cattle drank of this oil, and from twenty to twenty-five head of them died therefrom, amongst which

was a cow owned by the appellee. The oil gave forth a great stench, and some of the owners who saw their cattle drinking it drove them away because they feared they would be injured by the oil. The appellant made no effort to guard the cattle from the oil or to drive them away. The plaintiff did not see his cow drinking the oil or know of it until some time afterwards. He sued the appellant, and recovered judgment for the value of his cow, and this appeal is brought to reverse that judgment.

It is urged by counsel for appellant that under the evidence in this case it owed no duty to appellee, and therefore was guilty of no act of negligence for which appellee would be entitled to a cause of action; and that if the appellant was guilty of any negligence it was not the proximate cause of the injury, and on this account the appellee is not entitled to recover for the death of the cow.

The liability of the appellant for the death of the cow depends upon the right of appellee to permit his cow to range at large and the effect that the act of appellant had in permitting the oil to run in the ditches at an unenclosed place near a public road and in thus attracting the cow to drink the oil which caused its death.

The common law made it the duty of the owner of domestic animals to keep them upon his own land; and if he failed in that duty and permitted them to stray upon the land of another, though uninclosed, he was chargeable with a trespass. But such a doctrine is not recognized in this State; the stock owner in this State is not accountable as a trespasser for permitting his stock to stray upon the open premises of another. *Little Rock & Ft. S. Ry. Co.* v. *Finley,* 37 Ark. 562.

The owner of domestic animals is therefore guilty of no violation of duty nor of any act of negligence in permitting his cattle to run at large on such uninclosed lands of another. On the other hand, the owner of the land is not required to fence out the stock, and ordinarily owes no duty to one who thus suffers his stock to stray upon his land. He has the right to use his own property as he may see fit, but in that use he has no right to do a negligent act which will result in an injury to another. His liability arises in the use of his premises when he fails to

observe for the protection of the property of another that degree of care and precaution which the circumstances demand, whereby an injury results to such other person's property. He does owe, therefore, to the owner of straying stock the duty to refrain from attracting or drawing to a dangerous object or substance which he has placed upon his land such stock. Such act becomes one of negligence whereby, if injury results to another, a liability is incurred. The land owner has no right to thus actively draw into peril straying stock. He may not be under any duty to guard the stock from the dangers to which they ordinarily might be exposed, but if he places on his land a dangerous substance which would attract passing animals, and thereby the animals are injured, if the injury is the natural and probable result of the act which a prudent man would have foreseen, then the land owner is liable for the injury resulting therefrom. *Kansas City, S. & M. Ry. Co.* v. *Kirksey,* 48 Ark. 366; Ingham on Law of Animals, p. 153; *Railway Co.* v. *Ferguson,* 57 Ark. 16. Thus, in the case of *Crafton* v. *Hamilton & St. Joe Rd. Co.,* 55 Mo. 580, some salt was spilled at a depot while the employees were unloading it, and afterwards a cow was attracted to the place by the salt and killed by the cars, and it was held that it was an act of negligence to leave the salt on the track. *Page* v. *N. C. Rd. Co.,* 71 N. C. 223.

In the case of *Henry* v. *Dennis,* 93 Ind. 452, the defendant placed and left exposed an open barrel of fish brine upon a public street where the plaintiff's cow was lawfully running at large, and the cow ate and drank of the fish brine and was thereby poisoned. It was held that the defendant was guilty of an actionable wrong. See also *Young* v. *Harvey,* 16 Ind. 314. But we think that the doctrine announced in the case of *Jones* v. *Nichols,* 46 Ark. 207, is decisive of this case. In that case the appellants were the owners of a cotton gin, and in an open space under the building a pit was dug for their cotton press. The appellee's cow fell into the pit, and was killed. In that case the court said: "The pit which the appellants dug, and into which the cow fell in the night time, was close to the highway; it was uninclosed and was without signal of warning or protection; moreover, cotton seed and corn had been left by the appellants scattered in the neighborhood of it, so that, in the

language of one of the witnesses, it was not only a stock trap, but was actually baited for the game. The court instructed the jury, in effect, that if they should find such a state of facts from the proof, the appellants were guilty of negligence which would render them liable for the injury done. This proposition cannot be controverted."

In the case at bar the appellant placed in an open space on its land its cars from which the oil leaked until it filled the ditches along the roadside. Here the domestic animals of the townspeople were accustomed to stray and graze; and they were attracted to the pools of oil and drank of it. This the employees of appellant saw and permitted for some days; and, although they saw that the owners of some of the animals seeing this drove them away because they feared the oil would kill them, the appellant's employees made no effort to guard the cattle from the danger or to drive away the animals of the other owners, but permitted them to drink the oil; amongst which was this cow of appellee's. The oil was a poison to the cattle when drunk in the quantities as was done by them; and appellee's cow was killed by the oil which it thus drank. Under these circumstances we think that the appellant was guilty of negligence which rendered it liable for the death of the cow.

The instructions given by the court were in accord with this view of the case, and we find no error in the rulings of the court upon any of the declarations of law given or refused.

The judgment is affirmed.

FORT SMITH LIGHT & TRACTION COMPANY v. KELLEY.

Opinion delivered March 21, 1910.

1. CORPORATIONS—IDENTITY.—The fact that some of the stockholders and officers in one corporation were stockholders and officers in another corporation did not establish the identity of the corporations, nor make the acts of one the acts of the other. (Page 469.)

2. CONTRACTS—CONSTRUCTION—EVIDENCE.—Courts may acquaint themselves with the persons and circumstances that are the subject of the statements in the written agreement, and are entitled to place them-

selves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, in order to ascertain the intention of the parties from the language used. (Page 471.)

3. SAME—CONSTRUCTION AS A WHOLE.—A contract should be construed as a whole, all of its parts being considered in order to determine the meaning of any particular part. (Page 471.)

4. GAS—ASSIGNABILITY OF FRANCHISE.—The grantee of a franchise for supplying gas to a city, with the city's consent, may assign the franchise to another; and a grant to a company or its assigns is an authority for an assignment without further action by the city. (Page 473.)

5. CONTRACTS—RESTRAINT OF TRADE.—A contract whereby one who undertakes to furnish natural gas for use of the public agrees to compete with others in the price of such commodity is not in restraint of trade. (Page 474.)

6. SAME—VALIDITY OF PARTIAL RESTRAINT.—A contract whereby a person agrees not to supply natural gas in a certain city is only in partial restraint of trade, and is therefore not void. (Page 475.)

7. GAS—COMBINATION TO FIX PRICE—MONOPOLY.—An agreement by a company having a franchise to supply gas to the consumers in a certain city to purchase natural gas from another company at certain fixed prices is not a combination to fix the price of such gas within the prohibition of the anti-trust act of 1905. (Page 476.)

8. CONTRACT—RESTRAINT OF TRADE—DIVISIBILITY.—Where an agreement contains a stipulation which is capable of being construed divisibly, and one part is void as being in restraint of trade while the other is not, the court will give effect to the latter, and will not hold the agreement to be void altogether. (Page 477.)

9. INJUNCTION—ADEQUACY OF REMEDY AT LAW.—Injunction will lie to prevent the assignor of an exclusive franchise for supplying natural gas in a city from interfering with the assignee's enjoyment of such franchise, the remedy of damages at law being inadequate. (Page 477.)

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

STATEMENT BY THE COURT.

On the 21st day of December, 1903, the city of Fort Smith, by ordinance No. 634, granted to Harry E. Kelley and *"assigns"* a franchise for furnishing natural gas to the inhabitants of the city for a period of fifty years. The Mansfield Gas Company, a corporation, owned natural gas wells in the vicinity of Fort Smith and a plant or system of mains and pipes for operating same in the city. Kelley owned ninety-five per cent. of its stock.

The Fort Smith Light & Traction Company, a corporation, had the power under its charter to generate, produce and *fur-*

nish gas and electricity for lighting, heating, power and domestic uses, and to furnish same to public or private consumers in the city of Fort Smith and suburbs. It also had the power to buy and sell gas, and "to do a general merchandise business in electrical and gas appliances, supplies, fixtures and inventions; to install the same; and to do all things incident to or connected with any of the aforesaid purposes which might further and aid the purposes and objects aforesaid." In pursuance of these powers, the Fort Smith Light & Traction Company was maintaining and operating an electric light and power plant in Fort Smith; also an artificial gas plant and a system of mains and pipes for its distribution.

On December 23, 1904, Kelley and the Mansfield Gas Company, appellees, entered into a contract with the Fort Smith Light & Traction Company, appellant, "for the purpose," as the contract declares, "of selling natural gas to consumers in the city of Fort Smith, Arkansas, under the franchises granted in ordinance No. 634." This contract provides among other things that, "in consideration of the terms, conditions and agreements" set forth, the appellees are to supply natural gas to appellant "for and during the period of forty-nine years" within the corporate limits of the city of Fort Smith and its suburbs, "to be sold and disposed of" by appellant in the territory mentioned. It further provides that appellant *"shall have the exclusive right to sell and dispose of said natural gas and to distribute the same within the limits aforesaid."*

The contract provides that appellant shall use its system of mains and pipes in said city and the pipes of appellees already laid in said city, and that appellees at their own expense should make such additions to their mains and pipes in the city of Fort Smith and suburbs as the demand for natural gas should warrant. The contract gave to appellees the power to control the prices of natural gas to the consumers for all purposes except for illumination. For the latter purpose the appellant had the right to fix the rate at one dollar per thousand cubic feet. Under the contract appellant agreed to pay appellees for the natural gas from the 1st day of January, 1905, to the 1st day of April, 1905, 25 per cent. of the gross earnings from the sale of it, as determined by meters, and from the 1st day of April, 1905, to

the expiration of the contract 75 per cent. of the gross earnings less 10 per cent. allowed appellant under certain conditions. Appellant was also to pay in nine monthly installments, beginning April 1, 1905, a sum equal to 50 per cent. of the gross earnings (less 10 per cent. under certain conditions) from January 1 to April 1, 1905. "The gross earnings over and above the payments above stipulated" were to be retained by appellant as its compensation.

There was a provision in the contract by which appellant was to purchase of appellees the "distribution system" of the latter at the actual cost of installing same. Apellant was to pay 10 per cent. per annum on the cost of the distribution system (4 per cent. of this being designated "depreciation fund"), the payments to be made monthly and to continue for twenty-five years, if appellee furnish appellant natural gas for that long. But, if the supply of gas failed so that appellees could no longer furnish same, appellant nevertheless was to purchase the distribution system, in that event, by paying the cost thereof "less the sums that had been paid under the 4 per cent. depreciation fund." Thereupon appellant was to have the use of the franchise granted to Harry E. Kelley. (In the contract appellees are "parties of the first part," and appellant is "party of the second part.")

The contract contains these further provisions, towit: "That the party of the second part may contract for and purchase natural gas from other parties or corporations when such parties or corporations will furnish, supply and deliver the same to the party of the second part at lower figures than the said parties of the first part will do, it being agreed, however, that before making any such contract or contracts the party of the second part shall give to said parties of the first part an opportunity to meet such prices. If said parties of the first part shall refuse to meet such prices as can be contracted for with other parties or corporations, and said second party shall have contracted with such other parties or corporations, the said parties of the first part shall have the right, by making a lower price, to reinstate the use of their natural gas under this contract.

"If the said second party shall contract for natural gas from other parties or corporations in conformity with the foregoing

provisions, the said party of the second part shall have the right to use the aforesaid pipes and distributing system of the said parties of the first part by continuing paying the parties of the first part the six and four per cent. herein provided, and shall have the right to use the franchises granted to the said Harry E. Kelley by the city of Fort Smith, Arkansas, by ordinance No. 634.

"That, whilst the party of the second part has the right to manufacture, produce and sell artificial gas at all times, it shall nevertheless, at any and all times, during the period of this contract use every effort to sell and dispose of the highest maximum quantity of natural gas that shall be furnished, supplied and delivered to it by said parties of the first part."

There is a provision in the contract that appellees "will use due diligence in prosecuting their search for natural gas," and "*that both parties agree to use every effort to extend the use of natural gas and to protect and promote the interests of each other over and above the interests of any other party, person or corporation.*" The contract contains various other provisions, but the above are all that it is necessary to mention.

In November, 1906, the Arkansas & Territorial Oil & Gas Company had developed a gas field near the city of Fort Smith which was sufficient to supply that city with natural gas. This company was a West Virginia corporation, but doing business in this State. We will, for convenience, hereafter refer to it as the "Arkansas Company." This company offered to supply appellant gas at "lower figures" than appellees were doing. Appellant, pursuant to its contract, notified appellees in writing of the terms and prices of the Arkansas Company, and appellees in writing refused to meet the terms of the Arkansas Company. Whereupon, on the 6th day of November, 1906, appellant entered into a contract with the Arkansas Company by which the latter agreed to furnish appellant natural gas for a period of five years from the 6th day of March, 1907, (unless the supply was sooner exhausted) for use within the corporate limits of the city of Fort Smith and Van Buren, Arkansas, to be sold and disposed of by appellant at rates to be fixed by it, but at not less than the following net prices: For illuminating purposes, $1.00 per thousand cubic feet, etc., then follow the minimum prices

for other purposes. The contract made with the Arkansas Company contained a similar provision to that made with appellees reserving to appellant the right to contract with others offering betters terms, *i. e.*, gas at "lower figures."

The appellant and appellees agreed that the exchange of gas supplies should be effected in such manner as to cause as little interruption as possible to the service, and accordingly the transfer from appellees' pipes to the pipes of the Arkansas Company was made January 23, 1907. The employees of appellant and of the appellees and the Arkansas Company assisted in making the transfer. Kelley, however, for appellees, gave appellant to understand that it was violating the contract, that he wanted the contract carried out, and that if appellant violated the contract it did so at its peril. After the contract between appellant and the Arkansas Company was entered into, the appellees were preparing to furnish gas to the inhabitants of the city of Fort Smith under the rights conferred, as they claimed, by ordinance No. 634, granting the franchise to Kelley. They had bought and laid pipes, dug ditches, put notices in the paper that they were in the "natural gas business," and advising the people not to make contracts for their gas supply until they had seen the Mansfield Gas Company. They had proceeded, and were proceeding, to make contracts for supplying natural gas. Thereupon appellant brought this suit for temporary restraining order and, upon final hearing, for perpetual injunction against appellees. There was an answer by appellees, a cross complaint by Kelley and an answer thereto by appellant, all raising the issue as to whether appellees could proceed to furnish natural gas to the inhabitants of the city of Fort Smith under the franchise granted to Harrey E. Kelley. The testimony is voluminous. Any other facts found necessary will be stated in the opinion. The court dismissed the complaint and the cross complaint, and the parties have appealed.

Rose, Hemingway, Cantrell & Loughborough, Moore, Smith & Moore, Flynn & Ames, James A. Cummins, and *Hill, Brizzolara & Fitzhugh,* for appellant.

1. The franchise was granted to "Harry E. Kelley, his heirs, associates, successors, assigns or trustees," and was as-

signable. 177 U. S. 573; Thornton on Oil & Gas, § 477; 114 U. S. 501; 102 Mo. 472; 14 S. W. 974; 15 S. W. 383; 117 Cal. 168; 171 Mass. 243; 73 Fed. 956; 139 Fed. 660. The contract between appellees and appellant is clearly an assignment, granting to appellant during the life of the contract the right to "exercise and enjoy all the rights and privileges conferred by" the franchise ordinance. A franchise cannot be split up, and the owner cannot assign it and still retain it for his own use. 28 La. Ann. 483.

2. The contract is not in restraint of trade. It is not only not such a contract as tends to stifle competition and enhance the prices of commodities to the consumer, but by its terms it favors competition and guards the interests of the consumers, while not excluding appellees from the privilege of meeting the lower prices proposed by other companies and thereby reinstating the use of appellees' gas. As between appellant, a mere distributor of natural gas, and appellees, producers thereof, competition is impossible. There is competition between appellees and the Arkansas Company, but when appellees offer to sell gas at a lower price than their competitor, then appellant is bound to sell their gas exclusively. If there is a partial restraint of trade, it is confined to the limits of a single town, and is not unlawful. 48 Ark. 146; 62 Ark. 101; 172 U. S. 11; 186 Pa. St. 443; 40 Atl. 1000; 84 Ky. 180; 29 N. J. Eq. 242; 39 N. J. Eq. 367; 210 Pa. 288; 59 Atl. 1088; 31 Mich. 490; 86 Ill. 246; 7 Biss. 367; 29 Fed. Cas. 791; 73 Mo. 390; 33 Ia. 424; 171 Pa. St. 284; 136 N. Y. 333; 163 Pa. St. 62; 41 Wis. 172; 78 Ill. 589; 139 Fed. 533; 177 Mo. 599; 139 U. S. 80; 199 U. S. 279; 106 N. Y. 486; 21 Wend. 157; 20 Wall. 64, 69; 9 Cyc. 539.

3. There is no merit in the contention that the object of the clause in the contract granting to appellant the privilege of charging $1.00 per 1,000 cubic feet of gas was to stifle competition between natural gas and the electricity which appellant produced; but, if such objection were well taken, the contract is severable, and that clause could be stricken out, and the rest of the contract would stand. A contract in restraint of trade will be set aside only in so far as it offends against public policy.

106 N. Y. 484; 210 Pa. St. 288; 20 Wall. 69; 139 U. S. 91; 106 Cal. 332; 126 Cal. 176; 102 Mass. 480; 113 Pa. St. 579.

4. The contract cannot be void, because the city has the power to regulate the price of gas. Kirby's Dig., § 5445 *et seq.;* 84 N. E. 101, 102.

5. Under its charter appellant is authorized "to generate, *produce* and *furnish* gas for lighting, heating, power and domestic uses," etc., which is broad enough to authorize the distribution of *natural* gas. The contract is, therefore, not *ultra vires.* 71 Ark. 158; 75 Kan. 572; 89 Pac. 1039; 182 Pa. St. 309; 37 Atl. 932; 118 Pa. St. 468; 110 Tenn. 187; Am. Dig. (yr. 1899) col. 2029; Am. Dig. 1901a, col. 2163; *Id.* col. 1936.

6. By their acceptance of benefits under the contracts, *i. e.,* 6 per cent. on the cost of the distribution plant and 4 per cent. for depreciation, paid in monthly intallments according to the contract and regularly received and accepted by appellees, they are estopped to ask that the contract be set aside. 47 Ark. 320; 50 Ark. 201; 53 Ark. 514; 59 Ark. 251; 62 Ark. 278; 77 Ark. 129; *Id.* 109; 74 Ark. 190; *Id.* 377.

7. Appellant did not cause the Arkansas Company to be organized, notwithstanding a few of the stockholders of appellant company are also stockholders in the Arkansas Company. Ownership of stock in one corporation does not deprive one of the right to own stock in another.

8. Kelley's cross-bill cannot be maintained because, if the contract is in unlawful restraint of trade, he is *in pari delicto* with appellant. 53 Ark. 147; 63 Ark. 319; 80 Ark. 65; 197 U. S. 245; Pingree on Extraordinary Contracts, § 322.

Youmans & Youmans and *Mechem & Mechem,* for appellees.

Their argument is stated in the opinion. No authorities are cited in support of points 1, 2, 3 and 5. In support of point 4 they cite 130 U. S. 396; 153 Ind. 483; 121 Ill. 530; 83 Tex. 650; 48 So. 19; 41 S. E. 553; 87 N. E. 823; 55 N. E. 577; 74 Am. St. Rep. 268, note; 70 Atl. 1; 69 Kan. 285; 22 W. Va. 617; 119 N. Y. 50; 31 So. 961; 116 S. W. 1045, 1046; 89 Tex. 403; 83 Ia. 156; 79 Ill. 346; 37 S. E. 476; 50 S. E. 876; 56 S. E. 264; 139 N. Y. 250; 145 N. Y. 267; 161 Pa. 473; 116 Am. St. 916; 140 Mich. 548; 89 Tex. 394; 171 Ala. 562. In support of point 6, they

cite 40 Ark. 83; 57 N. E. 822; 25 Conn. 19; 51 N. J. Eq. 379; 48 N. J. Eq. 332; 35 Barb. 364; 50 *Id.* 289; 56 N. E. 963; 16 L. R. A. 752; 14 N. Y. 528; 138 *Id.* 359; 55 Kan. 173. Point 7: 33 Ark. 638; 56 Am. St. Rep. 271; 44 N. J. Eq. 427.

WOOD, J., (after stating the facts). Appellees urge affirmance upon certain grounds which we will consider in the order presented by counsel.

1. *"That plaintiff violated the contract in organizing a competitor in the production and sale of gas and bringing it into this field to compete with defendants, in disregard of the contract which provides that both parties will 'promote and protect the interests of each other and above those of any other person or corporation.'"*

H. M. Byllesby was president of H. M. Byllesby & Company, a New Jersey corporation. Its business was that of engineering, promoting, developing and managing various industrial and mechanical enterprises in different sections of the country, which had reference particularly to the supply of natural oil and gas. Byllesby was vice president of appellant, Arthur S. Huey was president of appellant and also vice president of H. M. Byllesby & Company. The relation that H. M. Byllesby & Company sustained to appellant is explained by H. M. Byllesby & Company as follows: "We are employed by the Fort Smith Light & Traction Company, as we are by some other ten other public service corporations, as their engineers and managers. In this capacity we take general charge of their engineering matters and of the management of their business, acting in that capacity by appointment of their board of directors, reporting to them at their meetings, receiving our authorization from them from time to time for our duties as above described as engineers and managers. The company has its regular local manager who carries out the detail management of the company's affairs under our general directions, we in turn acting as above described under the direction of the board of directors of the company.

Witnesses on behalf of appellees testified that the contract between appellant and appellees was dictated on the part of appellant by its vice-president, H. M. Byllesby. They say he carried on the negotiations on behalf of appellant pertaining to that contract, and such communications as were had between appellant and

appellees concerning the contract that was made by appellant with the Arkansas Company. One of the witnesses said H. M. Byllesby "was the whole thing," so far as appellant was concerned in making the contracts as to the supply of gas. The testimony shows conclusively that H. M. Byllesby & Company were instrumental in organizing the Arkansas Company. Counsel for appellees contend that the general officers and managers of appellant, who are also general officers and managers of H. M. Byllesby & Company, brought into existence the Arkansas Company for the purpose of furnishing gas to appellant at a lower price than prevailed under the contract with appellees. If it be conceded that Byllesby, vice-president of appellant, dictated the present contract on appellant's part with appellees, still that does not warrant the conclusion that appellant organized the Arkansas Company to compete with the appellees; nor is such conclusion justified by reason of the fact that the general officers and managers of appellant were also general officers and managers of H. M. Byllesby & Company. There is no evidence to sustain appellees' contention. The undisputed evidence is that the organization of the Arkansas Company was never discussed with the directors of appellant; that neither its directors nor any of its agents or officers ever offered any inducements to the Arkansas Company to come into the gas field near Fort Smith for the purpose of avoiding the contract between appellant and appellees; that appellant's directors, officers and agents "were in entire ignorance of the personnel of the Arkansas Company, and had no knowledge of what their intentions were until the Arkansas Company through its officers submitted" to appellant "a proposition for furnishing gas;" that appellant "never had any interest in the Arkansas Company other than its contract with it for the distribution of natural gas." The evidence shows that these three corporations: appellant, Mansfield Gas Company, and H. M. Byllesby & Company, were entirely separate and independent corporations. Appellant had a total of one hundred and nine share holders, and of these only seventeen also had stock in the Arkansas Company. There were many stockholders in the Arkansas Company who were not stockholders in either appellant or H. M. Byllesby & Company, and also in H. M. Byllesby & Company that had no stock in the

other corporations. The fact that some of the stockholders in one company had also stock in each of the other companies, and the fact that the general managers and officers of one company were also general managers and officers of another company, did not make these companies the same corporation, nor the acts of one the acts of the other. *Lange* v. *Burke,* 69 Ark. 85. Our conclusion of fact, therefore, is that appellant did not organize the Arkansas Company.

But, even if appellant did organize the Arkansas Company, and for the purpose of causing appellees to lower the price of gas, as a matter of law that would not have been a breach of that provision of the contract which prescribes "that both parties will promote and protect the interests of each other over and above those of any other person or corporation." This court said in *Wood* v. *Kelsey,* 90 Ark. 272: "Courts may acquaint themselves with the persons and circumstances that are the subject of the statements in the written agreement, and are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them," in order to ascertain the intention of the parties from the language used. The contract must be construed as a whole, all its parts being considered in order to determine the meaning of any particular part as well as of the whole."

Now, this provision of the contract had reference to the mutual protection of the parties in matters where their common interests conflicted with that of some third party. It did not mean that each party would not be allowed to promote and protect his own interest when such interest conflicted with that of the other party to the contract. It could not have had reference to the lowering of the price of gas to appellant, for other provisions of the contract specifically provided for that, and it was appellant's duty as a public service corporation to furnish gas to the inhabitants of the city whose franchise it held, as cheaply as it could be obtained by the legitimate prosecution of its business. Appellant and appellees must have known that they could not enter into a contract that would be contrary to the public interests. The supplying of gas under the ordinance was a matter of public concern, and in contracting with each other they had to consider what would be for the benefit

of the public. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650.

Appellant could not furnish the cheapest gas to the public if its contract with appellees compelled it to pay the highest price. Although the contract provided that the price of gas to appellant should be lowered "if other parties or corporations should furnish it at a lower price," yet Kelley's own evidence shows that he thought his company had the only gas field in the vicinity of Fort Smith. He says: "At that time the only other field was 160 miles away. In the fall of 1904 there was no reasonable certainty upon which men could have counted as a business proposition that the gas would be found which has since been brought to Fort Smith." So it is plain that Kelley did not have in mind that there would be any competition to his gas supply from any source.

2. *"It violated the contract in refusing to receive and distribute defendant's gas, when it could not purchase gas more cheaply of others than defendants, within the proper construction of said provision."*

Appellees contend that, before appellant could avail itself of a contract with another person or corporation to furnish cheaper gas, such contract would have to cover the same period of time, and embrace only the territory mentioned in the contract with appellees. The parties might have "so nominated" in the contract, but they have not done so. The provision is: "That the party of the second part may contract for and purchase natural gas from other parties or corporations when such parties or corporations will furnish, supply and deliver the same to the party of the second part at lower figures than the said parties of the first part will do." The provision is for the benefit of appellant. It was clearly for the benefit of appellant to obtain gas at the rates agreed upon in its contract with the Arkansas Company. True, this would perhaps lead to disastrous consequences to appellees if they failed "to meet such prices." But that is not the concern of courts. The parties have made their contract, and it must be given the meaning its plain language imports. Appellees would not have to abandon the field and suffer confiscation of their plant and income when an onslaught is made upon their prices, or else "take their gas elsewhere," as suggested by

counsel. A sovereign preventative of any such ruinous results to appellees is found in that provision of the contract which reads: "If said second party (appellant) shall have contracted with such other parties or corporations, the said parties of the first part (appellees) shall have the right, by making a lower price, to reinstate their natural gas under this contract." So long as appellees had this remedy in their hands, it would be impossible for appellant and any rival natural gas supply company or person to displace or supplant them.

3. *"The contract does not exclude defendants from selling their gas in Fort Smith, after plaintiff has ceased to receive it from them."*

Kelley assigned his rights under the ordinance to appellant. "The city or town may agree that the grant may be assigned, and a grant to the company or its assigns is sufficient to authorize an assignment without the further consent of the city." Thornton on Oil and Gas, § 477; *Los Angeles* v. *Los Angeles City Water Co.*, 177 U. S. 573; *Chadwick* v. *Old Colony Rd.*, 171 Mass. 243; *New Orleans, &c., R. Co.* v. *Delamore,* 114 U. S. 501.

The contract provides that "the party of the second part (appellant) *shall, during the life of the contract, exercise and enjoy all the rights and privileges conferred by ordinance No. 634 of the city of Fort Smith, Arkansas.*" The life of the contract for the supply of gas was forty-nine years. It provided that "the party of the second part (appellant) *shall have the exclusive right to sell and dispose of said natural gas and distribute the same within the limits aforesaid," i. e.,* in the city of Fort Smith and suburbs. "All the rights and privileges" under ordinance No. 634 could not, under the terms of assignment provided by the contract, be enjoyed by both appellant and appellees at one and the same time. The franchise granted by the ordinance was not susceptible of numerous multiplications and divisions through the process of assignment by one to another, and leaving the assignor to enjoy equally with the assignee the rights and privileges of the franchise assigned. The right to create franchises is in the city, and not in the one to whom it gives the franchise. The grantee of a franchise, if same is assignable, may transfer what he has to another, but he cannot create a new franchise. *State* v. *Morgan,* 28 La. Ann. 483.

The grantee of the franchise, by assigning the same, transferred to his assignee *all the rights he had under his grant.* Such is the effect of an assignment of a franchise, and such was the effect of the contract by which the assignment was made in this case. The language is clear and unmistakable. Appellant has the *exclusive* right to sell and dispose of the said natural gas, and distribute same, and is to "exercise and enjoy *all the rights and privileges* conferred by ordinance No. 634." This language construes itself. Appellant could not enjoy the *"exclusive right" and have "all the rights and privileges,"* if appellees also had enjoyed those rights and privileges. That would be a contradiction of the language of the contract, and would destroy its meaning.

The fatal mistake of appellees was in concluding that the contract with appellant, granting it the exclusive right to supply natural gas under ordinance No. 634, terminated when appellees refused to meet the *lower prices* offered by the Arkansas Company. True, appellees were not compelled to meet these prices; but they could not, by refusing to meet them, recall the assignment and re-invest themselves, so to speak, with the rights and privileges granted to Kelley by the ordinance.

The effect of the contract assigning the franchise to appellant was to give to appellant the exclusive right to distribute gas in the city of Fort Smith and suburbs. It would be a breach of the contract for appellees during the life of the contract, to procure another ordinance from the city and to attempt to distribute gas under that. From such violation of the letter and spirit of the contract equity will perpetually enjoin appellees.

4. *"If the contract did undertake to exclude defendants from Fort Smith for forty-nine years, it would be a restraint of trade and competition, against public law and policy, and unenforceable."*

The contract is not one in restraint of trade. It does not restrain appellees from supplying natural gas to the city of Fort Smith under the ordinance No. 634, so long as they are willing to meet a "downward revision" of the prices of natural gas. The law prohibiting contracts in restraint of trade does not prevent one from making a contract by which he agrees to compete with others in the price of the commodity which he produces for the use of the public. One purpose of the law in pro-

hibiting contracts in restraint of trade is to encourage competition and thereby lower the prices of services and commodities to the public. Appellees contend that by this contract the price of natural gas is not reduced, so far as the consumer is concerned. But that is its inevitable tendency, and, indeed, was its effect in this case. The price of gas to the consumer has been greatly reduced since appellant entered into the contract with the Arkansas Company. Appellant could never lower the price of gas to the consumer unless by the terms of the contract it had the right to purchase gas at a lower rate than was fixed by appellees. That is precisely the right that appellant has by the terms of this contract, whenever appellees failed to meet the lower prices of some other person or corporation.

It was impossible for the consumer to be oppressed by a monopoly in the price of natural gas under the terms of this contract, for by its terms appellant's pipes were open to every producer who applied for admission at a *lower rate*. The necessary result of this was to bring down the price of gas to the consumer to the lowest possible price at which it could be supplied to the inhabitants of Fort Smith on a remunerative basis to the appellant. It would be difficult to conceive and to write down a more excellent and beneficial plan than that by which the inhabitants of Fort Smith were furnished natural gas.

Since, under our construction of this contract, there was no restraint of trade and no monopoly created injurious to the rights of the public, the cases cited in the brief of counsel for appellees, where there were contracts in restraint of trade or creating monopolies, are not in point, and we need not review them here. No authority can be found, we believe, construing a contract similar to this one as against public policy and void. For, as we have shown, by this contract the interest of the public is subserved by the most effectual provision that the ingenuity of the parties and their draftsmen could have devised.

But, should we be mistaken in holding that the contract is not one in restraint of trade, then we are of the opinion that, at most, it could only be a contract in partial restraint of trade. Under all the authorities, and our own decisions, such contracts, when reasonable, are not against public policy, and therefore are not void. *Keith* v. *Herschberg Optical Co.*, 48 Ark. 146; *Web-*

ster v. *Williams,* 62 Ark. 101. See numerous authorities cited in appellant's brief. If appellees, by not meeting the lower prices, were compelled to take their gas elsewhere, this they might have done for aught that appears to the contrary, and the burden was on them, from this viewpoint, to show that the contract was unreasonable.

5. *"The contract as to gas was absolutely void under the anti-trust act of 1905 because it was a combination to fix the price of natural gas."*

The contract did not violate the anti-trust law of 1905. There was no combination between appellant and appellees to fix the price of natural gas to the consumer except for illumination. Appellees had the fixing of the price of gas before they entered into the contract with appellant, and they have it still, as long as they meet the lower prices, as to gas for all purposes except for illumination. The price of gas for illumination was fixed by the contract at a certain figure. But appellees under the contract had the right to fix the price, according to the schedule specified by them, only so long as there was no competitor in the field "beating down" the price. When natural gas was offered appellant at a reduced price, then appellees had to meet these reduced prices. If they had complied with these conditions, they still would have had the right to fix the price. The agreement on the part of Kelley was to sell to appellant his franchise and on the part of the gas company to sell its gas. The agreement on the part of appellant was to buy the franchise, the distributing system, and the natural gas, upon the terms expressed in the contract, and to pay for same out of the proceeds of sales made by appellant to consumers. The contract is unique in its provisions as to the sale. But it is nevertheless a contract of sale.

The anti-trust law of 1905 was to prevent a combination among producing competitors to fix the prices to the detriment of consumers. There was no competition here, as shown by appellee Kelley and the undisputed evidence, between appellant and appellees in the supply of natural gas. Appellant had no natural gas, and the contract was concerning natural gas. The artificial gas that was then being supplied by appellant could not,

by reason of the difference in the cost of producing it, be brought into competition with natural gas.

We find no elements of an unlawful combination to fix the price of natural gas. While the price of natural gas for illumination was fixed at a certain sum named, the evidence hardly warrants the conclusion that this was done for the purpose of stifling competition between natural gas and electricity, as appellees contend. But if they are right in their contention, this clause does not render the whole contract void. It is easily severable, and may be eliminated, leaving the contract in other respects valid. In *Oregon Steam Navigation Co.* v. *Winsor,* 20 Wall. 64, 70, the court says: "It is laid down by Chitty as the result of the cases, and his authorities support the statement, 'that agreements in restraint of trade, whether under seal or not, are divisible; and, accordingly, it has been held that when such an agreement contains a stipulation which is capable of being construed divisibly, and one part is void as being in restraint of trade, whilst the other is not, the court will give effect to the latter, and it will not hold the agreement to be void altogether.'"

The same rule applies here. See other cases cited in appellant's brief on the divisibility of contracts.

6. *"The laying of pipes and mains in the streets of Fort Smith, though done without authority of the city, will not be enjoined upon the application of one who does not suffer any injury different from that suffered by all others."*

The laying of pipes and mains in the streets of Fort Smith by appellees for the purpose of supplying natural gas to the inhabitants of the city is a breach of their contract with appellant granting the latter the exclusive right to supply natural gas, and, of course, by such breach appellant suffers injury, and is damaged in a manner that is peculiar to itself, and is not shared in by the inhabitants of the city. The doctrine of the law of injunction as to nuisances, invoked by appellees, is not applicable here.

7. *"If, however, the laying of pipes and mains in the streets could be challenged by plaintiff, it could obtain no relief here, as the remedy at law would be complete, no showing of irreparable injury to plaintiff or insolvency of defendants being made."*

That courts of chancery will grant relief by injunction to

prevent a breach of contract in partial restraint of trade is well settled. *Webster* v. *Williams,* 62 Ark. 101; High on Injunctions, § 1167, and numerous cases in note 1.

"The jurisdiction in cases of this nature is based upon the ground that the parties cannot be placed *in statu quo,* and that damages at law can afford no adequate compensation, the injury being a continuous one and irreparable by the ordinary process of courts of law." High on Injunctions, § 1168.

If equity will enjoin a breach of contracts of this character that are in partial restraint of trade, *a fortiori* will it prevent a breach of such contracts that contain no restraint whatever.

The decree is therefore reversed, and the chancery court is directed to enter a decree in accordance with this opinion, granting the relief prayed for in appellant's complaint and dismissing appellee Kelley's cross complaint for want of equity.

HART and FRAUENTHAL, JJ., dissent.

CONDREN v. GIBBS.

Opinion delivered March 28, 1910.

1. ELECTIONS—TOWNSHIP OFFICES—JURISDICTION IN CONTESTS.—Under Kirby's Digest, § 2860, providing that the county court shall have jurisdiction of contests of county and township offices, that court has jurisdiction of a contest over the office of township road overseer. (Page 480.)
2. SAME—EVIDENCE—CONCLUSIVENESS OF RETURNS.—Though the official returns of an election are not conclusive, they are *prima facie* evidence of the result, and will stand until they are discredited by satisfactory evidence showing that they have not been preserved in manner prescribed by law, or have been tampered with or falsified. (Page 481.)
3. SAME—IMPEACHMENT OF OFFICIAL RETURNS.—The official returns of an election cannot be impeached by parol evidence without production of the ballots themselves if they are in existence. (Page 482.)
4. SAME—IMPEACHMENT OF OFFICIAL RETURNS.—Where the ballots of an election were kept by the election commissioners for six months as required by law, and were then destroyed, no notice having been given to the commissioners to preserve them for a longer period, it is not admissible thereafter to contradict the official returns by parol proof showing how the votes were cast at such election. (Page 483.)

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

T. B. Pryor and *Holland & Holland,* for appellant.

The official returns are *quasi* records and stand until overcome by affirmative evidence against their integrity. 73 Ark. 193; 50 Ark. 95. The county court has no jurisdiction to determine a contest for a district office. Art. 7, sec. 11, Const. 1874; 68 Ark. 558; 66 Ark. 204. Parol evidence is inadmissible to contradict the returns of an election unless it be shown that the ballots have been tampered with. 53 Pac. 173.

Jo Johnson, for appellee.

The testimony of the voter is stronger than that of an election officer. 73 Ark. 187; 50 Ark. 85; 69 Ark. 501. The equivalent of fraud overturns returns. 41 Ark. 111. District overseer is the same as township overseer. Acts 1905, p. 463. When not attacked, the returns are the best evidence. 49 Ark. 238. County court had jurisdiction. 50 Ark. 270.

FRAUENTHAL, J. At the general election for State, county and township officers held on the 14th day of September, 1908, R. L. Condren and W. F. Gibbs were opposing candiates for the office of road overseer of the road district composed of Bass Little Township in the Greenwood District of Sebastian County. The election for this office was held under and by virtue of the act of the Legislature approved April 18, 1905, entitled "An act to provide for election of road overseers and for other purposes" in certain named counties, by which it is provided that all township and district road overseers in the Greenwood District of Sebastian County shall be elected in the same manner and for the same term as township and county officers now elected in the State of Arkansas, and that each political township shall constitute a road district. Acts 1905, p. 463.

The election officers of said Bass Little Township made due and proper returns of said election to the election commissioners of said county. According to the certificate and poll books thus returned, there were 139 votes cast at the election in said township; of these Condren received 65 votes and Gibbs 62 votes for the office of road overseer; and on twelve of said ballots no vote was cast for said office. The election commissioners proceeded

to ascertain and declare the result of said election, and in pursuance thereof delivered to Condren a certificate of his election to said office. Thereupon Gibbs instituted proceedings in the county court to contest said election. The contestant, Gibbs, then proceeded to take his testimony by depositions, which he completed on March 9, 1909. He gave no notice at any time to the county election commissioners that the election of Condren to said office had been contested; and no such notice was given by Condren; and the election commissioners received no written notice from any source of said contest. The ballots and certificates of said election returned to them from said Bass Little Township were retained by the county election commissioners for a period of six months after said election and the returns had been delivered to them, and until March 22, 1909, when they destroyed them in pursuance of the provisions of section 2838 of Kirby's Digest. At the time the contestant took his testimony the said ballots cast at said election were in the custody of said county election commissioners, but no application was made by either party to the proper tribunal to have the same opened; and, as above stated, no notice was given to the election commissioners of the contest so that the ballots should be preserved. At the taking of the testimony on the part of contestant 78 witnesses testified that they had at said election voted for Gibbs for road overseer, and at the time the contestee objected to the testimony of each of these witnesses upon the ground that the returns of the election officers and the ballots were the best evidence, and that these could be impeached only by their introduction, and by evidence that they had not been actually cast as returned. The contest was tried by the county court at its April term, 1909, and a judgment rendered in favor of contestant, from which an appeal was taken by contestee to the circuit court. Upon a hearing of said appeal in the circuit court, a judgment was rendered by that court in favor of the contestant; and from that judgment the contestee prosecutes this appeal.

It is urged by counsel for contestee that the county court is not invested by law with the jurisdiction to try causes involving contest for the office of road overseer; that the statute making provision for the election of a road overseer does not name any tribunal as having jurisdiction in contests for said

office; that on this account the circuit court alone had original jurisdiction to try the contest for this office under section 11 of article 7 of the Constitution. But by section 2860 of Kirby's Digest it is provided: "When the election of any clerk of the circuit court, sheriff, coroner, county surveyor, county treasurer, county assessor, justice of the peace, constable or any other county or township officer, the contest of which is not otherwise provided for, shall be contested, it shall be before the county court."

By the above act of the Legislature, approved April 18, 1905, it is declared that each political township in the county shall constitute a road district, and that a township road overseer shall be elected therefor. From this we are of the opinion that the office of road overseer in the Greenwood District of Sebastian County is a township office. We are, therefore, of the opinion that the county court had the jurisdiction to try the contest of the election of road overseer involved in this case.

The true object and duty of a court trying an election contest case is to ascertain who was in fact elected to the office; but this can only be correctly determined by competent evidence and proof. The same rules of evidence that apply in suits over any property right should be applied to the contest of an election. It is the policy of the law to guard and maintain the purity of the ballot and to lay bare any false or fraudulent returns. But, in order to determine what the true result of the election was, it is necessary to adhere to and apply those rules which the experience of the courts and the law have established for the ascertainment of truth. The election judges, clerks and commissioners are sworn officers, and the returns made by them should be and are considered *prima facie* evidence of the result of the election, although they are not conclusive. As is said by Chief Justice HILL, speaking for this court in the case of *Schuman* v. *Sanderson,* 73 Ark. 187: "Official returns are *quasi* records, and stand until overcome by affirmative evidence against their integrity." *Powell* v. *Holman,* 50 Ark. 85. The poll book and tally sheets made by the election officers and the ballots are primary evidence of the result of the election, and they must stand until they are impeached by competent evidence. They may be impeached by evidence that shows that they have been tampered with and falsi-

fied, but the truthfulness and reliability of the returns must stand until they are discredited by satisfactory evidence showing that they have been tampered with or falsified. McCrary on Elections, § § 503, 504.

There must be evidence showing that the poll book, tally sheets or ballots have not been preserved in manner prescribed by law, or that the ballots have been forged or others substituted for them, or some wrongful act or conduct on the part of the election officers, from which fraud can be inferred, must be shown, before the returns can be discredited and thereby disregarded.

In the case at bar the evidence shows that the returns were duly and properly made, and these and the ballots were preserved in strict accordance with the provisions of the statute. The lower court found that the judges and clerk of the election were supporters of contestee, and voted for him, but there is no testimony of any act or of any conduct on their part indicating fraud or wrong or dereliction of duty. Each of these officers testified to the correctness of these returns and of their acts and conduct in the holding of this election, and that each ballot was counted exactly as it was cast by the voter. The only way that it is attempted to impeach these returns is by the introduction of 78 witnesses who testified that they voted for contestant. The returns show that he received only 62 votes; so that, if this testimony is competent, it would tend to impeach these returns for fraud, and, if true, would successfully discredit them. But under the circumstances of this case is such testimony competent? The returns, consisting of the poll book and tally sheet and the certificate of the vote, are *prima facie* correct. The original ballots are the best evidence of the true result, and will control the canvass and returns of the election; and if these ballots are preserved in manner prescribed by law, they cannot be contradicted by parol evidence, unless it be shown that they have been tampered with or other ballots substituted in their place. McCrary on Elections, § 478; 10 Am. & Eng. Enc. Law § 838; 15 Cyc. 425; *Dixon* v. *Orr,* 49 Ark. 238; *Freeman* v. *Lazarus,* 61 Ark. 247.

"A voter cannot be allowed to testify that he voted for one person when he admits that he cast a ballot which has not since been changed showing that he voted for another person." 15 Cyc. 420.

This rule is founded upon the principle that the ballot is a writing, and so cannot be contradicted by parol evidence. But like other writings it may be shown that the ballot has been changed since it was cast or that another and different ballot has been put in its place. *Behrensmeyer* v. *Kreitz,* 135 Ill. 591.

This can be done by the production, and the impeachment by the witness, of the ballot actually returned by the election officers. If the ballots should be lost or destroyed, then they can be impeached, without actual production thereof, by parol evidence. But such parol evidence is only admissible without production of the ballots when the same have been lost or destroyed during the period that under the law the ballots shall be preserved. For after such period when the ballots should be destroyed under the statute they lose their legal existence as ballots. 10 Am. & Eng. Ency. Law, 733; 15 Cyc. 428.

By section 2838 of Kirby's Digest it is provided that the ballots shall be retained by the election commissioners for a period of six months, after which time they shall be destroyed, unless the commissioners shall be sooner notified in writing that the election of some person voted for at such election and declared to have been elected has been contested, in which event the ballots shall be preserved for use as evidence in such contest. Inasmuch as the returns of the election are *prima facie* evidence of the result thereof, the party attacking the returns should give the notice of the contest to the commissioners, to the end that the ballots may be preserved for the purpose of impeaching the returns. If the contestant has not done this, either through negligence or design, he cannot be heard to complain. The ballots were in existence and in the custody of the election commissioners at the time that contestant took his testimony, and if he had so desired he could have taken the proper steps to have had them preserved. Failing in having the ballots produced, he cannot, by parol evidence of the witness as to how he voted, impeach the ballot. Such a rule would result in injustice, and would deprive the contestee of the opportunity of contradicting the witness by the ballot itself. The witness may be honestly mistaken, and may through error have cast his ballot differently from what he intended, or his testimony as to whom he voted for may not be true.

In the case at bar, according to the returns of the election officers, there were 62 votes cast for the contestant. Upon the trial of this contest 78 witnesses testified that they voted for contestant. Now, each of the ballots was numbered, and the corresponding number was set opposite the name of the voter in the poll book. So that, by the production of the ballot, it could have been determined what voter cast it. In this case it could have been determined who were the 16 voters who testified that they voted for contestant but whose ballots were returned by the election officers as cast for contestee. By the production of the ballots it could then have been seen whether error had been made, and the election officers could then have more definitely said, and probably by other evidence or circumstances have shown, that the witness was in error or untruthful. But, without the production of the ballots, it was impossible to tell the voter who testified he voted for contestant and whose ballot was returned as cast for contestee. It was impossible under these circumstances to ascertain the truth by testimony to which the contestee was entitled, as well as upon the testimony adduced by contestant.

It follows that where the election officers have preserved the ballots in the manner and for the period prescribed by law, and after such time has expired the ballots have been destroyed by virtue of and in pursuance of the statute, the voters cannot be allowed to say they voted for persons other than those shown by the returns which were made up from the original ballots. Under the evidence adduced in this case the testimony of the 78 witnesses was inadmissible to contradict the ballots and thus to impeach the returns of this election.

The judgment is reversed, and this cause is remanded for a new trial.

HIX *v.* SUN INSURANCE COMPANY.

Opinion delivered April 11, 1910.

1. INSURANCE—SOLE OWNERSHIP OF INSURED PREMISES—EFFECT OF DIVORCE.—Under a policy of fire insurance which stipulated that it should be void "if the interest of the insured be other than unconditional and sole ownership," a decree divorcing the insured from his wife and giving her temporary possession of the insured premises does not divest him of the sole and unconditional ownership. (Page 487.)
2. SAME—SOLE OWNERSHIP OF INSURED PREMISES—EFFECT OF DIVORCE.—Kirby's Digest § 2864, entitling a wife, upon a divorce being rendered in her favor, to one-third of the husband's property absolutely, will not affect a husband's ownership of property, upon a divorce being granted to his wife, until the property is designated by the decree. (Page 488.)

Appeal from Miller Circuit Court; *Jacob M. Carter,* Judge; reversed.

Joe E. & John N. Cook, for appellant.

The title to the property has not changed. 48 So. 22; 89 Ark. 111; 67 Ark. 553. Title acquired at public sale is not divested until the sale is confirmed. 74 N. W. 270; 53 Neb. 816. Transfer from one partner to another does not affect the policy. 133 Ill. 220. A vendor's lien does not work a forfeiture. 77 Ark. 27; note to 20 L. R. A. (N. S.) 776.

Webber & Webber, for appellee.

The verdict was properly directed. 63 Ark. 200; 67 Ark. 584; 72 Ark. 51. If incumbrances are not disclosed, the policy is void. 44 S. E. 404; 44 Md. 95; 120 S. W. 714; 10 Fed. 232; 106 N. W. 484; 34 S. W. 915; 12 C. C. A. 531; 63 Ark. 200. The interest of appellant was not truly stated, as required by the policy. 20 L. R. A. (N. S.) 776; 121 Mo. 75; 25 S. W. 848; 63 S. E. 283. A policy cannot be enforced where insured has title to only an undivided interest. 40 Mich. 241; 158 Pa. St. 459; 27 Atl. 1077; 43 S. E. 52; 116 Ga. 794; 67 S. W. 153; 26 So. 932.

MCCULLOCH, C. J. Appellant instituted separate actions against two fire insurance companies on policies of insurance, one on his household goods for $750, and the other on his dwelling house for $400. All of the property covered by both policies was totally destroyed by fire during the period specified in the policies. The two cases were consolidated, as involving the same

issues, and were tried together. The court gave a peremptory instruction to the jury to return a verdict in favor of each defendant.

Both policies are of the standard form, and liability thereunder is denied on account of alleged breach of the following condition stated in each policy, viz.: "This entire policy, unless otherwise provided by agreement indorsed thereon or added thereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the assured in fee simple."

No written application was made for the insurance, and there was no misrepresentation as to the title or the occupancy, nor did any change take place in the title or occupancy after the issuance of the policies. The title to the real estate, which constituted his homestead, was vested in appellant, and he owned the personal property. A short time before the policies were issued to him, a decree for divorce was rendered against appellant in favor of his wife. That decree, omitting the caption and formal recitals, reads as follows:

"The court is of the opinion that said plaintiff is entitled to a divorce on the above alleged grounds, and also alimony in the sum of twenty-five dollars per month to be paid by the said defendant, and that she keep possession of the two minor children, the defendant to be permitted to visit them at all reasonable hours. The court finds that said parties own a home in the city of Texarkana, Arkansas, which is now occupied by said plaintiff and her two said children, and the court adjudges that she may continue to occupy the same and hold the household goods. As to the sale of said home, the court makes no order, further than at any time said parties may see fit to sell the same they may do so on such terms as they may agree upon and that is satisfactory to each of them. It is further adjudged that if, before said parties sell said property, the said plaintiff shall marry, then she shall vacate said property, and said defendant shall be released from paying any further alimony. The judgment of the court as to alimony and the occupancy of the home is subject to further orders. It is therefore considered, ordered and decreed that the bonds of matrimony now

existing between said plaintiff and defendant be dissolved and set aside, that plaintiff keep possession of said home, household goods and children, and that said defendant pay her twenty-five dollars per month for her and her two children's support."

Did that decree divest any part of appellant's title to, or interest in, the property, so that he was no longer the unconditional and sole owner thereof within the meaning of the insurance policies?

The statutes of this State provide that where a final judgment for divorce is rendered in favor of a wife, she "shall be entitled to one-third of the husband's property absolutely, and one-third of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage for her life, unless the same shall have been relinquished by her in legal form, and every such final order or judgment shall designate the specific property, both real and personal, to which such wife is entitled; and when it appears from the evidence in the case, to the satisfaction of the court, that such real estate is not susceptible of the division herein provided for without great prejudice to the parties interested, the court shall order a sale of said real estate to be made by a commissioner, to be appointed by the court for that purpose, at public auction to the highest bidder upon the terms and conditions and at the time and place fixed by the court; and the proceeds of every such sale, after deducting the cost and expenses of the same, including the fee allowed said commissioner by said court for his services, shall be paid into said court, and by the court divided among the parties in proportion to their respective rights in the premises." Act of March 28, 1893; Kirby's Digest, § 2684.

This court has construed the statute to give to the divorced wife for and during her natural life such interest and amount of his real estate as would be her dower in case of the husband's death. *Beene* v. *Beene,* 64 Ark. 518.

Now, it is seen, from an inspection of the decree, that the court did not "designate the specific property, both real and personal," to which the wife was entitled, nor did it order a sale of the property for division. The effect of the decree, both as to the personal property and real estate, was merely to award the possession thereof temporarily to the wife, reserving the question of division or of designation of the wife's portion for future

determination. It did not purport to divest any part of appellant's title to the property, nor to diminish his interest therein. The fact that the possession was temporarily awarded to appellant's wife did not affect his title to the property, and, notwithstanding that award, he continued to be the sole and unconditional owner of the property within the meaning of the policies. The conditions named in the policies do not refer to possession, but to title and ownership.

It may be insisted, however, that the statute of its own force vested in the divorced wife title to an undivided interest in the husband's property, which she could have asserted and had set apart at the time the decree for divorce is rendered, or could do so afterwards. The statute provides that the specific property to which the wife is entitled shall be designated in the decree for divorce; but, conceding that this may be done afterwards by another decree of the court, until it is done the divorced wife's claim is an unascertained one which does not change the husband's interest in the property from that of sole and unconditional ownership. He is still the sole and unconditional owner thereof in fee simple, though the divorced wife's undetermined claim exists, and he cannot convey it without her concurrence. The husband cannot sell his homestead before divorce unless his wife joins in the execution of the conveyance, nor can he convey his other lands free of the wife's inchoate dower right; yet he is the sole and unconditional owner. He is not merely the owner of an undivided interest, but he is the sole and unconditional owner until his wife's interest be asserted and carved out. The title remained vested in the husband solely and unconditionally until it was divested by a decree of the court designating the specific property to which the wife was entitled.

We are therefore of the opinion that the court erred in its peremptory instruction. The testimony is not satisfactory as to the amount of personal property owned by appellant, or as to its value, and we do not undertake to decide what amount he ought to recover on the policy; but there was testimony sufficient to warrant a finding that appellant owned personal property covered by the insurance policy, and he was entitled to have the jury decide how much he should recover, according to the proof.

Reversed and remanded.

HART, J., dissenting.

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

Opinion delivered April 11, 1910.

CARRIER—DAMAGES—MENTAL SUFFERING.—Mental suffering alone, unaccompanied by physical injury or any other element of recoverable damages, cannot be made the subject of an independent action against a carrier for damages, even where the act or the violation of duty complained of was wilfully committed.

Appeal from Drew Circuit Court; *Henry W. Wells,* Judge; affirmed.

Williamson & Williamson, for appellant.

The relation of passenger and carrier being established, the passenger is entitled to damages for mental suffering caused by insulting and abusive conduct of the carrier's agent toward the passenger. 3 Mason 245; Fed. Cas. No. 2575; 1 East 106; 103 Ill. 549; 3 Cliff. 416; 106 Mass. 189; 6 Ind. App. 205; 80 Md. 23; 62 Me. 90; 62 N. J. L. 286; 4 Ell. Rds. § 1638; 90 N. Y. 588; 8 Bush 147; 85 Ky. 547; 36 Wis 657; 133 N. Y. 261; 18 Ill. App. 620; 62 Fed. 440; 54 L. R. A. 572; 59 *Id.* 590; 12 *Id.* 339; 66 *Id.* 618; 46 *Id.* 549; 31 *Id.* 390; 69 Miss. 421; 102 Ga. 479; 12 S. W. 275; 15 S. W. 469; 30 S. W. 574; 178 N. Y. 349; 10 Am. & Eng. Ann. Cas. 476; 1 *Id.* 353; 13 *Id.* 399; 94 N. W. 922; 74 S. W. 576; 71 S. W. 535; 96 S. W. 102; 97 S. W. 1007; 39 S. W. 124; 69 S. W. 994; 63 S. W. 895.

W. E. Hemingway, E. B. Kinsworthy, E. A. Bolton, and *Jas. H. Stevenson,* for appellee.

There can be no recovery against a railroad company for mental anguish alone. 84 Ark. 42; 89 Ark. 187; 70 Ark. 136; 64 Ark. 538; 76 Ark. 348; 67 Ark. 123; 82 Ark. 289; 4 Suth. Dam. 1245; 23 Mo. App. 216; 88 Ga. 763; 6 Nev. 224; 71 Me. 227; 147 Pa. 40.

HART, J. On the 30th day of August, 1908, M. V. Pierce embarked on one of the passenger trains of the St. Louis, Iron Mountain & Southern Railway Company at Warren, Ark., for Monticello, Ark. When the train auditor came to him to take up his ticket, Pierce informed him that he had reached the station too late to purchase a ticket, and tendered his fare in money. The auditor at first refused to receive it, and cursed

and abused Pierce in the presence of the other passengers, and threatened to eject him from the train. The conductor interfered, and the auditor then received his fare, and permitted him to go to his destination, but continued to curse and abuse him.

These facts were alleged by Pierce in a suit filed by him against the railway company to recover damages on account of the humiliation and mental suffering occasioned him by the auditor's conduct. The railway company demurred to the complaint. The demurrer was sustained, and the complaint was dismissed. Pierce has appealed to this court.

In the case of *St. Louis, Iron Mountain & Southern Railway Company* v. *Taylor,* 84 Ark. 42, the court held (quoting syllabus): "Mental suffering alone, unaccompanied by physical injury or any other element of recoverable damages, cannot be made the subject of an independent action against a carrier for damages, even where the act or violation of the duty complained of was wilfully committed."

The rule was approved and applied in the case of *Chicago, Rock Island & Pacific Ry. Co.* v. *Moss,* 89 Ark. 187.

Counsel for appellant recognize the rule announced in these cases, but ask us to overrule it, as being against the weight of authority and the better reasoning on the subject.

The authorities bearing on the question were thoroughly considered and reviewed in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Taylor, supra,* and no useful purpose can be served by again discussing the question. It is sufficient to say that the conclusion was reached in that case after a careful and deliberate consideration of the question, and no additional arguments are advanced for overruling these cases.

The judgment is therefore affirmed.

WAGNER v. HEAD.

Opinion delivered April 18, 1910.

1. ADVERSE POSSESSION—NOTORIETY AND CONTINUITY OF POSSESSION.—Proof that defendant went into possession of land under a tax title and remained there three months in 1905, and that in the summer or fall

of 1906 a timber cutter with defendant's permission occupied a house on the land for a few months, and that thereafter the place remained vacant until 1908, when defendant moved on the land, and soon afterwards was sued for possession, is insufficient to show that defendant had a sufficiently notorious or continuous possession to amount to an investiture of title, under Kirby's Digest, § 5061. (Page 492.)

2. EJECTMENT—RECOVERY OF TAX LANDS—AFFIDAVIT OF TENDER OF TAXES.—Kirby's Digest, § 2759, providing that no person shall maintain an action for possession of land against a tax purchaser without filing an affidavit of tender of taxes, etc., does not apply where the taxes were paid before the sale. (Page 493.)

Appeal from Little River Circuit Court; *James S. Steel,* Judge; affirmed.

L. A. Byrne, for appellant.

An affidavit was necessary in order to maintain the action. Kirby's Dig. § 2759. Even though the tax deed be void, the holder had been in actual possession for the statutory period. 76 Ark. 447; 71 Ark. 390; 66 Ark. 141; 79 Ark. 194; 80 Ark. 82; 83 Ark. 334.

J. T. Cowling and *James D. Head,* for appellee.

Appellant should have saved exceptions to the court's ruling on his motion to dismiss. 70 Ark. 418. One who buys land at a tax sale to which he claims title, and which was incumbered with taxes, only removes such incumbrance. 33 Ark. 267; 55 Ark. 104; 56 Ark. 187; 42 Ark. 215; 44 Ark. 504. Appellant did not have the requisite possession. 48 Ark. 278; 27 Ark. 77; 49 Ark. 266.

McCULLOCH, C. J. This is an action instituted by appellee to recover from appellant a tract of land in Little River County, the title to which he (appellee) claims under mesne conveyances from the United States as swamp and overflowed land, and also under a sale in 1882 by the commissioner of the chancery court in an overdue tax suit. The validity of his title is conceded, but appellant asserts title under a deed executed to him in 1904 pursuant to a sale for delinquent taxes and by adverse possession for two years under said tax deed. The tax sale was void by reason of the fact that the taxes for which the land was sold were paid by the owner. There was a trial before the court sitting as a jury, and a finding against appellant on his plea of

adverse possession. He seeks a reversal of the judgment on the alleged ground that the evidence does not sustain the finding.

Appellee purchased the land in April, 1905, from T. B. Cook, who was the owner and in possession by his tenant, one Harold. Cook built a cabin on the land in the year 1900, and cleared about thirty acres, and had it put in cultivation. Crops were made on it by Cook's tenants during the years 1901, 1902, 1903 and 1904. Harold was on the land as Cook's tenant, and he remained on the place as such tenant until the spring of 1905, when Cook sold the land to appellee, but on account of the overflow he was unable to make a crop and moved. No crop has been raised on the place since then. There is evidence to the effect that before Harold moved off he agreed to hold and occupy the place as appellant's tenant for the year 1905; but this was never brought to the notice of either Cook or appellee, so far as the evidence in this case shows.

After Harold moved off the place, in the spring or summer of 1905, appellant went on it and remained there about three months, but got sick and moved off. This was not brought to the attention of appellee. The place remained vacant until the summer or fall of 1906, when a man named Elliott obtained appellant's permission for one of his timber cutters to occupy the house on the land under an agreement to repair it. Elliott also applied to Cook for permission to occupy the house, and the latter informed him that he had sold the land to appellee. The timber cutter moved into the house in the summer or fall of 1906, and remained there until about February 1, 1907. During all this time the house was in a dilapidated condition, the fences were down, and the place was vacant except the house. It continued to be vacant until the early part of the year 1908, when appellant moved into the house, and very soon thereafter appellee began this suit against him for possession.

The evidence does not sustain appellant's plea of continuous adverse possession for a period of two years. At most, he has proved only fitful acts of possession, which were never brought to the notice of appellee, and which lacked sufficient continuity to amount to an investiture of title by limitation. *Scott* v. *Mills*, 49 Ark. 266.

It is further insisted that the action should have been dismissed because of appellee's failure to file the affidavit required by Kirby's Digest, § 2759, to the effect that he had tendered the amount of taxes for which the land had been sold. The taxes had been paid before the sale; therefore no tender was required. *Kelso* v. *Robertson,* 51 Ark. 397.

Judgment is therefore affirmed.

AYERS v. HEUSTESS.

Opinion delivered April 18, 1910.

1. CONTRACTS—CONSTRUCTION.—A written contract should be construed as a whole, and such reasonable construction placed on it as to give effect to each word and to each provision, and to make the several parts consistent with each other. (Page 495.)
2. LANDLORD AND TENANT—CONSTRUCTION OF LEASE.—Under a lease which stipulated that the tenant should pay "$160 for rent of forty acres of land at $4 per acre, more or less, known as the Dudley farm," the intention of the parties was to contract for rent at four dollars per acre, and not for a gross price for the whole tract. (Page 495.)

Appeal from St. Francis Circuit Court; *Hance N. Hutton,* Judge; affirmed.

Mann & Rollwage, for appellant.

The plain and obvious meaning of the words "more or less" is generally taken to be that the parties are to run the risk of gain or loss as there might happen to be an excess or deficiency in the estimated quantity. 19 Ark. 102; 28 Ky. 181; 41 N. E. 599; 27 Atl. 253; 22 Fed. 1192; Warvelle on Vend. § 798. The note was prepared by appellee, and, if doubtful in its meaning, will be construed most strongly against him. 90 Ark. 88; 74 Ark. 41.

John Gatling, for appellee.

Parol evidence is admissible to explain an ambiguous deed. 86 Ark. 169; 90 Ark. 272. It is admissible to locate the premises where the words of general description are used. 45 N. Y. S. 367; 17 App. Div. 187. The quantity of land mentioned in a deed must yield to the boundaries mentioned therein. Martin-

dale on Conveyancing, § 106. The words "more or less" are intended to prevail where the discrepancy was caused by mistake only, without fraud or deception. 4 N. J. Eq. 212; 38 Am. Dec. 514. A mistake of seven acres cannot be said to justify such a suspicion. 18 S. E. 355; 19 Ga. 600.

McCULLOCH, C. J. Appellee, W. S. Heustess, instituted this action before a justice of the peace against his tenant, Jane Ayers, to recover the sum of $27.20, alleged to be due for rent of six and four-fifths acres of land. He recovered judgment for that amount, both in the justice's court and in the circuit court on appeal. Appellant brings the case here for review.

Appellee rented to appellant a tract of land known as the Dudley land, and the latter executed a rent note in the following form:

"$160. Forrest City, Ark., 3, 28, 1908.

"October 15, 1908, after date, I promise to pay to the order of W. S. Heustess one hundred sixty and no-100 dollars, for rent of forty acres of land at $4 per acre, more or less, known as the Dudley Land.

"Jane Ayers."

Nothing was said at the time about surveying the land, and the quantity of land in cultivation on the place was not ascertained. In the fall of the year appellee collected $160, and demanded that the land be surveyed for the purpose of ascertaining the precise quantity which appellant had cultivated. Appellant objected, and claimed that she had paid the full amount of the stipulated rent, and declined to pay any more. The land was surveyed, and it was ascertained that appellant had cultivated forty-six and four-fifths acres. The decision of this case turns on a construction of the written contract—whether it specified the gross rental price of $160 for the whole tract of 40 acres, more or less, or whether it meant that the price should be $4 per acre for the actual quantity of land contained in the tract.

In the first place, the words "more or less" should be held to refer to the quantity of the land. This is the construction which the parties obviously intended, and which counsel on both sides now concede was intended. These words in the contract are treated as transposed so as to read, "for rent of 40 acres of land, more or less, known as the Dudley land, at $4 per acre."

It is a familiar canon of construction that a written instrument should be considered as a whole, and that such construction should be placed on it, when reasonable, as to give effect to each word and to each provision, and to make the several parts consistent with each other. Now, if appellant's construction of the contract be accepted, no effect at all is given to the specification as to the price per acre, and that part of the contract is entirely ignored. Of course, if the words "at $4 per acre" had been omitted, so as to make it a promise to pay $160 for rent of forty acres of land, more or less, then it should probably be construed to mean that that was the stipulated price for the rent of the whole tract of land, regardless of the precise number of acres. But when the parties put in the price per acre, it is manifest that they meant to fix the price by the acre, and to regulate the gross rental price by the number of acres. In other words, they meant to contract for four dollars per acre for each acre of the land, and not for a gross price for the whole tract. If the tract of land had turned out to contain less than forty acres, appellant could not have been required under the contract to pay more than four dollars per acre, notwithstanding the statement in the contract of the gross amount of $160. On the other hand, since it is ascertained that the tract contained forty-six and four-fifths acres, she is obligated by the contract to pay four dollars per acre for it it.

We are not unmindful of the general rule in construing deeds that the addition of the words "more or less" to the specification of quantity is usually held to be merely precautionary, and intended to cover slight and unimportant inaccuracies, and that their use does not alter the meaning of the instrument as to the number of acres covered by the contract. Doubtless, the same rule of construction ought to be adopted with reference to a lease. But we think that the rule does not apply to the interpretation of this contract, which, when read and considered as a whole, meant to stipulate for the payment of the price per acre, and not the gross price for the whole tract.

Judgment affirmed.

KAMENZEND v. STATE.

Opinion delivered April 18, 1910.

1. LIQUORS—SALE OF WINE IN ORIGINAL PACKAGES.—A grower of grapes or berries, under Kirby's Digest, § 5100, may sell his wine made thereof in original packages of not less than five gallons, properly labeled, notwithstanding an adverse vote at the preceding general election or an order of the county court prohibiting the sale of native wine. (Page 497.)
2. SAME—SALE OF WINE IN SMALL PACKAGES.—Under Kirby's Digest, § 5100, a grower of grapes and berries in this State may sell wine made therefrom in quantities not less than one-fifth of a gallon, when properly labeled, anywhere, except where prohibited by an order of the county court under Kirby's Digest, § 5129, prohibiting the sale of liquors within three miles of a church or school house, or unless there is a local statute prohibiting the sale of wines. (Page 497.)
3. SAME—REPEAL OF STATUTES.—The act of April 1, 1895 (Kirby's Digest, § 5100), amending the three-mile law, did not repeal so much of Kirby's Digest, § 5093, as allowed the manufacturers of liquors to sell same in prohibition districts in original packages of not less than five gallons. (Page 498.)

Appeal from Franklin Circuit Court, Ozark District; *Jeptha H. Evans,* Judge; reversed.

Sam R. Chew, for appellant; *J. D. Benson,* of counsel.

A manufacturer or distiller may sell whisky in five-gallon original packages without incurring the penalties provided by the law for unlawful sale of liquors. 60 Ark. 247. Those who grow grapes may make wine thereof and sell same in original packages of not less than five gallons, notwithstanding the fact that at the next preceding election the vote of the people was against such sale. 67 Ark. 422; 84 Ark. 482.

Hal L. Norwood, Attorney General, and *W. H. Rector,* Assistant, for appellee.

The only exception in favor of wines is in favor of sacramental purposes. 62 Ark. 585. The manufacture of wine made of grapes or berries cannot lawfully sell same without license, except in places where intoxicating liquors can be licensed according to law. 61 Ark. 482.

McCULLOCH, C. J. The question presented in this case is whether or not a grower of grapes or berries may make wine thereof and sell the same in original packages of not less than

five gallons, properly labeled, within the territorial limits of an order of the county court prohibiting the sale of native wines and all other vinous, spirituous or intoxicating liquors. The particular statute which controls is as follows:

"Any person who grows or raises grapes or berries may make wine thereof and sell the same in quantities not less than one-fifth of a gallon, or in sealed bottles, anywhere in the State without license when the same has been properly labeled as provided for in section 5101; provided, that the people shall have the right to petition the county court to prohibit the sale of native wine as now provided by law, but native wine shall not be included under section 5129, unless by special petition against wine; provided, further, that the growers of wine as above mentioned shall have the right to sell the same in original packages of not less than five gallons, as is now granted to manufacturers and distillers of whisky and brandy, under section 5093." Kirby's Digest, § 5100.

Section 5093 referred to in the above quoted section is as follows: "It shall not be lawful for any person to sell alcohol or any spirituous, ardent, vinous, malt or fermented liquors in this State, or any compound or preparation thereof, commonly called tonics, bitters or medicated liquors, or intoxicating spirits of any character which are used and drank as a beverage in any quantity or for any purpose whatever, without first procuring a license from the county court of the county in which such sale is to be made authorizing such person to exercise such privilege. Provided, manufacturers of alcohol, vinous, ardent, malt or fermented liquors can sell in original packages without license. Provided, further, such original packages shall not contain less than five gallons."

We construed section 5100 to mean that a grower of grapes or berries may sell his wine made thereof in original packages of not less than five gallons, properly labeled, notwithstanding an adverse vote at the preceding general election or an order of the county court prohibiting the sale of native wine. *Sluder* v. *State*, 84 Ark. 482. He can also sell his wine without license in quantities of not less than one-fifth of a gallon, when properly labeled, unless prohibited by an order of the county court especially directed against the sale of native wine. *Bates* v. *State*, 81 Ark. 336.

An order of the county court entered pursuant to section 5100, especially directed against the sale of native wine, relates only to sales other than those made by growers in original packages of not less than five gallons. We are now speaking of statutes of general application, and not of special statutes applicable to particular localities. There may be special satutes that have the effect of prohibiting the sale of wines and all other kinds of liquors in any quantity, as in *Cotton* v. *State,* 62 Ark. 585.

Learned counsel for the State insist that *Sluder* v. *State, supra,* should not be regarded as decisive of the present case, for the reason that it is not shown in the statement of facts in the opinion that there had been an order of the county court especially directed against the sale of native wines. We find, from an examination of the transcript in that case, that there had been such an order of the county court, and the language of the opinion is unmistakable that the court intended to hold, just as we now hold, in the construction of the statute.

It is also insisted that the act of April 1, 1895, amending the three-mile law (Kirby's Digest, § 5129) repealed so much of section 5093 as allowed, in prohibition districts, the manufacturer of alcohol, vinous, ardent, malt or fermented liquors to sell the same without license in original packages of not less than five gallons, and that section 5100 allowed no greater privileges to growers of grapes. The particular language of the act of 1895, relied on, is that part which reads as follows: "And thereafter * * * it shall be unlawful for any person to vend or give away *any* spirituous, vinous or intoxicating liquors of any kind, or alcohol or any preparation thereof commonly called tonics, or bitters, within the limits aforesaid."

The Sluder case is also decisive of that question. We do not construe the act of 1895 as making any change in the law with reference to sales by manufacturers in original packages. It amended a prior statute so as to change the length of time a prohibition order shall run, but it made no other change, and in all other respects it closely follows the language of the prior statute.

The facts were agreed upon, so no useful purpose will be served in remanding the case.

Reversed and dismissed.

BEASELY v. MUTUAL AID ASSOCIATION, UNITED BROTHERS OF FRIENDSHIP AND SISTERS OF MYSTERIOUS TEN.

Opinion delivered April 18, 1910.

1. BENEVOLENT ASSOCIATION—CONCLUSIVENESS OF RECORD.—Under Kirby's Digest, § 944, relating to corporation formed for benevolent purposes, providing that "it shall be the duty of the clerk or secretary of any such corporation to keep a fair record of the proceedings of such corporation in a book provided for that purpose," it is not admissible for one who claims to be a beneficiary under a policy of insurance issued by a benevolent association to contradict by parol evidence the record of its proceedings showing that another had been substituted as such beneficiary, there being no allegation of fraud therein. (Page 501.)
2. INSURANCE—BENEFIT SOCIETY—RIGHT TO CHANGE BENEFICIARIES.—Where the bylaws of a mutual benefit association authorized the beneficiaries in a benefit certificate or policy of insurance issued by it to be changed, such bylaw formed a part of the contract evidenced by the benefit certificate or policy of insurance. (Page 502.)

Appeal from Jefferson Circuit Court; *Antonio B. Grace*, Judge; affirmed.

Taylor & Jones, for appellant.

Letters written by officers of the association discussing plaintiff's claim are not competent evidence. Bacon on Ben. Soc. § 467; 131 Ill. 498. Parol evidence is always admissible to establish fraud. 1 Story, 135. There is no authority in the contract for making such change of beneficiary. 55 Ark. 212; 52 Ark. 202. Relief must be granted according to the terms of the contract. 71 Ark. 301.

White & Alexander, for appellee.

The fund paid into court is not such a fund as should be made the subject-matter of interpleader. 3 Pom Eq. Jur. 1322; 66 L. R. A. 89. The records of a corporation cannot be contradicted or varied by parol. 38 Mass. 288; 101 Cal. 70; 63 Mass. 338; 57 Am. D. 50; 61 N. H. 418; 37 Vt. 40. A party may be authorized by the policy, or by the constitution and bylaws which are made a part of the contract, to change the beneficiary. 55 Ark. 212; 71 Ark. 301. The constitution and bylaws are a part of the contract between the parties. 81 Ark. 512; 86 Ark. 419.

BATTLE, J. Willis Beasely, the husband of Lula Beasely and father of Bertha Beasely, was a member of a subordinate lodge of the United Brothers of Friendship and Sisters of Mysterious Ten, called Pine Bluff Lodge No. 1. This order was a chartered mutual aid association, and issued to a member, when he joined, a certificate in which it agreed to pay, upon the death of such member, to any person named as beneficiary in the certificate the sum of $225 in accordance with the laws of the order.

After Willis Beasely became a member of the asssociation, it issued to him such a certificate, in which his wife, Lula Beasely, was named a beneficiary. Under the bylaws of the order any member in open lodge may, by asking, change the name of the beneficiary in the certificate issued to him. On the 17th day of August, 1908, Willis Beasely, in open lodge, caused the name of the beneficiary in his certificate to be changed from Lula Beasely to Bertha Beasely. On the 10th day of November, 1908, Willis Beasely, while he was in good standing with the subordinate lodge and the association, departed this life. Proof of his death was made to the Pine Bluff Lodge and the association. Lula Beasely then demanded the $225 of the association, but it refused to pay. Mrs. Beasely then brought an action against Mutual Aid Association, United Brothers of Friendship and Sisters of Mysterious Ten. The defendant answered, and among other things stated that, since the death of the deceased, Bertha Beasely had presented a claim for the sum named in the certificate, claiming it as beneficiary, that the money was due, and it was willing to pay it to whom it belonged; and asked that Bertha Beasely be made a party to the action, that it be permitted to pay the money into court, and that Bertha be required to appear within a reasonable time and maintain or relinquish her claim to the same.

Bertha was made a party, and required to appear in court within twenty days and maintain or relinquish her claim to the fund, which the defendant was ordered to pay into court. Bertha Beasely then appeared, and answered, stating that the association executed and delivered its certain certificate of insurance upon the life of Willis Beasely, and named her as the beneficiary therein, and thereby promised to pay to her the sum of $225 upon the death of Willis Beasely, which occurred on the

10th day of November, 1908; that proof of his death had been made and filed with the defendant in the mode and manner prescribed by the order; that the certificate in which Lula Beasely was named beneficiary had been cancelled; and that she (Bertha) was entitled to the fund paid in court.

The jury, trying the issues made by the pleadings and evidence adduced by the parties in the trial, returned a verdict in favor of Bertha Beasely for the $225 paid into court, and the court rendered judgment in her favor for that amount, and plaintiff appealed.

It was proved that a certificate for $225 was issued to Willis Beasely, in which Lula Beasely was named the beneficiary. It was also proved by the record of the Pine Bluff Lodge No. 1, of the association, that the beneficiary in the certificate was changed to Bertha Beasely, on motion of Willis Beasely, in open lodge, in accordance with the bylaws of the association.

In the course of the trial appellant offered the following evidence:

"Now, we offer to show by Mack Sheppard, in addition to the testimony given by him and also by Black Waterhouse, that they were in the lodge on the night of the 17th of August, 1908, in Pine Bluff with Willis Beasely, now deceased. That Willis Beasely in open lodge asked the lodge to grant him a sick benefit, as he had been sick and was entitled to it; that this was all the request made by him; that he did not make any request for any change of the policy issued to him or in the name of the beneficiary, Lula Beasely.

"And we offer to prove by Alex Moon that he was present on the same night, and that he, Willis Beasely, asked the lodge for his sick benefit, but did not make any request for a change of the beneficiary named by his policy."

The court refused to allow the introduction of this evidence.

Section 944 of Kirby's Digest provides: "It shall be the duty of the clerk or secretary of any such corporation to keep a fair record of the proceedings of such corporation in a book provided for that purpose, and which shall be at all times open to the inspection of the members of such corporation."

This statute governs associations like the defendant association in this case, and makes such records evidence of the pro-

ceedings recorded. It was designed to perpetuate such proceedings, and relieve them of the uncertainty of human memory. Members of such corporations, when organized, impliedly enter into an agreement with each other that such records, fairly kept and complete, shall be the exclusive evidence of their proceedings. Were it otherwise, such proceedings would be involved in doubt, and subject to be overturned by the uncertain and unreliable memories of witnesses, and the records would cease to subserve the useful purpose for which they were designed. The records in this case are not attacked for fraud, but the evidence of witnesses was offered as more reliable. The court did not err in refusing to allow its introduction.

Appellant insists that the certificate issued, in which she was the beneficiary, was an insurance policy, and that "neither the defendant association, nor the subordinate lodge No. 1, nor any of its officers or members, had the right to change the policy or the name of the beneficiary therein, because" she "had a vested right therein, and no such change could be made, unless expressly authorized by the policy itself, or by the constitution, articles of association, or bylaws of the association, when these are by the terms of the policy made a part of it;" and cited *Johnson* v. *Hall,* 55 Ark. 212, to support her contention. In the case cited Ellen M. Trotter in 1884 became a member of the Knights and Ladies of Universal Brotherhood, and obtained a benefit certificate, by which the society agreed to pay at her death a certain sum of money to her children. Some time after the issue of the benefit certificate to Ellen M. Trotter, she caused the same to be changed by inserting therein, after the words "her children," the names of her minor children, Charles, Henderson and Edgar. The evidence in that case failed to show that "the society had adopted any law or regulation authorizing or prohibiting a change of the beneficiary designated in a certificate, or prescribing a mode by which the designation in such certificate might be changed or restricted."

In the case before us the bylaws expressly authorized the change of the beneficiary, and the change was made by the lodge on motion of the insured in accordance with such bylaws, which formed a part of the contract evidenced by the certificate.

Woodmen of the World v. *Jackson,* 80 Ark. 419; *Supreme Lodge of Knights and Ladies of Honor* v. *Johnson,* 81 Ark. 512.

Judgment affirmed.

WEAVER-DOWDY COMPANY *v.* MARTIN.

Opinion delivered April 18, 1910.

1. DEEDS—NOTICE IN LIEU OF RECORD.—Actual notice to a grantee's agent that his grantor had previously sold and conveyed the land to another by an unrecorded deed is equivalent to record notice of such deed. (Page 505.)
2. SAME—EQUITABLE MORTGAGE—NOTICE.—The rule that actual notice of an unrecorded mortgage is not equivalent to record notice thereof is inapplicable to the case of an absolute deed intended as a mortgage to secure a debt. (Page 505.)

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

McCaleb & Reeder, for appellant.

Plaintiff must recover, if at all, on the strength of his own title. 37 Ark. 643; 64 Ark. 383; 76 Ark. 449; 77 Ark. 347; 90 Ark. 190; 90 Ark. 420. Appellant is an innocent purchaser and entitled to the possession of the land. 129 U. S. 579; 123 U. S. 307. The rights of appellant are superior to those of appellee. 89 Ark. 298. Plaintiffs, having failed to record their deeds, cannot hold against subsequent purchasers for value without notice. 74 Cal. 444; 16 Pac. 242; 27 Ark. 557; 149 Ind. 92; 93 Ind. 431; 112 Mo. 502. Neighborhood rumors of a fact are not notice to any one of the fact. 14 Ga. 145; 26 Me. 484; 38 Mich. 96; 59 Pa. 167; 23 Pa. 440; 7 Watts, 261; *Id.* 163; 17 Tex. 143. An unrecorded mortgage is void as against a subsequently recorded deed. 7 Ark. 505; 13 Ark. 112; 19 Ark. 278; 40 Ark. 146; 31 Ark. 62; *Id.* 163: 88 Ark. 363. And this is true although the subsequent purchaser had actual notice of such mortgage. 9 Ark. 112; 20 Ark. 190; 18 Ark. 105; 49 Ark. 457; 68 Ark 768; 71 Ark. 517; 33 Ark. 203.

Samuel M. Casey, for appellee.

The description of the land in the deeds to appellee is sufficient. 40 Ark. 238; 68 Ark. 544; 83 Ark. 334; 59 Ark 464; 79 Ark. 442. An issue cannot be raised in the Supreme Court for the first time. 64 Ark. 305; 77 Ark. 103. In order to convert an absolute deed into a mortgage, the evidence must be clear and decisive. 75 Ark. 551; 31 Ark. 163. Actual notice to a subsequent purchaser of an unrecorded deed is as binding as though it were recorded. 14 Ark. 294; 44 Ark. 517; 48 Ark. 277; 71 Ark. 31; 68 Ark. 150; 77 Ark. 309. Whatever would put a subsequent purchaser on inquiry would be sufficient notice. 15 Ark. 184; 16 Ark. 340; 50 Ark. 322; 17 Am. St. R. 282. Appellant was not a *bona fide* purchaser. 49 Ark. 214; 55 Ark. 45.

BATTLE, J.. Two suits were instituted in the Independence Chancery Court against Weaver-Dowdy Company, one by J. R. Martin and the other by D. E. Dobson, in which each plaintiff claimed to be the owner of a portion of the east half of the southwest quarter of section 18, township 14 north, range 7 west, the two, in the aggregate, claiming ownership of the entire tract. Each plaintiff claimed ownership under conveyances from J. W. C. Thomas and wife, the deed of Martin being dated November 3, 1905, and that of Dobson August 23, 1906. In May, 1907, the defendant, Weaver-Dowdy Company, procured a deed from Thomas for the entire tract, and caused the same to be immediately recorded, and was proceeding to take possession of the land when the two suits were instituted. At this time the deeds of Martin and Dobson were not recorded. By agreement the two suits were consolidated and were heard as one.

The defense of the defendant in both suits was to the effect that the deeds of plaintiffs were not recorded, and that it purchased the land for a valuable consideration, without notice, actual or constructive, of the prior deeds of Thomas to plaintiff. It sets up an additional defense in the suit instituted by Dobson to the effect that the deed of Dobson, though absolute in form, was intended for a mortgage to secure certain indebtedness of Thomas to Dobson, and was not recorded before the execution of deed by Thomas to the defendant.

Plaintiffs in both suits asked that the deed of Thomas to the defendant be cancelled.

The court rendered a decree in favor of plaintiffs, canceling the deed of Thomas to Weaver-Dowdy Company, and holding the plaintiffs to be the owners of the land involved.

The evidence in the case clearly and satisfactorily proved that the agent of the defendant, while in the course of the performance of his duties as such, had actual notice of the existence of plaintiff's deed and title to the land in controversy before it purchased the same. This was equivalent to a record of them (deed), and fully protected plaintiffs against the subsequent claim and deed of the defendant. *Floyd* v. *Ricks,* 14 Ark. 286, 294; *Brown* v. *Hanauer,* 48 Ark. 277; *Storthz* v. *Chapline,* 71 Ark. 31; *Seawell* v. *Young,* 77 Ark. 309.

The conveyance of Thomas to Dobson was an absolute deed. If it be assumed that it was intended as a mortgage to secure a debt, as the defendant insists, it was valid against the defendant. It (defendant) had notice of its existence before purchasing the land, and as against it no record was necessary. Thomas conveyed all the interest he had in the land to Dobson. He had nothing but an equity to redeem. Whatever interest he had could be enforced only in a court of equity. It is not statutory, or dependent upon the statute for enforcement, but purely equitable and exists *dehors* the record, and cannot be filed or made a matter of record. Having purchased with notice of Dobson's deed, the defendant took nothing as against him and those claiming under him, but subject to his rights, whatever they may be. *Martin* v. *Schichtl,* 60 Ark. 595; *Fort Smith Milling Co.* v. *Mikles,* 61 Ark. 123.

Decree affirmed so far as it effects the rights of the plaintiffs.

DRILLING *v.* ARMSTRONG.

Opinion delivered April 18, 1910.

PARTNERSHIP—CONTRACT HELD NOT TO CREATE.—A contract whereby the owners of a hotel building leased it for a certain percentage of the gross profits, without any agreement that the hotel should be run as a joint business, does not create a partnership.

Appeal from Conway Circuit Court; *Hugh Basham,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellant on September 18, 1909, filed against appellees the following complaint (omitting formal parts):

"The plaintiffs state that they are and at all times herein mentioned were partners, doing a retail grocery business in the city of Morrilton.

"That prior to the 1st day of August, 1907, defendants and one Mrs. E. Bogard entered into the following contract with each other, towit:

" 'In Duplicate.

" 'Lease.

" 'This agreement is made and entered into this 3d day of August, 1906, by and between Carroll Armstrong and Robert L. Armstrong, hereinafter called the lessors, and Mrs. E. Bogard, hereinafter called the lessee. The lessors hereby let and lease unto the lessee what is known as the "Speer Hotel Property," situated near the railway depot in Morrilton, Conway County, Arkansas, together with the garden belonging to the hotel situated in the same block, and also the furniture, beds, bedding, bed clothing, chairs, tables, tableware, kitchen furniture, dining room, cutlery, crockery ware, and all other property in and about the place used in the operation of said hotel property. To have and to hold the said property until the first day of August, 1907, unless this agreement is terminated sooner by either of the parties hereto giving the other party at least 30 days' notice in writing; the lessee to yield and pay the lessors thirty per cent. of the total or gross receipts taken in for all purposes in the operation of said hotel, to be paid from time to time as the lessors may request during the month, and not later than the first of each month, during the continuance of this lease, the lessee to keep a full and accurate account of all receipts taken in in the operation of said hotel, which account is to be subject to the inspection of the lessors at all reasonable hours. The account to show the daily receipts. Each of the parties hereto retain duplicate inventories of the personal property delivered to the lessee, which is to be taken care of by the lessee and returned to the lessors in like condition, wear and

tear excepted. It is agreed that the lessee is to take all supplies and groceries now on hand and account to the lessors for the same at their cost, including wood. The lessee covenants with lessors: (1) To pay lessors 30 per cent. of the gross receipts taken in and received in the operation of said hotel, and to keep an accurate and complete account of the gross receipts to be entered up daily, and to pay lessors their 30 per cent. as above stipulated, the daily account of the receipts to be subject to the inspection of the lessors at all reasonable hours. (2) To take proper care of the property, real and personal, and not suffer any waste or injury, except the usual wear and tear. (3) To permit the lessors and their agents to enter at all reasonable times to view and inspect the condition of the premises and personal property. (4) Not to make any alterations or additions to said property during said term without the consent of the lessors being first obtained in writing.

"'It is mutually agreed and understood between the parties hereto that the lessee is to become the owner of seventy per cent. of the gross or total receipts taken in by her during the continuance of this agreement, out of which seventy per cent. the lessee is to pay all operating expenses of said hotel, and that the balance of said gross receipts is to become the property of the lessors, and the lessors, it is mutually agreed, are not to be liable for any of the expenses of operating said hotel. In addition to the above, it is agreed by the lessee that the lessors shall during the continuance of this contract have their board at said hotel without any charge whatever, but as part of the consideration of this lease. And it is mutually understood and agreed that the lessors reserve the right to select a room or rooms, not, however, to choose any regular boarder's room, to be occupied by them in the said hotel.

"'The lessee agrees not to assign this lease without the written consent of the lessors. It is mutually agreed that during the continuance of this contract said hotel is to be operated in the name of the lessee. It is mutually agreed between the parties hereto that the lessee take possession of said property on the 4th of August, when her term begins. It is mutually agreed that the lessors may enter the property at reasonable hours for the purpose of causing such repairs made as they may wish.

" 'In testimony of the foregoing, we, the undersigned, have hereunto set our hands this the day and year aforesaid.

" 'Carroll Armstrong,
" 'R. L. Armstrong,
" 'Mrs. E. Bogard.'

"That upon the expiration of said contract on the 1st day of August, 1907, defendants and said Mrs. Bogard extended same for one year by the following written agreement:

" 'August 1, 1907.

" 'It is mutually agreed that the contract which expires on this date for the operation of the Speer Hotel, between Carroll and R. L. Armstrong and Mrs. E. Bogard, shall be and the same is hereby extended for one year more, or until the 1st day of August, 1908, which said contract is hereby referred to and made a part of this agreement.

" 'Carroll Armstrong,
" 'R. L. Armstrong,
" 'Mrs. E. Bogard.'

"That, on the expiration of the said renewal, said agreement was continued indefinitely by verbal agreement between the parties thereto, and the transaction hereinafter mentioned occurred during the existence of said contract. That said contract and agreement was one of partnership, and made each of the parties thereto liable as partners for the debts and liabilities of the said business. That, during the contract aforesaid, plaintiffs sold to said hotel business, and there were used in the operation thereof groceries and supplies in large amounts, and there now remains due and unpaid on said account so furnished the sum of $262.15, an itemized statement of which is hereto attached as part hereof.

"Wherefore plaintiff prays judgment against defendants for said sum and for their costs."

Appellees demurred generally to the complaint. The demurrer was sustained, and, appellants electing to stand on their complaint, same was dismissed. Judgment was entered for appellees, and this appeal is duly prosecuted.

Sellers & Sellers, for appellants.

A partnership existed between the parties. 87 Ark. 412; 44 Ark. 423; 63 Ark. 518; 74 Ark. 437; 80 Ark. 23; 145 U. S..

611. If the supposed partner acquired by his bargain a property in, or control over, the profits while they were still undivided, he is liable to third persons as a partner. 3 W. Va. 507; 100 Am. Dec. 766; 61 N. Y. S. 351; 167 N. Y. 605; 127 Fed. 228; 45 Ind. 439; 37 Ga. 115; 58 Conn. 375; 81 N. Y. 550; 115 N. Y. 625; 58 W. Va. 629; 98 N. Y. S. 321; 108 S. W. 922; 45 N. Y. 797; 58 N. Y. 272; 48 N. Y. 545; 12 Conn. 69; 18 Wend. 185; 6 Met. 82. A sharer in gross receipts is liable to creditors. 6 Conn. 347; 5 Wend. 275; 12 Rich. Law 176; 2 Watts 232; 18 L. R. A. (N. S.) 975; 44 N. H. 452.

Moose & Reid, for appellees.

Participation in profits is not the test of partnership, but is evidence of it. 2 Ark. 346; 44 Ark. 424; 63 Ark. 518. No one fact or circumstance can be taken as an absolute and conclusive test. 18 L. R. A. (N. S.) 970; *Id.* 1070. When the profit sharing contract expressly shows that it is not the intention of the parties to form a partnership, but to make a lease, no liability to third persons is incurred. 4 Ky. L. R. 619; 43 Ill. 437. The fact that a lessor receives as rent for the use of his property a portion of the profits arising from its use does not make him a partner in business conducted on the property. 85 N. W. 537; 42 Am. R. 99; 28 N. Y. S. 134. To constitute a partnership there must be a community of property, of interest, and of profits. 144 Mich. 274.

WOOD, J., (after stating the facts). The complaint alleges a partnership growing out of the terms of the contract between the Armstrongs and Mrs. Bogard. But, as we view the contract, it is nothing more nor less than a lease contract between the Armstrongs and Mrs. Bogard, whereby the former, as the lessors of the property therein described, lease the same to the latter as the lessee for a definite term upon consideration that the lessee give to the lessors their board and thirty per cent. of the gross receipts of the business, which belonged exclusively to the lessee, and was to be operated and conducted by her solely for her own benefit. The contract, considered as a whole, does not create the relation of partnership, when measured by any of the rules by which such relation is determined, as announced by the decisions of this court.

In the case of *Herman Kahn Co.* v. *Bowden,* 80 Ark. 26,

this court said: "A partnership may be defined to be as the relation existing between two or more persons who have agreed to carry on a business together and to share in the profits thereof as joint owners of the business."

In *Culley* v. *Edwards,* 44 Ark. 427, we said: "So far as liability to creditors is concerned, the test of the partnership is whether the business has been carried on in behalf of the person sought to be charged as a partner, *i. e.,* did he stand in the relation of the principal toward the ostensible traders by whom the liabilities have been incurred and under whose management the profits have been made?" See our latest case, *Roach* v. *Rector,* 93 Ark. 521, where former decisions are cited and approved.

Now, there is nothing in this contract to show that the Armstrongs and Mrs. Bogard agreed to "carry on a business together, and to share in the profits thereof as joint owners of the business." The contract shows to the contrary. There is nothing in the contract to show that the business was carried on or was to be carried on in behalf of the Armstrongs. They do not by the terms of the contract stand in the relation of a principal to Mrs. Bogard. She was not in any sense their agent in conducting the hotel business. The contract shows to the contrary.

In *Buford* v. *Lewis,* 87 Ark. 412, we said: "A participation in profits is not conclusive, but it is a cogent test for trying the question, and is conclusive, unless there are some circumstances altering the nature of the contract." Here the circumstances under which the hotel business was to be conducted, so far as the rights of appellees are affected, are expressed in the contract, and on demurrer these must be taken as the test of the relation. The terms of the contract do not show a hotel business to be operated as a joint enterprise for the common benefit of the parties to it. The Armstrongs, as we view the contract, had nothing whatever to do with the management or operation of the business. Mrs. Bogard was the sole proprietor of the business. Appellees had no voice in the methods or manner of carrying on the business. As we have stated, the parties did not sustain the relation of principal and agent in any sense of the word.

Under the rule announced in *Meehan* v. *Valentine,* 145 U. S. 611, for ascertaining the partnership relation as to creditors, and quoted and approved by this court in *Buford* v. *Lewis,* 87 Ark. 412, *supra,* and in *Rector* v. *Robins,* 74 Ark. 437, the business must be "carried on" as a "joint business." That essential feature is conspicuously absent from the contract under consideration. See other authorities cited in appellee's brief.

The decree is affirmed.

RANDLEMAN *v.* TAYLOR.

Opinion delivered April 18, 1910.

1. BOUNDARIES—EFFECT OF MISTAKE.—A consent by coterminous proprietors of real estate to mark a boundary line supposed to run according to the marking between undisputed tracts, given by both in ignorance of the real facts and of the existence of a conflict, does not estop either from claiming his rights when the mistake is discovered; nor can it be construed as a license from the one party to the other to cut timber on the disputed tract up to the supposed boundary line. (Page 512.)
2. REPLEVIN—MEASURE OF DAMAGES.—Where trees are cut by an innocent trespasser, and cannot be recovered, the measure of the owner's damages is the value of the property in its converted form, less the labor expended on it, provided such expense does not exceed the increase in value. (Page 513.)
3. INSTRUCTIONS—PRAYER IN PART INCORRECT.—It was not error to refuse an instruction which was in part incorrect. (Page 513.)

Appeal from Clay Circuit Court, Eastern District; *Frank Smith,* Judge; reversed.

STATEMENT BY THE COURT.

R. R. Randleman was the owner of the south ½ of sec. 12, township 21 north, range 7 east, in Clay County, Ark. The timber on the north half of said tract of land belonged to J. A. Taylor.

Randleman brought suit in replevin against Taylor to recover the value of a lot of cypress timber alleged to have been wrongfully cut and removed from the land by Taylor and manufactured into lumber by him. A survey of the land showed that

the timber which is the subject-matter of this suit was cut by Taylor from the south half of the above described land. It will be remembered that Taylor only claimed to own the timber on the north half of said tract. Taylor claims that he and Randleman agreed on a boundary line between the two tracts, and he only cut timber to the agreed line. He further stated that subsequently there was a settlement between Randleman and himself in regard to the timber in dispute. Randleman denied this.

The case was tried before a jury, which returned a verdict in favor of Taylor. From the judgment rendered upon the verdict Randleman has duly prosecuted an appeal to this court.

Spence & Dudley, for appellant.

Appellant was not estopped from claiming his rights under the true line after it has been discovered. 129 U. S. 760; 21 L. R. A. 829.

Hunter & Castleberry, for appellee.

The appellate court will not reverse a judgment if there is legally sufficient evidence to sustain it. 82 Ark. 214; *Id.* 372; 84 Ark. 359; *Id.* 406; 87 Ark. 109; 90 Ark. 100. When the line between the two land owners is established by agreement, it is binding on both parties. 15 Ark. 297; 23 Ark. 704; 71 Ark. 248; 75 Ark. 248. The judgment is right, and should be affirmed. 81 Ark. 247; 84 Ark. 172; 85 Ark. 451; 89 Ark. 154; 90 Ark. 524.

HART, J., (after stating the facts). Counsel for appellant assign as error the action of the court in giving the following instruction: "IV. Defendant denies that he did in fact cut any timber on the south half of the south half, but says his operations were confined exclusively to the north half of the south half, and he says further that, even though any trees were cut on the said south half of the south half, they were cut under the following circumstances: That the line between the said south half and the north half was undetermined, and was not known accurately to either himself or the plaintiff, and that to adjust any difference as to the true location of the line they established it by agreement fairly made and free from fraud, and that he cut no timber on the said south half as bounded by said established line. If you find the facts so to be, your verdict will be for the defendant."

The instruction was erroneous, and should not have been given.

To sustain their contention, counsel for appellant rely upon the case of *Schraeder Mining & Manufacturing Co.* v. *Packer,* 129 U. S. 688, in which the court hold: "A consent by coterminous proprietors of real estate to mark a boundary line supposed to run according to the marking between undisputed tracts, given by both in ignorance of the real facts and of the existence of a conflict, does not estop either from claiming his rights when the mistake is discovered; nor can it be construed as a license from the one party to the other, to cut timber on the disputed tract up to the mistaken boundary line."

The evidence in the case at bar shows that appellant and appellee agreed upon a boundary line under the belief that it was the true line, when in fact it was not, and that immediately the timber was cut and removed from the land. In short, it was an erroneous line agreed upon by mistake. In such cases the agreement is not binding, but may be set aside by either party when the mistake is discovered, unless there is some element of estoppel which prevents him. 4 Am. & Eng. Enc. Law (2 ed.), 862.

It is only where the true line is unknown, or is difficult of ascertainment, and the parties establish the line to settle a disputed and vexatious question as to the boundary line between them, that the agreement is binding. In such cases the mutual concessions between the parties is a sufficient consideration for the agreement. In the present case the boundary line was not incapable of ascertainment. The parties agreed to the line under the mistaken belief that it was the true line.

The measure of damages in cases like this, where the property has been cut by an innocent trespasser and delivery can not be had, is the value of the property in its converted form, less the labor expended on it, provided such expense does not exceed the increase in value. *Eaton* v. *Langley,* 65 Ark. 448; *Nashville Lumber Co.* v. *Barefield,* 93 Ark. 353.

Counsel for appellant also insists that the court erred in not giving the folowing instruction: "You are instructed that, as to the alleged settlement and establishment of the line, the burden of proof is upon the defendant." The court did not

err in refusing this instruction; for, while the burden was on the defendant (appellee) to show payment, as declared in *Hays* v. *Dickey,* 67 Ark. 169, and cases cited, the burden was not on him to prove the "establishment of the line." Under the well-settled rules of the court, appellant could not complain of the action of the court in refusing an instruction which was in part incorrect.

For the error in giving instruction No. 4 as indicated in the opinion, the judgment will be reversed, and the cause remanded for a new trial.

JAMES v. STATE.

Opinion delivered April 18, 1910.

1. TRIAL—ASKING WITNESS IMPROPER QUESTIONS—PREJUDICE.—It was not prejudicial error for the prosecuting attorney, in a prosecution for larceny, to ask the defendant's witnesses on cross-examination if it was not a fact that the defendant was known to be or had the reputation of being a gambler if the witnesses replied in the negative. (Page 518.)
2. SAME—IMPROPER ARGUMENT.—Where a witness testified in a larceny case that he met defendant some time after the offense is alleged to have been committed and with him had gone to a place called Arcoma, it was not prejudicial error for the prosecuting attorney in his argument to the jury to say: "Gentlemen of the jury, what is Arcoma? It is a bald place on the mountain out here that some speculators tried to make a city of, but they established a Monte Carlo out there, and killed it deader than the devil." (Page 518.)

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

Sam R. Chew, for appellant.

Where the verdict appears to be against the preponderance of the evidence, and where plaintiff's counsel made statements prejudicial to the losing party, this court will reverse. 75 Ark. 577; 65 Ark. 475; *Id.* 619; 77 Ark. 19. Remarks of an attorney were held to be prejudicial where there was no evidence to support them. 72 Ark. 427; 70 Ark. 305; 63 Ark. 174; 72 Ark. 461; 71 Ark. 415; 68 Ark. 529.

Hal L. Norwood, Attorney General, and *W. H. Rector,* Assistant, for appellee.

A verdict will not be disturbed where there is any evidence to support it. 23 Ark. 131; 33 Ark. 196; 46 Ark. 141; 19 Ark. 671; 24 Ark. 251. When a witness testifies that the reputation of the accused is good, the prosecuting attorney has the right to show that such witness has heard rumors to the contrary. 132 Ind. 542; 57 Kan. 537; 172 Mo. 191; 83 Ala. 25. The control of the argument is largely within the discretion of the trial judge, and unless he has clearly abused that discretion the verdict will not be disturbed. 84 Ark. 131; 71 Ark. 62; *Id.* 403; 88 Ark. 62; *Holt* v. *State,* 91 Ark. 576; 74 Ark. 256; 74 Ark. 491; 72 Ark. 613; 86 Ark. 607; 73 Ark. 458.

FRAUENTHAL, J. The defendant, Lon James, was convicted of the crime of grand larceny. He seeks by this appeal to obtain a reversal of the judgment upon the following grounds: because, (1) the evidence is not sufficient to sustain the verdict, (2) the circuit court permitted the introduction of incompetent testimony, and (3) the attorney for the State made an improper argument to the jury.

The evidence on the part or the State established the following facts: Joseph Friend was the owner of a drug store in the city of Fort Smith. On November 16, 1909, between 8 and 9 o'clock P. M., the defendant came to his drug store in order to collect the purchase money of some geese which he had sold him. While there, he requested Friend to exchange a five-dollar bill for some silver money. Friend had his money in a sack in an unfastened drawer in a prescription case. This prescription case was located about 30 feet from the front of the store. The defendant accompanied him to the drawer from which he took his sack, and therefrom took his money, which consisted of three ten-dollar bills and some silver amounting in the aggregate to about $50; and, not having the five-dollar bill desired by defendant, he returned the money to the sack and the sack to the drawer in the presence of the defendant. The defendant then stated that he desired to purchase a knife, and Friend exhibited a number of knives to him at the prescription case. The defendant stated that he wished to see a knife which was kept in the window at the front of the store.

Mr. Friend then proceeded to the front of the store and remained there about five minutes looking for the knife, and during all this time the defendant remained at the prescription case. The defendant then proceeded to the front of the store, and with Friend returned to the prescription case, and purchased one of the knives which had there been shown him and laid out on the case. The defendant remained at the store for probably an hour. About an hour after he had left the store Mr. Friend discovered that the three ten-dollar bills and about four dollars in silver were missing from the sack which he had replaced in the drawer. From the time the defendant came into the store and up to the time he purchased the knife Mr. Friend and he were the only persons in the store. After that, and while defendant was still there, three other persons came into the store. All these parties were witnesses in the case, and testified that they were not at the prescription case, and did not take the money. Mr. Friend testified that while these parties were in the store he observed them, and they did not have an opportunity to take the money. After defendant left and before Mr. Friend discovered that the money had been taken, one other person came into the store. This party was also a witness in the case, and testified that he did not take the money, and his testimony was corroborated by Mr. Friend. The testimony tended to show also that none of these four persons who had thus come into the store knew that Mr. Friend had any money in the drawer of the prescription case. After the defendant left the store he was in the company of some friends, one of whom, Mr. Lake, procured from him a knife, which was identified by Mr. Friend as one of the knives he kept at the prescription case, and was similar to the knife he had sold to defendant. Later, when defendant was arrested, there were found on his person three knives and $24 in money. One of these knives was similar to the knife he had bought from Mr. Friend; and when he was confronted with the fact that Mr. Lake had got a similar knife from him, so that he had two of these knives, he stated that he had got the second knife by mistake, and that if he intended to steal a knife from Mr. Friend he would not have taken one so cheap. He then paid for this second knife. The defendant was arrested on the same night, and there was no

ten-dollar bill amongst the money found on his person. The defendant introduced several witnesses who testified to his good character. This was substantially the evidence in the case. From this it appears that defendant knew that Mr. Friend had the money in the drawer in the prescription case, and had the opportunity to take the money without being observed by Mr. Friend. All the other persons who were in the store from the time Mr. Friend last saw the money in the sack up to the time he discovered that it had been taken were witnesses in the case and testified that they did not take it, and the testimony of Mr. Friend tended to prove that he observed and took notice of each of these four persons as long as they were in the store, and that none of them took or had the opportunity to take the money.

The jury were the judges of the credibility of these witnesses and of the effect which should be given to the actions and conduct of the defendant while in the store and to his taking one knife without paying for it. It was the especial province of the jury to determine the facts of this case. This they have done by their verdict, and we think that there is sufficient evidence to sustain that verdict. *Jefferson* v. *State*, 89 Ark. 129.

During the trial of the case the defendant introduced several witnesses who gave testimony to his good character for honesty. Upon cross-examination the attorney for the State asked each of these witnesses if it was not a fact that the defendant was known to be or had the reputation of being a gambler. The lower court permitted this question to be asked and answered over the objection of the defendant. It is earnestly contended by counsel for defendant that this ruling of the court was erroneous. But we do not think that it is necessary to pass upon that contention, under the circumstances of this case, because we do not think that the error, if any, was prejudicial to the defendant. Each of these witnesses testified in answer to this question that the defendant was not known to be and did not have the reputation of being a gambler. The answers to this question by the witnesses deprived the question of any pernicious effect that it could have had; and the testimony thus given could not have been injurious to the cause

of the defendant, for it tended to establish the good character he was endeavoring to prove.

In the trial of a cause a party cannot complain of an error if it is not prejudicial. If, therefore, it was an error to permit the introduction of the testimony complained of, it was not such an error as would justify a reversal, because it was not prejudicial. *McFalls* v. *State,* 66 Ark. 16; *Kelly* v. *Keith,* 77 Ark. 31; *Arkadelphia Lumber Co.* v. *Asman,* 85 Ark. 568; *Ware* v. *State,* 91 Ark. 555.

During the trial of the case one of the witnesses testified that he met defendant sometime after he had left Mr. Friend's store, and with him had gone to a place called Arcoma, which appears to be at the suburbs of Fort Smith. He stated that, finding no one there, they immediately returned. In the course of his argument to the jury the attorney for the State said:

"Gentlemen of the Jury, what is Arcoma? It is a bald place on the mountain out here that some speculators tried to make a city of, but they established a Monte Carlo out there, and killed it deader than the devil." Objection was made to these remarks, which was overruled. It is urged that these remarks were improper because there was no testimony as to what character of place Arcoma was; and that the refusal of the court to sustain the objection made to them was an error. But we do not think that these remarks could have deprived the defendant of a fair and impartial trial; and we do not think that they were so prejudicial as to justify the setting aside of the verdict in this case. The remarks of the attorney only tended to show that Arcoma was deserted; and the witness who testified that he accompanied defendant to this place stated that they immediately returned. If these remarks were improper, they were not calculated to influence the jury to the prejudice of the defendant. As was said in the case of *McFalls* v. *State,* 66 Ark. 16: "In determining whether such an error has been committed, it is believed to be safe to credit the jury with at least average intelligence." We do not think that there is any reversible error in the remarks of the State's attorney. *Puckett* v. *State,* 71 Ark. 62; *Kansas City S. Ry. Co.* v. *Murphy,* 74 Ark. 256.

Counsel for defendant has not complained of any error of the court relative to its rulings upon the instructions. We have

examined these, and we find that the court correctly instructed the jury relative to every phase of the case. The defendant has had a fair and impartial trial in this case, and he has been deprived of no right to which he was entitled under the law.

The judgment is affirmed.

HALL v. MORRIS.

Opinion delivered April 18, 1910.

1. LEVEES—ACTION FOR DELINQUENT TAXES—SUFFICIENCY OF NOTICE.—Under Acts 1893, p. 24, and Acts 1895, p. 89, providing that delinquent taxes due to the St. Francis Levee District may be collected in a suit *in rem* against the lands, and that where the owner resides in the county he shall be notified by the service of personal service, but that "it shall be immaterial that the ownership of said lands may be incorrectly alleged in said proceedings," *held* that where a resident of lands was actually summoned as required by law it is immaterial that some of his lands are described in the complaint as belonging to an unknown owner. (Page 521.)
2. SAME—ACTION FOR DELINQUENT TAXES—JOINDER OF SEVERAL TRACTS.—In a suit to collect delinquent levee taxes several tracts belonging to one person may be joined in separate counts of a complaint. (Page 523.)

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

A. B. Shafer, for appellant.

Where lands are erroneously proceeded against as owned by one not the owner, the sale does not effect the true title. 77 Ark. 477; 92 S. W. 26. There must be personal service of summons where the owner is in the county, or an occupant upon the land. 83 Ark. 534; 103 S. W. 737. A person brought into the court for one purpose is not there for all purposes. 70 Tex. 588; 9 S. W. 295; 87 Tex. 69; 26 S. W. 1060; 152 Ill. 468; 38 N. E. 932.

L. P. Berry and *S. V. Neeley,* for appellee.

It is immaterial that the ownership of the lands be incorrectly alleged in said proceeding. Acts 1895, p. 89. The notice was sufficient. 60 Ark. 373. The decree is binding on

all parties having an interest in said land. Kirby's Dig. § 5067. Before the decree will be vacated, appellant must show a meritorious defense. 50 Ark. 458.

FRAUENTHAL, J. This was a suit instituted by the appellant to set aside a commissioner's deed executed in pursuance of a sale of certain land in Crittenden County, made under a decree of the chancery court of that county for the nonpayment of levee taxes due thereon. The appellant claimed title to the land by conveyance from Susan Chase, who was the true owner of said land at the date of said decree; and the appellees claimed title thereto under the commissioner's deed executed to them as the purchasers of said land at the sale made by virtue of said decree.

On January 27, 1903, the Board of Directors of St. Francis Levee District filed its complaint in the Crittenden Chancery Court to enforce the payment of delinquent levee taxes due upon the lands therein mentioned. This suit was brought under and by virtue of the provisions of the act of the General Assembly of the State of Arkansas approved April 2, 1895, amendatory of the act of February 15, 1893, creating the St. Francis Levee District. The suit was brought against John F. Rhodes, Susan Chase, *et al.*, and the complaint described many tracts of land, each supposed owner's name being set opposite the tract alleged to be owned by him; and several tracts were set out in the complaint as owned by "unknown." Several tracts were set out in the complaint as owned by Susan Chase; but the tract in controversy was set out as "unknown." A summons was issued upon the complaint in the manner and form prescribed by statute regulating proceedings under the general chancery practice, and was duly served upon said Susan Chase in the time and manner prescribed by law; and as to the non-resident defendants and "unknown" owners a warning order was duly issued and published as required by law. Thereafter, the said chancery court entered a decree reciting that said Susan Chase had been duly served with summons in said cause for the time and in the manner prescribed by law, and that certain other defendants, including "unknown," were duly summoned by warning order as required by law; and finding upon evidence that levee taxes for the year of 1902 were due and unpaid upon the tract of land in

controversy; and duly ordering the sale thereof. The land was sold under said decree to appellees, and the sale was duly confirmed by the chancery court, and a deed duly executed by the commissioner thereunder to appellees.

At the time of the institution of said suit to enforce said delinquent taxes and during the entire proceedings thereunder Susan Chase, who was the true owner of the land in controversy, was a resident of Crittenden County. It is contended that said decree, in so far as it relates to the land in controversy, is null and void because in the complaint the land was named as "unknown" as to the owner, and the levee taxes were enforced against same as such by notice by warning order only, whereas the land was owned by a resident of the county, and that therefore there should have been set out in the complaint opposite said land the name of the owner; and that personal service of summons should have been made on the resident owner of the land, in order to have given the court jurisdiction to enforce the levee taxes thereon.

The acts of the Legislature above referred to provide that the payment of the levee taxes assessed against the land shall be enforced by suit, and that "said suit shall be conducted in accordance with the practice and proceedings of chancery courts in this State." It is further provided that "where the owners are unknown, that fact shall be so stated in said published notice. And, as against any defendant who resides in the county where such suit may be brought, and who appears by the record of deeds in said county to be the owner of any of the lands proceeded against, notice of the pending suit shall be given by the service of personal summons of the court at least twenty days before the day upon which said defendant is required to answer, as set out in said summons. * * * And provided further, actual service of summons shall be had where the defendant is in the county or where there is an occupant upon the land." By said acts it is further provided that "said proceedings and judgment shall be in the nature of proceedings *in rem,* and it shall be immaterial that the ownership of said lands may be incorrectly alleged in said proceedings; and such judgment shall be enforced wholly against said land, and not against any other property or estate of said defendant. All, or any part, of said delin-

quent lands for each of said counties may be included in one suit for each county, instituted for the collection of said delinquent taxes, etc., as aforesaid, and all delinquent owners of said land, including those unknown as aforesaid, may be included in said one suit as defendants." (Acts 1893, p. 24; Acts 1895, p. 88.)

By virtue of these acts the chancery court of Crittenden County acquired jurisdiction over the subject-matter of enforcing the payment of delinquent levee taxes assessed against the land involved in this suit, and that jurisdiction became complete when it gave the notice of the pendency of the suit in the manner prescribed by the acts. It was provided therein that such notice shall be given by personal service of summons upon an owner of land who resides in the county, and who appears by the record of deeds of said county to be the owner thereof. Notice of the pendency of that suit was given by personal service of summons upon Susan Chase in the manner prescribed by the said acts. This we think was the proper mode of giving the notice of the pendency of said suit relative to all lands mentioned in the complaint and owned by Susan Chase, who was a resident of the county, and the chancery court thereby acquired jurisdiction thereof. It is no valid objection to the acquisition of that jurisdiction that the land was noted in the complaint as to ownership as "unknown." The act specifically provides that "it shall be immaterial that the ownership of the lands may be incorrectly alleged in said proceedings." (Acts 1895, p. 89.) When the owner was a resident of the county, it was only necessary to serve him personally with a summons in form prescribed in the chancery procedings in this State. That was done in this suit. It was not necessary in that summons to set out any tract of land, but generally to notify the defendant of the pendency of the suit. If the defendant owned several tracts of land which were so noted in the complaint, the service of only one summons on such defendant was necessary. Such summons was sufficient to give him notice of the pendency of the suit and of every tract of land therein proceeded against, and it was immaterial that some tracts owned by him were noted in the name of another owner or "unknown." By the service of such summons the court acquired jurisdiction over every tract of land proceeded against which such defendant actually owned.

The proceeding instituted for the enforcement of the levee taxes was not equivalent to separate actions founded on separate complaints against the separate tracts of land and then a consolidation of those actions; but it was in effect one action founded on one complaint with separate counts against the separate tracts. So that only one summons had to be issued against and served upon each defendant or owner in order to give to the court complete jurisdiction over every tract of land mentioned in the complaint and owned by such defendant.

In the case of *Ballard* v. *Hunter,* 204 U. S. 241, there were involved tax sales made under these acts of the Legislature. In that case the court, speaking of these acts, said: "The statutes of the State under which the taxes were levied virtually make the land a party to the suit to collect the taxes. It is from the lands alone, and not from their owner, that the taxes are to be satisfied, and each acre bears its part. The burden of taxation could have been easily and definitely assigned by the court. Mistake in ascribing the ownership of the lands did not increase the taxation, or cast that which should have been paid by one tract of land upon another tract." In the case of *Ballard* v. *Hunter,* 74 Ark. 174, an attack was made upon a decree made under the above acts of the Legislature ordering the sale of land for the enforcement of levee taxes, upon the ground that the owner of the land was not named in the tax proceedings as a party. In passing upon that contention, this court said: "The fact that the lands in controversy were the property of Mrs. Josephine Ballard, and that she was not made a party defendant to the suit instituted to enforce the collection of the tax thereon, does not affect the decree therein and the sale thereunder. The act provides that such suit and decree shall be in the nature of proceedings *in rem,* and that it shall be immaterial that the ownership of the land may be incorrectly alleged in said proceedings."

To give the court jurisdiction under this tax proceeding over a tract of land owned by a resident of the county, it was necessary to serve such owner personally with summons. When that was done, the jurisdiction of the court was complete; and it was immaterial that the ownership was incorrectly alleged in the complaint or other proceedings; and therefore immaterial

that it was alleged "unknown" as to ownership, or that, in addition to the notice by personal service of summons on the owner who resided in the county, a warning order was also published. The decree, therefore, was made after the chancery court had acquired full jurisdiction in the premises, and is valid and conclusive against collateral attack.

The decree is affirmed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* SMITH.

Opinion delivered April 18, 1910.

1. RAILROADS—WALKING ON TRACK—CONTRIBUTORY NEGLIGENCE.—As a general rule, it is negligence for one walking along a railroad track to fail to look and listen for the approach of trains, and it is only in exceptional cases that it is proper to submit to the jury the question whether or not the failure to exercise such caution is negligence. (Page 526.)
2. APPEAL AND ERROR—INVITED ERROR.—Appellant cannot complain of an error in instructions asked by his opponent if the same error was repeated in instructions asked by himself. (Page 528.)
3. RAILROADS—DUTY OF PEDESTRIAN TO EXERCISE CARE.—It is the duty of a person crossing or travelling along a railroad track to listen and keep a lookout for approaching trains, and, where under the circumstances it can be reasonably done, to keep such lookout in both directions, and he should continue to keep such lookout in a reasonable manner until he is out of danger. (Page 528.)
4. SAME—LIABILITY TO PERSON NEGLIGENTLY ON TRACK.—Where a person injured on a railroad track was guilty of contributory negligence in failing to keep a lookout, the liability of the railroad company can arise only from a failure to use ordinary care after discovery of his perilous situation. (Page 529.)
5. PLEADINGS—NEGLIGENCE.—In a suit alleging an injury caused by another's negligence it is not sufficient to allege conclusions of law, but the facts constituting the alleged negligence should be set out with reasonable certainty. (Page 529.)

Appeal from Hot Spring Circuit Court; *W. H. Evans,* Judge; reversed.

T. S. Buzbee and *John T. Hicks,* for appellant.

The court should have instructed the jury find for appellant. 54 Ark. 431; 56 Ark. 457; 61 Ark. 549; 62 Ark. 157; 65

Ark. 235; 78 Ark. 55; 88 Ark. 172; *Id.* 231; 37 Ark. 593; 71 Ark. 38. It is the duty of one approaching a railroad track to look both ways for trains. 69 Ark. 134.

Henry Berger and *Mehaffy & Williams,* for appellee.

The evidence was sufficient to warrant a recovery. 74 Ark. 409; *Id.* 478. Appellant did not use proper care to avoid the injury after discovering the deceased. 80 Ark. 186. A general objection to several instructions in gross is not sufficient if any one of them is good. 76 Ark. 41; 75 Ark. 181; 73 Ark. 315; 78 Ark. 100; 79 Ark. 339; 65 Ark. 255; 80 Ark. 535; 81 Ark. 191; 82 Ark. 388; 85 Ark. 130; 86 Ark. 104. Licensees are not trespassers. 85 Ark. 333; 86 Ark. 185; 89 Ark. 103; 74 Ark. 610; 64 Ill. App. 623; 74 Fed. 285; 38 Atl. 236; 27 S. E. 20; 39 L. R. A. 399; 72 N. W. 783; 118 S. W. 201.

FRAUENTHAL, J. On April 30, 1909, about 6 o'clock P. M., Isaac Smith was run over and killed by a train of the Chicago, Rock Island & Pacific Railway Company upon its main track at its depot in the city of Malvern. The appellee instituted this action to recover damages for his alleged negligent death, and recovered a judgment for five hundred dollars. The defendant prosecutes this appeal from that judgment.

Upon the opposite side of the railroad track from the depot a public street runs next to and parallel with the track. Isaac Smith crossed over this street to the main track of the railroad, and stepped upon the ties next the rails at a point nearly opposite the depot. He then walked upon the ties next to and outside of the rails for a distance of from 120 to 150 feet, and then attempted to cross over the track when a train of defendant, coming from back of him, ran over and killed him. The evidence on the part of the plaintiff tended to prove that the public had for some time been accustomed to use the railroad track at this place as a foot walk, and at the place where Smith attempted to cross the track the public had for some time been using the same as a public crossing. Just before Smith crossed to the railroad track, the defendant had been and was engaged in switching its cars along this track; and about the time he stepped upon the ties its engine was backing towards the depot with four cars attached at its front. About that time the engine with the cars attached was emerging from a curve in the track

which, one of the witnesses said, was about from 400 to 500 yards from the depot, but which the other witnesses say was from 400 to 500 feet therefrom. There is no testimony indicating whether or not Smith looked or listened when he crossed the street and stepped upon the ties, but the uncontradicted testimony is that he walked along the track upon the ties with his head down, and that he did not turn or look around; and that he did not turn or look in the direction from which the train was coming when he attempted to cross the track. The evidence shows that the track was straight back to said curve, and no obstruction was between it and the depot; that it was broad daylight, and that the train could have been seen if Smith had looked in the direction from which it was coming. The deceased was somewhat deaf and about 65 years old. The evidence on the part of the plaintiff tended further to show that when the train emerged from the curve the fireman was sitting in the cab of the engine, and was looking down the track in the direction of Smith, and continued to look in that direction from that time until the train ran over him; that no bell was rung or whistle blown, and that the train did not slacken its speed from the time it left the curve until just as it struck Smith; and that during all that time Smith was walking with his back to the train and seemingly unaware of its approach.

At the request of the plaintiff the court instructed the jury, in effect, that if the deceased was walking along a portion of the railroad track which had been and was commonly and habitually used by the public as a highway for travellers on foot with the knowledge and acquiescence of the defendant, and did not discover the approach of the train, and that the defendant, by failing to keep a lookout, or by failing to ring the bell or blow the whistle, or by failure to use ordinary care after discovering deceased to avoid injuring him, did negligently run over and kill the deceased, then the plaintiff was entitled to recover.

It is urged by counsel for defendant that the uncontroverted testimony shows that the deceased was guilty of contributory negligence, and that therefore the instruction to the above effect was erroneous; and we think that ordinarily under the evidence adduced in this case this contention is correct.

It has been uniformly held by this court that, with a few exceptions which cannot apply to the uncontroverted testimony in this case, it is the duty of a person going on or near a railroad track to use ordinary care and precaution to protect himself from danger; and to use that ordinary care and precaution the law demands that he must look and listen. This rule applies whether such person is rightly there by the express or implied invitation of the railroad company, or otherwise. It applies when the traveller approaches a railroad track at a public crossing, and when as a licensee he walks along or upon the railroad track. In the case of *Tiffin* v. *St. Louis, I. M. & S. Ry. Co.*, 78 Ark. 55, this court says: "It has been repeatedly held by this court that it is negligence for one approaching a railroad crossing to fail to look and listen for the approach of trains, and that only in exceptional cases is it proper to submit to the jury the question whether or not the failure to exercise such caution is negligence." And in that case the exceptional instances are set out and discussed. The case at bar is not one of those exceptional instances, because, if the deceased had looked either as he walked along the ties or as he attempted to cross the track, he could have seen the approaching train, and the circumstances were not so unusual that he could not have reasonably expected the approach of a train at that time; and he was not misled or induced by any act of defendant's agents or employees to cross the track. Nor will the failure on the part of the employees of the railroad company to keep a lookout, as required by the act of April 8, 1891, absolve the injured person from the effect of his contributory negligence.

As was said in the case of *St. Louis S. W. Ry. Co.* v. *Cochran*, 77 Ark. 398: "The true rule, which no amount of amplification can simplify, is that whenever the negligence of the plaintiff contributes proximately to cause the injury of which he complains, the defendant is not liable, unless the defendant discovered the peril in time to avoid the injury by the use of ordinary care." *Johnson* v. *Stewart*, 62 Ark. 164; *St. Louis, I. M. & S. Ry. Co.* v. *Leathers*, 62 Ark. 235; *St. Louis, I. M. & S. Ry. Co.* v. *Dingman*, 62 Ark. 245; *St. Louis, I. M. & S. Ry. Co.* v. *Jordan*, 65 Ark. 429.

So much of the instruction, therefore, which at the request of the plaintiff submitted to the jury the question as to whether or not the deceased was guilty of contributory negligence in failing to look and listen, or to discover the approach of the train, when he was walking along the ties next to the track, or when he attempted to cross the track, was erroneous under the uncontroverted testimony adduced in this case. We think, however, that the defendant waived that particular error by requesting an instruction containing the same error. By such action it invited the error. "Appellant cannot complain of an error in instructions asked by his opponent if the same error was repeated in instructions asked by himself." *Choctaw, O. & G. Rd. Co.* v. *Hickey,* 81 Ark. 579; *Railway Co.* v. *Dodd,* 59 Ark. 317; *St. Louis, I. M. & S. Ry. Co.* v. *Baker,* 67 Ark. 531; *Little Rock & M. Ry. Co.* v. *Russell,* 88 Ark. 172; *St. Louis, I. M. & S. Ry. Co.* v. *Carter,* 93 Ark. 589.

But the defendant requested the court to instruct the jury in effect that the deceased was guilty of contributory negligence if, when approaching the railroad track and when walking down the ties and attempting to cross the track, he failed to look in both directions for the approach of a train. The defendant did not waive the right to ask instructions to that effect. The court refused to give the instructions so requested; and we think the court erred in its refusal so to do. It is the duty of a person crossing or traveling along a railroad track to listen and keep a lookout for approaching trains, and, where under the circumstances it can be reasonably done, to keep such lookout in both directions; and he should continue to keep such lookout in a reasonable manner until he is out of danger. In the case of *St. Louis & San Francisco Rd. Co.* v. *Crabtree,* 69 Ark. 134; this court, speaking through Mr. Justice RIDDICK, said: "When the circuit judge was asked to make the law clear to the jury on this point by telling them that one approaching a railroad track should 'look up and down the track so long as he approaches,' we think he should have done so." In the case of *St. Louis, I. M. & S. Ry. Co.* v. *Taylor,* 64 Ark. 364, we said: "There is no escaping the conclusion that a man of ordinary prudence, under the circumstances surrounding appellee, either would not have gone upon these tracks in the first instance, or,

having done so, would have looked both up and down the track for approaching trains before walking for a distance of thirty or forty yards directly upon one of the tracks." *Railway Co.* v. *Cullen,* 54 Ark. 431; *Railway Co.* v. *Tippett,* 56 Ark. 457; *S. Louis, I. M. & S. Ry Co.* v. *Martin,* 61 Ark. 549; *Little Rock & F. S. Ry. Co.* v. *Blewitt,* 65 Ark. 235. But, notwithstanding the deceased under the testimony in this case was guilty of contributory negligence, the defendant would still be liable for his injury if it discovered his peril in time to have avoided the injury by the use of ordinary care. The mere failure to make the discovery of the deceased's perilous situation would not make the defendant liable although such failure arose from the negligence of the defendants' employees. Where the person injured has thus been guilty of contributory negligence, the liability of the defendant only arises from a failure to use ordinary care after the discovery of his perilous situation. *Johnson* v. *Stewart, supra; St. Louis, I. M. & S. Ry. Co.* v. *Raines,* 86 Ark. 306; *St. Louis, I. M. & S. Ry. Co.* v. *Evans,* 87 Ark. 628; *Little Rock & M. Ry. Co.* v. *Russell, supra; St. Louis S. W. Ry. Co.* v. *Thompson,* 89 Ark. 496; *Garrison* v. *St. Louis, I. M. & S. Ry. Co.,* 92 Ark. 437.

Inasmuch as this cause must be remanded for a new trial, we have thus announced the principles which we think are applicable to the facts adduced in evidence upon the trial of the case. We do not think that it is necessary to point out each instruction and the portion thereof which we think the court erred in giving or refusing to give. Upon the second trial the instructions we believe can readily be made to conform to the above principles.

Nor do we think that it is necessary to pass upon the question of the refusal of the court to require the plaintiff to make his complaint more definite and certain in its allegations of the facts constituting negligence. The former trial of this case sufficiently advised the defendant of the facts upon which the plaintiff relies to show the negligence of the defendant in causing the injury. The rules of pleading apply to actions for negligence. It is not sufficient to simply allege conclusions of law. The statement of the facts constituting the alleged negligence should be set out with reasonable certainty. In this case, should

the motion be renewed to make the complaint more definite and certain in its allegations of the acts of negligence, this should be done.

For the errors indicated above the judgment is reversed, and the cause remanded for a new trial.

THARPE v. WESTERN UNION TELEGRAPH COMPANY.

Opinion delivered April 18, 1910.

1. INSTRUCTIONS—PRESUMPTION.—Under the rule that every presumption must be indulged in favor of the correctness of the ruling of the trial court, an instruction that *the sendee of a message which would have apprised him of his mother's death cannot recover damages for mental anguish on account of the failure of the telegraph company to deliver the message if he could not have reached the place of burial in time to attend her funeral without a postponement thereof* was not prejudicial where there is no showing that he would have procured a postponement of the funeral and attended the same if the message had been delivered in time. (Page 532.)
2. APPEAL AND ERROR—PROVINCE OF BILL OF EXCEPTIONS.—The court on appeal will not consider testimony copied in the transcript but not in the bill of exceptions. (Page 532.)
3. TELEGRAPHS AND TELEPHONES—DELAY IN DELIVERY OF MESSAGE—MENTAL ANGUISH.—If the sendee of a message announcing the death of his mother would not have attended the funeral if the message had been delivered promptly, he cannot recover damages for mental anguish for delay in its delivery. (Page 532.)

Appeal from Drew Circuit Court; *Henry W. Wells,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellant by this suit seeks to recover damages of appellee for mental anguish, under section 7947 of Kirby's Digest, growing out of the alleged negligent failure of appellee to deliver a telegram. He also asked to be allowed to recover fifty cents, the amount charged by appellee for the transmission and delivery of the message. His complaint states a cause of action. The appellee denied its material allegations. A trial was had

by jury, and a judgment was rendered against appellant, and this appeal has been duly prosecuted.

Williamson & Williamson, for appellant.

Where a message is sent to a mother, announcing the death of her son, and, but for the negligent delay in delivering it, she could have reached the place in time for the funeral, the company is liable. 72 S. W. 800; 27 Nev. 438; 1 Am. & Eng. Ann. Cas. 346; 73 Ark. 205; 83 Ark. 39; 87 Ark. 303; 112 S. W. 844; 110 S. W. 889; 99 S. W. 1131; 75 S. W. 843; 40 S. W. 624; 20 S. W. 834. The fact that the addressee is not a party to the contract does not prevent a recovery. 84 Ark. 323; 70 Tex. 245; 7 S. W. 715. The plaintiff is entitled to recover the toll paid for the message, even though he was not damaged otherwise. 97 S. W. 829; 78 Ark. 550. And to nominal damages. 61 Ark. 613; 41 Ark. 79; 58 Ark. 29; 65 Ark. 537; 78 Ark. 550.

Geo. H. Fearons, Rose, Hemingway, Cantrell & Loughborough and *E. L. McHaney,* for appellee.

PER CURIAM: The transcript contains the following bill of exceptions:

"The parties appeared in person and by their attorneys The plaintiff offered to prove negligence on the part of the defendant in the handling of the message in controversy; but, it appearing to the court on the part of the testimony of the plaintiff himself that he could not have reached Pulaski, Illinois, by the ordinary means of transportation in time to attend the funeral of his mother, without a postponement thereof, even though the message had been delivered as soon as possible after it was received in the town of Dermott, the court declares the law to be that under those circumstances the plaintiff couldn't recover for mental anguish in this action, even though the defendant negligently failed to deliver the message until October 31, or even November 1.

"The court instructed the jury to return a verdict for the defendant, which was accordingly done. To this declaration of law the plaintiff at the time excepted.

"And now comes the plaintiff, by his attorneys, Williamson & Williamson, and presents this his bill of exceptions, containing all the proceedings had at the trial of the said cause, and asks

that the same be examined, approved, signed and ordered filed and made a part of the record in this case, which is hereby accordingly done."

The bill of exceptions shows that appellant could not have reached Pulaski, Illinois, by the ordinary means of transportation in time to attend the funeral of his mother without a postponement thereof, even though the message had been delivered promptly at Dermott. But, in the absence of evidence showing that, had a telegram been promptly delivered, appellant could and would have procured a postponement of the funeral and would have attended same, no error of the court is made to appear. Every presumption must be indulged in favor of the correctness of the ruling of the trial court. *Johnson* v. *State,* 75 Ark. 427, on rehearing; *Curtis* v. *Des Jardins,* 55 Ark. 126. See cases collated, 1 Crawford's Digest, p. 72; 3 Crawford's Digest, p. 34; *Inabinett* v. *St. Louis, I. M. & S. Ry. Co.,* 74 Ark. 427.

Until the contrary is shown, therefore, it will be presumed that appellant, had the telegram been promptly delivered, would not have attended the funeral. It will not be presumed that, had the telegram been promptly delivered, the funeral of appellant's mother could and would have been postponed to enable appellant to attend same. There is what purports to be testimony in the transcript showing this to be the fact, but this testimony is not made a part of the bill of exceptions. It is not referred to therein. Therefore, under long and well established rules of procedure in this court, such testimony can not be considered. *Snyder* v. *State,* 86 Ark. 456.

The bill of exceptions does not contain any evidence that appellant paid appellee the sum of fifty cents for the transmission and delivery of a telegram. The allegation was made in the complaint, but is denied in the answer, and there is no proof of the fact. The judgment of the circuit court is therefore affirmed.

DANAHER v. SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY.

Opinion delivered March 28, 1910.

1. TELEPHONE COMPANIES—DUTY TO PUBLIC.—Under Kirby's Digest, § 7948, providing that "every telephone company doing business in this State and engaged in a general telephone business shall supply all applicants for telephone connection and facilities without discrimination or partiality; provided such applicants comply or offer to comply with the reasonable regulations of the company," etc., a telephone company, being a public servant, cannot refuse to serve any one who offers to pay its rates and comply with its reasonable rules and regulations. (Page 536.)
2. SAME—REASONABLENESS OF RULE.—A telephone company cannot refuse to furnish telephone connection to one until he pays a debt contracted for services rendered in the past. (Page 537.)
3. SAME—TENDER OF RENTAL OF TELEPHONE.—A tender or payment to the telephone company of its rate or charge for service or rent of a telephone for any particular length of time and an offer to comply with its reasonable rules and regulations would entitle the applicant to such service or rent. (Page 538.)

Appeal from Pulaski Circuit Court, First Division; *Robert J. Lea,* Judge; reversed.

J. E. Williams, Austin & Danaher and *Palmer Danaher,* for appellant.

The case should have been submitted to the jury. 81 Ark. 486. A telephone company will not be permitted to make illegal discriminations between patrons. 76 Ark. 124; 21 L. R. A. 639; 36 L. R. A. 535; 51 L. R. A. 744; 14 L. R. A. 424; 32 L. R. A. 697. Defendant had no right to refuse service to force settlement of a disputed account. 85 Am. St. R. 882; 39 S. E. 257; 6 Wis. 539; 17 Neb. 126; 52 Am. Rep. 404; 8 Am. & Eng. Corp. Cas. 1; 29 L. R. A. 376; 64 N. W. 711; 41 S. W. 1058; 29 N. E. 97; 32 Atl. 906.

Walter J. Terry, for appellee.

The statute under which this action is brought is uncertain, and therefore void as to all discriminations except those specifically designated in the statute. 52 Fed. 917; 1 L. R. A. 744; 59 Am. St. 457; 45 Ark. 158. The rule of the company was a reasonable one. 59 N. E. 327; 104 Ind. 130; 2 N. E. 201; 41 S. W. 1060; 44

N. Y. S. 879; 133 N. Y. 435; 47 N. E. 905. The penalty should not be imposed. 160 Fed. 316; 106 N. Y. S. 53. Appellant, being in arrears with rents, was not entitled to service. 118 N. W. 1068.

J. E. Williams, Austin & Danaher, and *Palmer Danaher,* in reply.

The penal statute relied on in this case is not void for uncertainty. 149 Ill. 361; 41 Am. St. 283. The court must determine what is reasonable. 125 U. S. 680; 94 U. S. 155; *Id.* 113; 143 U. S. 517; 116 U. S. 307.

BATTLE, J. Adelia P. Danaher brought this action against the Southwestern Telegraph & Telephone Company to recover the statutory penalty for discrimination against the plaintiff by refusing to furnish her telephone service for a period of forty days. Plaintiff alleged in her complaint that she is, "and for many years has been, a subscriber to the defendant's telephone exchange in Little Rock, and as such had a telephone instrument in her residence, furnished by defendant, and was at all times upon her call furnished with connections to all other telephones in said exchange until March 30, 1908, when the defendant disconnected said telephone and arbitrarily refused to permit plaintiff to use same, continuing so to refuse her service until the 8th day of May, 1908, when it again connected her telephone with its ex-exchange; that plaintiff paid defendant the rent upon said telephone for said months of March, April and May, 1908, and fully complied with all of defendant's rules and regulations; that defendant refused to permit plaintiff to use said telephone during all of said time from March 30, 1908, to May 8, 1908, both days included, and refused on each and all of said dates to answer any call made by plaintiff through said telephone or to call plaintiff at the request of any other subscriber asking for connection with said telephone. That, by virtue of the statutes of this State, it is made the duty of defendant to furnish all applicants telephone connections, service and facilities without discrimination or partiality, provided such applicants comply with all of defendant's reasonable rules and regulations; that the defendant discriminated against plaintiff each day of said period of forty days in this, that other persons who were subscribers to said telephone exchange were permitted to use their telephone at their residences and were given connections through

said exchange, provided they paid to defendant the rental price for such telephones and service, as plaintiff did, and that such other subscribers were permitted to have connection with the telephones of other subscribers in the city of Little Rock and elsewhere for the purpose of transmitting messages and communicating through said telephones to all persons having telephones upon their payment of an amount of money equal to that paid by plaintiff for like service during said period, while during the above mentioned period, and on each and every day thereof, the defendant refused to allow plaintiff to use her telephone and kept it disconnected from its switchboard, so that no call made by plaintiff was received at the exchange of defendant, and defendant during all of said time refused to connect plaintiff's telephone with that of any other subscriber; that during all of said time defendant furnished to other subscribers in like situation such service and connections. That by reason of such discrimination defendant has subjected itself to a penalty of one hundred dollars for each and every day during said period. And plaintiff prayed judgment for $4,000.

Defendant answered, denying all the material allegations of the complaint, and stated that on March 13, 1908, plaintiff paid the defendant $2, for which it receipted her, and at that time and on several prior occasions it notified her that there was a balance of $4 due defendant from plaintiff for two months prior telephone rentals; that plaintiff denied this indebtedness, claimed to have receipts covering it, and promised from time to time to produce them, but failed and refused to do so; that one of its rules is to refuse telephone service to such persons as neglect or refuse to pay their telephone rentals for preceding months; that this rule is reasonable and necessary, and was known to plaintiff, and was part of a contract existing between her and defendant; that on March 20 it notified plaintiff that she was indebted to it for two months' rental, amounting to $4, and that if same was not paid on March 30, 1908, her telephone service would be discontinued; that on March 30, 1908, plaintiff was again reminded of her delinquency, and again notified that if the bill was not paid her service would be discontinued; that she failed and refused to make payment of such past due rentals, and for that reason service was refused her."

Mrs. Danaher, the plaintiff, testified that she resides in Little Rock, and has been a subscriber of the defendant for a number of years, and that she was a subscriber during the months of March, April and May, 1908, and had a telephone in her residence; that she paid to the telephone company its regular charges for her telephone for every month since she first had the telephone, and that she paid the charges for March, April and May, 1908; that the defendant, claiming that she was indebted to it in the sum of four dollars for services rendered in some month in the past and she claiming that she had paid it and refusing to pay it again, discontinued her telephone service on the 30th day of March, 1908, in the afternoon, until May 8, 1908, about two o'clock in the afternoon, when it was resumed; and during all that time her neighbors were furnished with telephone service. Other evidence was adduced by both parties. The court instructed the jury trying the issues in the case to return a verdict in favor of the defendant, which they did, and judgment was rendered accordingly, and plaintiff appealed.

The telephone company, in devoting its property to a use in which the public has an interest, becomes a public servant, and is bound to serve the public impartially. It is like common carriers in that it is bound to serve those applying to it impartially and upon equal terms.

In *State* v. *Nebraska Telephone Co.*, in 17 Neb. 126, the court said: "That the telephone, by the necessities of commerce and public use, has become a public servant, a factor in the commerce of the nation, and of a great part of the civilized world, cannot be questioned. It is, to all intents and purposes, a part of the telegraphic system of the country, and, in so far as it has been introduced for public use and has been undertaken by the respondent, so far should the respondent be held to the same obligation as the telegraph and other public servants. It has assumed the responsibilities of a common carrier of news. Its wires and poles line our public streets and thoroughfares. It has, and must be held to have, taken its place by the side of the telegraph as such common carrier."

In *Chesapeake, etc., Telephone Co.* v. *Baltimore, etc., Co.*, 66 Md. 399, it is said: "The appellant (the telephone company)

is in the exercise of a public employment, and has assumed the duty of serving the public while in that employment. * * * The telegraph and telephone are important instruments of commerce, and their services as such have become indispensable to the commercial and business public. They are public vehicles of intelligence, and they who own and control them can no more refuse to perform impartially the functions that they have assumed to discharge than a railroad company, as a common carrier, can rightfully refuse to perform its duty to the public. They may make and establish all reasonable and proper rules and regulations for the government of their offices and those who deal with them, but they have no power to discriminate, and, while offering (themselves as) ready to serve some, refuse to serve others. The law requires them to be impartial and to serve all alike, upon compliance with their reasonable rules and regulations."

Section 7948 of Kirby's Digest provides: "Every telephone company doing business in this State and engaged in a general telephone business shall supply all applicants for telephone connection and facilities without discrimination or partiality; provided, such applicants comply or offer to comply with the reasonable regulations of the company, and no such company shall impose any condition or restriction upon any such applicant that are not imposed impartially upon all persons or companies in like situation; nor shall such company discriminate against any individual or company engaged in lawful business by requiring as condition for furnishing such facilities that they shall not be used in the business of the applicant, or otherwise, under penalty of one hundred dollars for each day such company continues such discrimination, and refuses such facilities after compliance or offer to comply with the reasonable regulations and time to furnish the same has elapsed, to be recovered by the applicant whose application is so neglected or refused."

A telephone company, being a public servant, cannot refuse to serve any one of the public in that capacity in which it has undertaken to serve the public when such one offers to pay its rates and comply with its reasonable rules and regulations. It cannot refuse to serve him until he pays a debt contracted for services rendered in the past. For the present services it has

a right to demand no more than the rate of charge fixed for such services. It transcended its duty to the public when it demanded more. *State* v. *Citizens' Telephone Co.*, 85 Am. St. 870; *State* v. *Nebraska Telephone Co.*, 17 Neb. 126; *State* v. *Kinloch Telephone Co.*, 93 Mo. App. 349; Jones on Telegraph and Telephone Companies, § 251, and cases cited.

A tender or payment to the telephone company of its rate or charge for service or rent of telephone for any particular time and offer to comply with its reasonable rules and regulations would entitle the applicant to such service or rent. Should the telephone company incur a penalty by refusing to rent or render such service, it could prevent the increase thereof by renting or offering to rent the telephone or rendering or offering to render the applicant such service.

The evidence adduced by the plaintiff was sufficient to entitle her to a submission of the issues in the case to the jury for a verdict. The court erred in instructing the jury to return a verdict for the defendant.

Reverse and remand for a new trial.

MILLER v. STATE.

Opinion delivered April 11, 1910.

1. EVIDENCE—OPINION OF MEDICAL EXPERT.—Where a witness, by experience and education, has gained special knowledge and skill relative to matters involving medical science, he is entitled to give his opinions thereon. (Page 543.)
2. SAME—OPINIONS OF NONEXPERTS.—The opinions of nonexpert witnesses may be given in evidence in cases where, from the nature of the subject, the facts cannot be otherwise properly presented to the jury so as to enable them to draw an intelligent conclusion. (Page 544.)
3. CONTINUANCES—DISCRETION OF TRIAL COURT.—The denial of a continuance in a criminal case will not be ground for reversal where it does not appear that injustice was done. (Page 545.)
4. SAME—DENIAL—PREJUDICE.—The denial of a continuance asked on account of the absence of witnesses was not error where the accused had ample time to take the testimony of such witnesses and made no effort to do so. (Page 546.)

5. SAME—GOOD FAITH OF APPLICATION.—While the trial court may not usurp the province of the jury in passing upon the credibility of witnesses, it has the right, in passing upon an application for continuance, to consider the facts relative thereto in order to determine whether the application was made in good faith or merely for delay. (Page 547.)

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

Going & Brinkerhoff, for appellant.

A continuance should have been granted. 34 So. 479; 42 So. 167; 60 S. E. 211; 83 S. W. 690; 81 Am. St. 150; 37 So. 809; 88 S. W. 107; 86 S. W. 327; 65 Ga. 332; 8 Ia. 536; 60 Ark. 564. Due diligence was used to secure the attendance of the witness. 34 So. 479. The State failed to prove the *corpus delicti.* 60 S. W. 771.

Hal L. Norwood, Attorney General, and *W. H. Rector,* Assistant, for appellee.

It was not error to refuse the continuance. 41 Ark. 62; 40 Ark. 114; 26 Ark. 323; 54 Ark. 243; 41 Ark. 153; 51 Ark. 167; 62 Ark. 543; 34 Ark. 26; 76 Ark. 290; 70 Ark. 521; 71 Ark. 62; 26 Ga. 271; 87 Ia. 306; 82 Ind. 580; 89 Ind. 187; 33 La. Ann. 781; 106 Ga. 400; 116 Ga. 583; 115 Mo. 471; 9 Wash. 204; 54 Ark. 243; 77 Ark. 146; 26 Tex. App. 443; 23 *Id.* 388; 30 *Id.* 64. The *corpus delicti* was proved. 34 Ark. 720; 48 Ind. 109; 171 Mass. 461; 14 Nev. 79; 101 Pa. 38; 68 L. R. A. 33.

FRAUENTHAL, J. Defendant, C. M. Miller, was arrested on June 18, 1909, charged with the killing of A. Flood. A few days thereafter, upon a preliminary hearing by the coroner, he was committed to await the action of the grand jury. At the following October term of the circuit court he was indicted by the grand jury of Poinsett County, charged with the crime of murder in the first degree by killing A. Flood on or about June 10, 1909. He was tried by a petit jury of said county, and was convicted of the crime of murder in the first degree, and now presents to this court this appeal, to obtain a reversal of that conviction.

The testimony which was adduced upon the trial of the cause established the following facts: A Flood was a fisherman, unmarried and about fifty or sixty years old, and for the past ten

or twelve years he had made his home up and down the St. Francis and Little Red rivers, in Arkansas. For about one year and a half prior to June 4, 1909, he had lived on the banks of the St. Francis River in Poinsett County, about twelve miles from Marked Tree. Here he had built a houseboat, and had accumulated some personal property, consisting of a gasoline and other boats and the trappings of a fisherman, in addition to his immediate personal effects. He had also accumulated about $515 in money, which he kept upon his person in a pocketbook. His nearest neighbor lived about one-half mile distant from him, and he mingled freely and frequently with the people in that community, as well as going frequently to Marked Tree, the nearest town to his home. He had a brother, who lived in Randolph County, with whom he communicated and corresponded regularly, writing him as often as once each month; and his brother received a letter from him shortly after June 4, which had been written just prior to that date.

About April 1, 1909, Flood met the defendant at Lake City for the first time. The testimony does not indicate how long defendant had been at that place, or where he came from; but he was out of employment and without any occupation; and Flood invited him to go to his home and join him in his fishing business. Defendant stated afterwards to a witness that when Flood agreed to take him to his home he had $5.30, and this was all the property he possessed. He went with Flood, and the two lived in the houseboat alone from that date until June 4, 1909, when Flood disappeared.

About one week prior to June 4, defendant said to a witness that he would own all of Flood's outfit in about a week, and told him to keep it quiet and say nothing about it. A witness testified that he was in company with defendant and Flood on June 4, and left them together at the houseboat about 4 P. M. of that day. Another witness testified that Flood had made an engagement to meet him at the witness' home on the following day with reference to a business transaction; and it appears from the testimony that Flood had made an agreement with another party to see him some days later relative to some business matters. But on June 4, 1909, Flood disappeared, and he is not known to have been seen by any one since that date.

On the following day defendant went to one of the neighbors in order to obtain his assistance in running the gasoline boat up the river to Marked Tree, and stated to him that he had bought all of Flood's property for $225; that on the evening before Flood had "skiddooed," that he had met a man on the river who desired his services in building a boat, and that Flood had gone with him to Madison, a place some thirty-five or forty miles distant; that upon leaving with this man Flood had sold his outfit to defendant, upon which defendant paid him $90 at that time. At another time defendant said that Flood had gone to Memphis.

On the day following Flood's disappearance (June 5, 1909), defendant took his neighbor and a number of persons on the gasoline boat to Marked Tree, and stated that he wanted to get there before the bank closed, and that he was expecting money to be sent him. They did not get to Marked Tree until after the bank had closed, and the parties remained there over night. About 10 o'clock on that night defendant was in a saloon with one of the parties and suddenly went out of the back door, and soon returned and exhibited a large roll of paper money, seemingly several hundred dollars. He stated that when he went out of the saloon a man spoke to him and asked him if his name was Miller, and upon answering that it was the man said that he was the person he was looking for, and thereupon paid him the money.

On June 7 defendant went to Memphis, where a reunion of the Confederate Veterans was in session, and remained in that city until June 10. On that day he met a man in a saloon by the name of George Ashmore, who was then a stranger to him. He introduced himself to Ashmore as Flood, and requested him to go with him to his fishing place near Marked Tree, and exhibited to him his money and told him that he, too, could make money at fishing. This man went with him, and upon his return from Memphis defendant introduced the man as Bob Horton. The two parties remained at the houseboat until about June 18, when defendant was arrested.

Upon the day before the arrest, there were found a number of parts of a human body about two hundred yards below the houseboat, which had caught in the drift. These pieces included

both elbows, parts of both legs, some parts of the abdomen and one thigh. Nearer to the houseboat there was discovered a log upon which were a number of hacked places, and in which pieces of flesh and bones were found, and a number of human hairs, and a piece of badly decayed flesh was found near the log. There was also found a piece of a leg and a human foot. The foot thus found was deformed and had a peculiar knot upon the instep. When Flood was about thirty years old, his right foot was injured, so that the instep was broken, and a peculiar knot had grown or risen upon the upper part of the instep. Upon this account his foot was deformed, and he walked as though he was crippled. The part would become sore and irritated at times, and would require the attention of a physician. Dr. J. A. Forgus, who was a graduate of a school of surgery, and who had practised surgery and medicine for a great number of years, waited upon Flood as a physician, and not long before his disappearance he had dressed and attended to his deformed foot. He testified that the dismembered foot that was found was the foot of Flood, and that he recognized it, and that he could and did identify it as Flood's foot on account of its peculiar deformity.

At the time of defendant's arrest, these parts of a human body were shown to him, and he was asked if he knew anything relative to them or the whereabouts of Flood. He made no answer and no statement, but only hung his head. Later, there was found upon the defendant Flood's watch and $91.95, in money. In the houseboat all of Flood's clothes and his shoes and personal effects were found. Amongst these was a suit of clothes that he had worn on June 4th, the day he disappeared, and his spectacles. Defendant had taken possession of all these clothes and personal effects, as well as of the houseboat and the boats which had been owned by Flood, and claimed that he had acquired them from Flood.

The floor of the houseboat appeared to have been recently scrubbed until the fibers of the wood stood out; but deep stains as of blood appeared upon the floor, and splotches of dry blood were found upon the bedstead. Some days later, the lid of the heating stove in the houseboat was raised, and gave forth a stench and odor as of burned flesh. The ashes of this stove

were examined, and among them were found a number of pieces of charred bones and a number of human teeth.

A fellow prisoner in the jail testified that sometime after defendant had been placed in jail he made a written statement relative to the killing of Flood in which he set forth that some one other than himself had done the killing, and he said that he desired to get the statement published in some paper, so that his relatives might see it and come to his assistance. This fellow prisoner also testified that later defendant told him that he had written a letter to a relative, and had given it to a colored woman, who had visited a colored prisoner in the jail, for her to mail, and that he was fearful that the letter might fall into the hands of the officers, and stated that that if it did it would convict him of the murder of Flood.

We have thus set forth in a general way the facts and circumstances adduced in evidence upon the trial of this case. The testimony introduced is somewhat voluminous, and, after having carefully examined it, we are convinced that there was sufficient evidence to sustain the finding of the jury that the parts of the human body which where found near Flood's houseboat were the dismembered remains of Flood, and that defendant was guilty of killing him as charged in the indictment. Under these circumstances, and as has been repeatedly held by this court, the verdict of the jury upon these questions of fact becomes conclusive upon the hearing on appeal.

Upon the trial the court gave full and correct instructions to the jury which covered every phase of the case. Defendant was represented in the lower court and in this court by able counsel, and he has suggested no error in any of these instructions. Nor is it suggested that the court failed to give any instruction which a fair trial of the case required. We have carefully examined all the instructions, and we find that they correctly declare the law. By them the jury were fully instructed as to every ingredient of the crime and as to every phase of the case.

It is urged by counsel for defendant that error was committed by the lower court in permitting certain witnesses to testify that the parts of the body found were parts of a human body; that the stains on the floor of the houseboat were blood stains, and that the hairs found upon the log were human hairs.

This contention is made upon the ground that this testimony was but the opinions of the witnesses, and for that reason was inadmissible. This testimony was given by two physicians, who had been educated at medical schools, and who had had extensive experience in their practice of medicine and surgery, as well as by other witnesses. The physicians actually saw these objects themselves, and they, as well as the other witnesses, first named and described these objects to the jury as well as they could. The two physicians are presumed to understand the questions pertaining to their profession, and to be expert upon those questions, and were competent to give their opinions relative thereto. The objects observed by them, and about which they testified, were within the line of their professional experience, and as to these they enjoyed a means of special knowledge. When a witness has, by experience and education, gained special knowledge and skill relative to matters involving medical science, he is entitled to give his opinion thereon. 1 Greenleaf on Evidence, § § 430c, 441b; 5 Enc. Ev. 534.

Furthermore, the opinions of ordinary witnesses, derived from observation, may be given in evidence in cases where, from the nature of the subject, the facts can not be otherwise properly presented to the jury. "Where the facts are of such a character as to be incapable of being presented with their proper force to any one but the observer himself, so as to enable the triers to draw a correct or intelligent conclusion from them without the aid of the judgment or opinion of the witness who had the benefit of personal observation, he is allowed, to a certain extent, to add his conclusions, judgment or opinion." 6 Thompson on Negligence, § 7750.

Frequently, the opinion of a witness as to the appearance of an object he has seen is the best and only evidence obtainable, and therefore such statements of the witness are admissible. 5 Enc. Ev. 677; Lawson on Expert & Opinion Ev. (2d Ed.) 512. Thus, it has been held that a witness may testify that spots and spatters on a thong were blood; and that blood seen by the witness was fresh blood. *Greenfield* v. *People,* 85 N. Y. 75; *State* v. *Bradley,* 67 Vt. 465; *People* v. *Loui Tung,* 90 Cal. 377. In the case of *Commonwealth* v. *Dorsey,* 103 Mass. 412, a witness was permitted to testify that certain hairs were human.

We are therefore of the opinion that no error was committed in allowing the introduction of the testimony complained of.

It is earnestly insisted by counsel for the defendant that the court erred in refusing to continue the trial of the case upon the motion for a continuance made by the defendant. It has been uniformly held by this court that the continuance of a trial in criminal as well as civil cases is within the sound discretion of the trial court, and that the refusal of the trial court to grant a continuance will never be a ground for a reversal unless it clearly appears that there has been an abuse of such discretion, and that it manifestly operates as a denial of justice. It has been said by this court that, to warrant a new trial for a refusal to grant a continuance, "it must be a flagrant instance of an arbitrary and capricious exercise of power operating to the denial of justice." The trial court is, from personal observation, familiar with all the attending circumstances, both of the case and of the motion for continuance. He has the best opportunity to form a correct opinion upon the matters presented; he is in a position to be better enabled to determine whether sufficient time has been had to obtain the desired testimony; he is more fully advised as to whether the application for a continuance is made in good faith or merely for delay, and as to whether or not there is a probability of the existence of the witness or the testimony that is claimed to be desired. In no case, therefore, will the exercise of the discretion of the trial court in a matter of continuance be reviewed upon appeal where it manifestly appears that justice has been done without sacrificing the rights of the defendant. *Dunn* v. *State,* 2 Ark. 229; *Stewart* v. *State,* 13 Ark. 720; *Golden* v. *State,* 19 Ark. 590; *Thompson* v. *State,* 26 Ark. 323; *Watts* v. *Cohn,* 40 Ark. 114; *Loftin* v. *State,* 41 Ark. 153; *Jackson* v. *State,* 54 Ark. 243; *Price* v. *State,* 57 Ark. 165; *Kitts* v. *State,* 70 Ark. 521; *Puckett* v. *State,* 71 Ark. 62.

In the case at bar defendant was arrested on June 18th, charged with the commission of this crime. In a few days thereafter a preliminary hearing was had, and he was committed to jail. At the following October term of the court he was indicted, and on October 20, 1909, he appeared in said court in person and by his attorney, and by the consent of all the parties

the trial of the cause was set for October 25th. During all the time from June 18th, he knew of the crime that was charged against him, and a few days thereafter, by virtue of the preliminary hearing, he knew of the facts and circumstances by which the State would attempt to establish his guilt. At no time did he make any suggestion that he could obtain the testimony which is now set out in his motion for a continuance until the very day of the trial. On October 20th he and his attorney agreed that the trial should be set for October 25th, and at that time no suggestion was made that this testimony was in existence or would be desired. Upon the day of the trial, defendant mentioned for the first time the existence of this alleged testimony. He then filed a motion for a continuance, in which he set out that he desired to obtain the testimony of Pat Miller, T. T. Moore and Will Barnett. He claimed that he could prove by Miller that Flood had formerly lived in Randolph County, and at one time had disappeared for six months and afterwards had returned; that by this witness he would also show that Sherman Flood, the brother of A. Flood, knew this. Upon the trial of the case Sherman Flood appeared as a witness and testified that he did not know and never had heard of Pat Miller, and that his brother had never disappeared at any time prior to June 4, 1909.

By the other witnesses defendant claimed that he could prove that one of them had borrowed from him $300 and had, on June 5, 1909, come to Marked Tree and paid this money back to him; and that the other witness knew that he had loaned this money. He stated that Miller resided at Paragould, that Moore resided in Memphis, Tenn., and Barnett in Caruthersville, Mo.

Defendant had made no effort to take the testimony of the witnesses who resided without the jurisdiction of the court, and made no application to the court at any time for that purpose until the case was called for trial. He did not have a subpœna issued for Miller until the night of October 22. He never made a suggestion that he desired to or could obtain the testimony of any such witnesses when, on October 20, he and his attorney agreed that the trial of the cause should be set for October 25th. From June 18th until the meeting of the court in October he

had an opportunity to employ counsel, and his subsequent employment of counsel showed that he was able to procure counsel; and, while it is claimed by his attorney that he was not employed until during the session of the court, we do not think that the court abused its discretion in finding that it was not shown that there had been a proper exercise of diligence to obtain this testimony.

Furthermore, the circumstances attending the application for continuance raise just doubts of the good faith of the defendant in making it, and we cannot say that the court abused its discretion in finding that it was made for delay rather than for the purpose of securing testimony. While it is not the province of the court to usurp the province of the jury by passing on the credibility of witnesses, nevertheless the court has the right, in passing on the matter of the application for a continuance, to consider the attending facts relative to the motion for continuance, in order to determine the probability of the existence of such witnesses and testimony, and thus to pass upon the question as to whether or not such application for continuance is made in good faith or merely for delay. *Lane* v. *State*, 67 Ark. 290. Of this the trial court is preeminently able to judge, and therefore it should not be said that the discretion of the trial court has been flagrantly abused in such a matter unless it manifestly appears that an injustice has operated thereby to the rights of the defendant.

We have carefully examined all the testimony in this case and the circumstances attending this application for continuance and its refusal, and we cannot say that the court has abused its discretion in overruling the motion of the defendant for a continuance. Upon the other hand, upon a full and careful examination of all the testimony and of the circumstances attending the trial, we are convinced that the defendant has had a full, fair and impartial trial; and it does not manifestly appear that an injustice has been done to the defendant by reason of the refusal to grant him the continuance.

The judgment is therefore affirmed.

BATTLE, J., dissents on the ground that continuance should have been granted.

BLACKSHARE v. STATE.

Opinion delivered April 18, 1910.

1. RECEIVING STOLEN GOODS—SUFFICIENCY OF VERDICT.—Where an indictment contained two counts, the first for larceny and the second for receiving stolen goods, a verdict finding "the defendant guilty of receiving stolen property," without using the term "feloniously," and fixing his punishment at a term in the penitentiary, is a general verdict, and, when considered in the light of the evidence and the court's charge, may be sufficient to sustain a conviction under the second count. (Page 550.)
2. LARCENY—ANIMALS OF ANOTHER.—One who takes and converts the animals of another to his use is guilty of larceny if at the time of the taking he had the felonious intent to deprive the true owner, whether known or not, of the permanent use and benefit of his property. (Page 553.)
3. SAME—ANOTHER'S ANIMAL—EFFORT TO COMPLY WITH STRAY LAWS.—One charged with larceny of another's animals may set up in defense that he endeavored to comply with the estray laws, and the testimony adduced to establish such defense may be considered by the jury in determining whether the accused took the animals with a felonious intent to convert them and deprive the owner of his property. (Page 554.)
4. SAME—ESTRAYED ANIMALS.—The rule applicable in case of lost goods that if the finder neither knows nor has any immediate means of ascertaining the owner, and appropriates them to his own use, he is not guilty of larceny, whatever may be his intent at the time, is inapplicable to estrayed domestic animals, which are not lost in the proper sense of the term. (Page 555.)
5. CRIMINAL LAW—IMPROPER ARGUMENT.—It was not error, in a prosecution for larceny and receiving stolen property, to permit the prosecuting attorney in his closing argument to say: "Why are all these people here? They came here to see if the law can be enforced; and I want to know, and they want to know, if property can be stolen, and no explanation be offered, and a man go scot free." (Page 558.)

Appeal from Clay Circuit Court, Eastern District; *Frank Smith,* Judge; affirmed.

L. Hunter and *Spence & Dudley,* for appellant.

The property must have been stolen before defendant can be convicted of receiving stolen property. 8 So. 529; 32 Gratt. 946; 34 Am. R. 799; 106 Ind. 272. Defendant must have known it to have been stolen. 118 N. W. 1042; 94 Pac. 218; 105 Minn. 217; 61 S. W. 1072. A verdict finding defendant guilty of receiving stolen property is insufficient to support a judgment or

sentence. 44 So. 940; 54 Fla. 96; 43 So. 311; 55 Ga. 191; 38 La. Ann. 357; 67 Pac. 42; 135 Cal. 61. It is necessary to show that the intent to steal existed at the time of the taking. 103 Ala. 40; 16 So. 12; 15 Ala. 158; 14 So. 859; 15 Ark. 168; 46 Ia. 116; 96 Ky. 85; 27 So. 852; 49 Am. St. R. 287; 3 Cush. 235; 39 N. Y. 459; 64 N. C. 586; 55 S. W. 334; 20 Tex. App. 662; 21 *Id.* 579; 2 S. W. 808; 2 S. W. 888. A stray horse which has been such for years is not the subject of larceny. 36 Tex. 375; 38 Tex. 643; 12 Cox, Cr. Cas. 489; 43 Tex. 650; 63 Ind. 285; 30 Am. St. R. 214; 7 Tex. App. 470. In his remarks to the jury the prosecuting attorney should not be permitted to go outside the record. 44 Wis. 282; 48 Ark. 106; 74 Ark. 258. The party from whom appellant purchased these cattle was guilty, not of larceny, but of violating the estray laws only. Kirby's Digest, § 7869.

Hal L. Norwood, Attorney General, and *W. H. Rector,* Assistant, for appellee.

Taking a horse found estray upon the taker's land, for the purpose of securing a reward from the owner thereof, is larceny. 105 Mass. 163. It is larceny for one to take up an estray, intending at the time to convert it to his own use. 3 Park. C. C. 129; 63 Ind. 285; 85 Ind. 503; 53 Mo. 124; 28 Mo. 528. Cases are not reversed because counsel express an opinion about matters connected with the trial. 74 Ark. 256; *Id.* 491; 72 Ark. 613; 73 Ark. 458.

WOOD, J. The grand jury of the Eastern District of Clay County, at its January term, 1910, indicted the appellant, Lin Blackshare, for larceny and knowingly receiving stolen property, with the intent to deprive the true owner of his property, which indictment, omitting the formal parts, is as follows:

"Count 1.

"The grand jury, in and for the district, county and State aforesaid, under and by the authority of the State of Arkansas, accuse the person named in the caption hereof as defendant of the crime of larceny, committed as follows, towit: On the tenth day of June, 1909, in the district, county and State aforesaid, the person named in the caption hereof did unlawfully and feloniously take, steal and drive away two head of cattle of the value of _____ dollars, of the value of _____ dollars, and of the value of _____ dollars, the property of A. W. Zoll, against the peace and dignity of the State of Arkansas.

"Count 2.

"The grand jury, in and for the district, county and State aforesaid, under and by the authority of the State of Arkansas, accuse the person named in the caption hereof as defendant, of the crime of receiving stolen property, committed as follows, towit: On the tenth day of June, 1909, said person named in the caption hereof did unlawfully, feloniously and knowingly receive into and have in his possession, with intent to deprive the true owner of his property, two head of cattle of the value of one hundred dollars, of the value of _____ dollars, of the value of _____ dollars, and of the value of _____ dollars, the property of A. W. Zoll, all of which property had at the said time been stolen, and the said person named in the caption hereof, at the time of receiving and taking said personal property in his said possession, well knew that the same had been stolen; against the peace and dignity of the State of Arkansas."

The appellant was convicted upon the second count of the indictment which correctly charged him with the crime of receiving stolen property, knowing that the same had been stolen. The jury returned the following verdict: "We, the jury, find the defendant guilty of receiving stolen property, and fix his punishment at one year in the penitentiary."

First. It is contended by appellant that this verdict is insufficient to constitute a verdict of conviction for knowingly receiving stolen property because the verdict does not contain a finding that it was done knowingly. The following authorities support the contention that a verdict simply finding defendant guilty of receiving stolen property is not sufficient: *State* v. *Whitaker,* 89 N. C. 472; *O'Connell* v. *State,* 55 Ga. 191; *Dreyer* v. *State,* 11 Texas App. 631; *State* v. *Burdon,* 38 La. Ann. 357; *Miller* v. *People,* 25 Hun (N. Y.) 473; *O'Neal* v. *State,* 44 So. 940; *Harris* v. *State,* 43 So. 311; *People* v. *Tilley,* 67 Pac. 42, 135 Cal. 61. In all of the above cases except the one in 11 Tex. App. the verdict of the jury did not assess the punishment at imprisonment in the State penitentiary. In the case from New York (*Miller* v. *People*) the form of the verdict was: "We find the person guilty of receiving stolen goods, knowing them to be stolen." The charge was that the prisoner "feloniously" received, etc. The court held that the verdict was in form a special ver-

dict, and was fatally defective in omitting the word "feloniously" which former decisions of that court had held to be essential. The form of the verdict in the case at bar is distinguished from the form of the verdict in all of the above cases except the Texas case in that the jury prescribe the punishment, showing expressly an intention to find the accused guilty of an offense punishable by imprisonment in the penitentiary. The verdict under consideration is not a special verdict.

"A special verdict is one which sets out the facts, leaving the court to draw therefrom the conclusion of law." Bish. Crim. Proc. § 1006. A general verdict "is a conviction of everything well charged in the indictment." 1 Bish. Crim. Proc. § 1006a. "A partial verdict is one of conviction as to a part of the charge, and acquittal or silence as to the residue." 1 Bish. Crim. Proc. § 1009.

The verdict in this case is a *partial* verdict upon the second count of the indictment and in the form of a general verdict on that count.

Mr. Bishop says: "The test is, that if the verdict sufficiently finds anything, whether for or against the defendant, judgment will be rendered on the one side or the other for what is thus found." * * * "The language of the verdict, being that of 'lay people,' need not follow the strict rules of pleading, or be otherwise technical. Whatever conveys the idea to the common understanding will suffice, and all fair intendments will be made to support it." I Bish. Crim. Proc. § § 1004, sub. 5; 1005a.

In *O'Neal* v. *State,* 44 So. 940, *supra,* the form of the verdict was: "We, the jury, find the defendant (naming him) guilty of receiving stolen goods." The Supreme Court of Florida while holding the verdict to be a nullity in that case, announced a rule of construction which we approve, towit: "In a criminal case the verdict should be construed with reference to the indictment or information and the entire record, and if, when so construed, it is definite and clearly expresses the manifest intention of the jury, and is otherwise legal, mere inaccuracies of expression will not render the verdict void."

This court has heretofore adopted that rule of construction for verdicts. In *Strawn* v. *State,* 14 Ark. 549, the appellant was indicted for maiming Jesse Edwards, the offense being a felony

under the statute. The same statute provided: "that if persons fight by mutual agreement, and one of them is maimed, it shall not be deemed maiming within the meaning of this act; but the parties shall be punished by fine and imprisonment as for an aggravated affray," etc. The latter offense was a misdemeanor, but embraced in the same indictment with the felony. The verdict was: "We, the jury, do find the within-named John Strawn not guilty as charged in the within indictment, but find that he and the within-named Jesse Edwards fought by mutual agreement." The prisoner moved in arrest of judgment, because the verdict, which acquitted him of the offense charged in the indictment, failed to show that he was guilty of any minor offense. Passing on the motion, this court, through Chief Justice WATKINS, said: "Certainly, it might have been proper for the verdict to have stated more explicitly that the accused was not guilty, as charged, of the offense of maiming, but that he and Edwards fought by mutual agreement, whereby the latter was maimed. But, looking at the indictment, the statute and the verdict as returned, the conclusion is reasonable, if not unavoidable, that such was the meaning and intention of the jury; and although the verdict does not state, in express terms, that Edwards was maimed, it will bear that construction, and was therefore sufficient to warrant the sentence."

In *Fagg* v. *State,* 50 Ark. 506, the appellant was indicted for murder in the first degree. The jury returned the following verdict: "We, the jury, find the defendant guilty of manslaughter, but can not agree upon the punishment." The court sentenced him as for voluntary manslaughter. This was assigned as error. Chief Justice COCKRILL, for the court, said: "The verdict did not designate the degree of manslaughter, nor assess the punishment. The duty of fixing the penalty therefore devolved upon the court. On conviction of murder the statute requires the degree of the offense to be found by the jury. It is not so as to manslaughter; it is only necessary that the court should have a certain guide to the intention of the jury. Verdicts receive a reasonable construction in order to reach the jury's meaning, and, when that is found, they are enforced as though the intention was express. Viewing the verdict in this case in the light of the evidence and the court's charge, the conclu-

sion is reasonable, if not irresistible, that the jury intended a conviction of voluntary manslaughter. The court had charged them specifically upon that offense, and had made no mention of involuntary manslaughter. If they knew that there was such a grade of homicide, it is not probable that they understood that the defendant could be convicted of it in this prosecution. A verdict of involuntary manslaughter would have been inappropriate to the evidence, and the jury would have been unmindful of their duty to have returned such a verdict. In the absence of an expression to the contrary, a presumption of an intention to violate a duty is not indulged against a juror more than any other officer. The evidence certainly warranted a verdict of murder in the first degree; that the jury did not intend to acquit is shown by the verdict."

Applying the above doctrine of our own cases to the verdict in the present case, it is sufficient to sustain the judgment of conviction for receiving stolen property knowing same to have been stolen. The fact that the jury prescribed the punishment at two years in the penitentiary showed that they intended to convict of some offense charged in the indictment. They designated it as "receiving stolen property," showing that they did not intend to convict of larceny as charged in the first count. The only other count charged the offense of receiving stolen property knowing same to have been stolen." The words used in the verdict, when taken in connection with the second count of the indictment and the evidence, the charge of the court pertaining to that, leave no room to doubt that the intention of the jury was to find him guilty on that count. Under the charge of the court the jury could not have found the defendant guilty on that count without finding that he received the property knowing same to have been stolen. The language of the verdict was tantamount to a general verdict of guilty on that count, and, according to the rules for the construction of verdicts, it met every requirement of the law, and furnished a certain and correct basis for the judgment of the court.

Second. Without going into detail, it suffices to say that the evidence tended to prove and warranted the jury in finding that one George Johnson took up the cattle in controversy that estrayed from their owner and were running around his place.

They were known in the neighborhood as stray cattle. When approached by the owner for the cattle, Johnson claimed that he had turned them out with his cattle, but did not know what had become of them. It was shown that Johnson disposed of the cattle under circumstances which tended to prove, and which warranted the jury in finding, a felonious intent on his part to convert the same to his own use. There was testimony to the effect that it was generally understood that the cattle were posted. But there was no evidence in the record on the part of appellant tending to prove that George Johnson had complied with the estray laws. There was no testimony showing that he attempted to comply with the estray laws or showing what efforts, if any, he had made in that direction.

Appellant asked the court to grant the following prayer:

"You are instructed that, if you find from the evidence that George Johnson took up the steers as estrays and made an effort to post them, and later converted them to his own use, he would not be guilty of larceny, and hence the defendant, Lin Blackshare, would not be guilty."

The court refused, and appellant duly preserved his exceptions. The court gave the following prayers:

"No. 7. Evidence has been offered in regard to the posting of the steers as estrays. You will consider this evidence, as you will all other evidence in the case, as bearing upon the question of the defendant's intent. It is for you to consider the evidence upon that question and decide the weight, if any, it shall have in determining whether or not the defendant is guilty of either the larceny of these steers or of the offense of knowingly receiving them into his possession, knowing them to have been stolen.

"No. 8. If you believe from the evidence that George Johnson took up the steers as estrays, and attempted to post them, and that the defendant in good faith believed that they had been posted in such way as to vest in Johnson the title, and that the said Johnson had the right to sell them, and defendant bought them in good faith, then you will find the defendant not guilty."

The instructions given by the court concerning estrays was as favorable to appellant as the evidence warranted. The court

did not err in refusing the prayer of appellant. An effort on the part of one who takes up cattle as estrays to post them would not justify such one in converting such cattle to his own use. The law requires one taking up estrays to do something more than simply to make an effort to post them. See chapter 149, Kirby's Digest. An effort, but failure, to comply with the estray laws before converting estrayed animals to one's own use would be evidence to be considered by the jury as tending to prove the absence of a felonious intent in making such conversion. But that is as far as it could go. Where one has taken and converted the animals of another to his own use, if at the time of the taking there was the felonious intent to deprive the true owner, whoever he might be, of the permanent use and benefit of his property, the one so taking the animals of another under our statute would be guilty of larceny. One so charged may set up in defense an effort to comply with the estray laws, and the testimony adduced to establish such defense may be considered by the jury in determining the question as to whether the accused took the animals with a felonious intent at the time of the taking to convert them to his own use and to permanently deprive the owner of his property.

"When an estray is taken up by one who has at the time of the taking the felonious intent to convert same to his own use, it is larceny." *Starck* v. *State,* 63 Ind. 285. See also *Com.* v. *Mason,* 105 Mass. 163. In the recent case of *Brewer* v. *State,* 93 Ark. 479, we said, speaking of lost goods: "The rule clearly deducible from the authorities is that if the finder of lost articles neither knows nor has any immediate means of ascertaining the owner, and appropriates them to his own use, he is not guilty of larceny, whatever may be his intent at the time." But this doctrine has no application to estrayed domestic animals. As is said in *State* v. *Martin,* 28 Mo. 530: "It is with no propriety, either in view of custom or statutory law, that animals can be called lost goods here, simply because they are outside the owner's enclosures, and the owner does not know where they are. Such animals are not *lost* in the proper sense of the term; nor can the person who comes across them and feloniously appropriates them to his own use with any propriety be called the *finder,* as he might be if he, with the same

felonious intent, picked up a purse upon the highway. * * * And the fact that they are not branded with the owner's name is perfectly immaterial. It is sufficient for the person who comes across them to know they are not his property; and if he drives them off and converts them feloniously to his own use, he is as much guilty of larceny, when he is ignorant of their true owner, and their owner is ignorant of where they are, as he would be if both had full knowledge on both these points. * * * They (estray laws) have nothing to do with the criminal law, and are merely directory to promote commerce and afford facilities for the reclamation of stray animals." See also *People* v. *Kaatz,* 3 Parker, C. C. 129.

Third. Instruction number 4 is as follows: "If you find from the evidence that the defendant did, in fact, buy the steers and pay a consideration therefor, this would be no defense if it was a part of an agreement, or understanding, or conspiracy between the defendant and Johnson by which the larceny of the steers might be accomplished."

It is contended that there was no evidence of any conspiracy between Johnson and appellant, and that therefore the latter part of the above instruction is abstract. It was in evidence that a certain party was asked why he did not buy the cattle and replied, in the presence of appellant, "that he didn't want the cattle; that somebody told him that they had not been posted, and that he did not want any trouble," whereupon appellant stated with an oath: "I will buy them."

A witness who lived with Johnson is shown to have testified as follows:

"One night Blackshare came over there and stayed until bedtime. Blackshare and Johnson went out in the lot, and were out there probably an hour. Next morning Johnson went to his (witness') room before day and told him to get up, that he wanted him to help drive this yoke of cattle across the slough, and, I think, described the cattle. He called them butt-headed cattle—one lined black and one black. He got up and helped Johnson cross the slough; went across the country through the woods. When they came to a cypress slough, Johnson told him to go up the slough and see if he could find a place to cross, and while he was gone Johnson took the cattle and went

down the slough and tied them, and came back and met him and he saw a couple of men ride up and untie these cattle and ride off with them. Believe he said there was some horse tracks there, and he asked who had been there. Johnson asked if he didn't see Blackshare pass and he said no, and Johnson told him that Blackshare came by and threw him the money for the cattle, and he took it from his pocket. It was wrapped in a brown paper and counted out fifty dollars. Couldn't see any road where the cattle were led. Witness asked George Johnson what he was taking the cattle through the woods for, and George said there was a fellow named Happy Jack that he didn't want to know anything about it."

There was no objection to this testimony. This testimony, taken in connection with the evidence that appellant admitted that he bought the cattle from Johnson, paying for same the sum of fifty dollars, was sufficient, in connection with the other evidence, to warrant the court in submitting to the jury whether or not there was a conspiracy between appellant and Johnson to steal the cattle. The instruction was not abstract.

Fourth. The second count of this indictment, as stated, charges that the defendant knowingly received property stolen by another. This second count charges that the defendant did unlawfully, feloniously and knowingly receive into and have in his possession, with the intent to deprive the owner of his property, the two steers in question, and the material allegations of this count are that in this district, of this county, and within three years before the date of this indictment, the defendant received from a person who had stolen the steers in question, knowing them to have been stolen, with the intent to deprive the true owner of his property by so receiving them. If the evidence warrants it and requires it, the defendant could be found guilty of either of these counts, but not of both of them.

It is urged that the instruction, as read to the jury, did not contain the words "knowing them to have been stolen." But we find nothing in the record to show that the instruction containing these words was not read to the jury. The bill of exceptions contains the instruction as above set out, and it shows that the words "knowing them to have been stolen" were inserted in the instruction before "either of defendant's counsel

had argued the case to the jury." There is no affirmative showing that the words mentioned were not read. The bill of exceptions indicates that they were read, and, in the absence of a showing to the contrary, that would be the presumption.

Fifth. The last contention is that the court erred in permitting the prosecuting attorney to make improper remarks in his closing argument. Counsel assert that the remarks were as follows: "That the defendant failed to put George Johnson (the alleged thief) and Isaiah Johnson, his father, and Jim Blackshare, a son of defendant, on the witness stand to contradict statements made in the trial." We find no such assignments of error in the motion for new trial. Hence can not consider it. The record does show that the prosecuting attorney in his closing argument made the following remarks: "Why are all these people here? They came here to see if the law can be enforced; and I want to know, and they want to know, if property can be stolen and no explanation be offered, and a man go scot free." The ruling of the court in permitting the above remarks is properly presented for our consideration. The remarks were but the expression of the opinion of the prosecuting attorney. They were not calculated to influence a jury of sensible men to disregard the oath they had taken to try the cause according to the law and the evidence and a true verdict render. A majority of the court do not consider the remarks prejudicial error. For, fairly construed, the comments of the attorney could hardly be said to have reference to the failure of appellant to testify as a witness in explanation of the charge, but rather to the failure of the evidence adduced in the opinion of the attorney, to afford an explanation.

The judgment is therefore affirmed.

Ex parte CHASTAIN.

Opinion delivered April 25, 1910.

1. CONTEMPT—REVIEW ON CERTIORARI.—Upon certiorari to review a judgment imposing a fine for contempt of court the judgment will be affirmed where it recites that the fine was imposed "on account of language and conduct in open court" but fails to set forth the particular language or conduct which constituted the contempt. (Page 559.)

2. SAME—REVIEW ON CERTIORARI—PROCEDURE.—One who desires to have a judgment of the circuit court imposing a fine for contempt reviewed on certiorari should ask the trial court to recite the facts in the judgment, and, in the event of refusal, should bring them into the record by bill of exceptions. (Page 559.)

Certiorari to Sebastian Circuit Court; *Daniel Hon,* Judge; affirmed.

Appellant, *pro se.*

The commitment is illegal, irregular and void. Kirby's Dig. § 723. The judgment should contain a statement of the facts constituting the contempt. 73 Ark. 358.

Hal L. Norwood, Attorney General, and *W. H. Rector,* Assistant, for appellee.

The grounds of the contempt need not be stated. 5 Ired. Law, 149; 73 Ark. 358; 14 East 1; 5 Dow. 199; 3 B. & Ald. 420; 11 Adol. & El. 273; 9 Adol. & El. 1. Contempt judgments were not reviewable at common law. 22 Ark. 149.

McCULLOCH, C. J. Petitioner brings up by certiorari for review a judgment by the circuit court of Sebastian County, Fort Smith District, adjudging him and another person to be in contempt of the court "on acount of language and conduct in open court," and imposing a fine of $10 as punishment for the contempt.

The above-quoted statement of the case is taken from the judgment of the court, and it is all which tends to describe the alleged contemptuous conduct. It is insisted that the judgment is void because it fails to set forth the particular language or to describe the conduct adjudged to be contemptuous. The court should have stated in its judgment the facts constituting the contempt; but the absence of such statement does not render the judgment void. Ex parte *Davies,* 73 Ark. 358; Ex parte *Summers,* 5 Iredell, Law, 149.

Petitioner should have asked the court to recite the facts in the judgment, and, in the event of refusal, the facts could have been brought into the record by bill of exceptions. Having failed to do that, he has left nothing to be said in support of his attack on the validity of the judgment.

The prayer of the petition is therefore denied, and the judgment is affirmed.

TAYLOR v. ROBINSON.

Opinion delivered April 25, 1910.

1. EJECTMENT—EXHIBITS AS EVIDENCE.—Where the answer in an ejectment suit denied the execution of the deeds exhibited with the complaint, and the bill of exceptions does not show that plaintiff introduced any of the disputed deeds in evidence, a judgment against the plaintiff must be affirmed, regardless of errors in the instructions or misconduct of defendant's counsel in argument. (Page 562.)
2. APPEAL AND ERROR—BRINGING UP EVIDENCE.—Upon appeal from the circuit court, the evidence must be brought up by bill of exceptions, and cannot be brought up, after the bill of exceptions was filed, by certificate of the judge and clerk. (Page 562.)

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

J. A. Watson and *C. E. Elmore*, for appellant.

A tenant cannot dispute the title of his landlord. 43 Ark. 28; 53 Ark. 532; 64 Ark. 453; 45 Ark. 117. The defect, if any, in the conveyancing was cured by the curative act of March 13, 1899. Even if the deeds were invalid, she could not now succeed. 62 Ark. 326; 75 Ark. 139; 77 Ark. 57; 112 S. W. 892. A married woman is estopped by the certificate of her acknowledgment to her deed as against a vendee for a valuable consideration. 38 Ark. 377; 37 Ark. 145; 41 Ark. 421; 45 Ark. 117.

J. L. Short and *David L. King*, for appellee.

The contract between Robinson and wife was valid. 46 Ark. 542. A purchaser is charged with notice of whatever title, rights or equities an occupant may have. 76 Ark. 25; 47 Ark. 533; 54 Ark. 499.

McCULLOCH, C. J. This is an action instituted by plaintiff, W. A. Taylor, in December, 1908, against defendant Martha J. Robinson to recover possession of a tract of land. A trial before a jury resulted in a verdict in favor of the defendant, and the plaintiff appealed.

The land in controversy was originally owned by defendant's husband, D. A. Robinson, to whom the same was patented by the United States in the year 1894. Plaintiff sets forth in the complaint the following chain of title, and exhibits therewith all the conveyances constituting the several links in the chain:

1. Deed of trust dated July 13, 1896, executed by D. A. Robinson and wife, Martha J. Robinson, to W. H. Raymond, trustee, to secure payment of a debt to the Farmers Savings, Building & Loan Association of Nashville, Tennessee.

2. Deed dated January 5, 1899, executed by D. A. Robinson and wife, Martha J., to Farmers Savings, Building & Loan Association, conveying the land to said grantee in fee simple.

3. Deed dated June 17, 1908, executed by J. F. Loughborough, receiver of the Farmers Savings, Building & Loan Association, to Mrs. H. O. Wright, conveying said land under orders of court as the property of said Farmers Savings, Building & Loan Association, an insolvent corporation.

4. Deed dated August 5, 1908, executed by C. P. Perrie, attorney in fact of Mrs. H. O. Wright, conveying the land in fee simple to plaintiff, W. A. Taylor.

It is also alleged in the complaint that on January 20, 1899, said Farmers Savings, Building & Loan Association and said D. A. Robinson entered into a contract in writing whereby the former leased said land to the latter for a period of five years from that date, and that said Robinson and the defendant, his wife, took possession of said land under said contract and held possession thereof under the lease, but had failed to pay any of the sums of money stipulated for in the contract. Said written contract is also exhibited with the complaint.

Defendant in her answer specifically denied that any of the conveyances set forth in the complaint, except the patents to D. A. Robinson, were ever executed. She further alleged in her answer that the lands in question constituted the homestead of her husband; that in January, 1899, she and her husband separated on account of his cruel treatment of her, and that as a settlement of their separate property rights he surrendered to her the land in controversy to hold as her absolute property in consideration of her agreement to rear their children without expense to him; that, pursuant to said settlement and agreement, she moved on the land, built a house thereon and cleared up a considerable quantity of it, and occupied it continuously as her own up to the commencement of this suit. She pleaded that her occupancy was actual, open, notorious and uninterrupted, claiming the land as her own for a period of about ten years.

It is contended that the verdict is not sustained by evidence, and also that the court erred in giving instructions and in refusing some of plaintiff's requests for instructions; also that the verdict should be set aside on account of alleged misconduct of defendant's counsel.

The condition of the record is such that we can not consider these assignments of error. The defendant in her answer denied the existence of each link in plaintiff's chain of title. The burden of proof was on plaintiff to prove his title. He failed to introduce the title deeds which were exhibited with the complaint. At least, the bill of exceptions fails to show that either the deeds or copies thereof were introduced in evidence, or that they were otherwise proved. Since the record was filed in this court, the plaintiff has brought up by certiorari certificates of the circuit judge and clerk, which were filed in the office of the clerk after the time for filing the bill of exceptions had expired, to the effect that copies of the deeds and other instruments exhibited with the complaint were introduced in evidence at the trial; but evidence adduced at the trial of a case can not be brought up in that way. We consider only the evidence which is certified in the bill of exceptions.

In a trial at law deeds and other instruments of writing exhibited with the complaint, the execution of which are denied in the answer, must be introduced in evidence. Their exhibition with the pleadings does not make them a part of the evidence in the case unless they are adduced in evidence at the trial. *Richardson* v. *Williams*, 37 Ark. 542; *Neff* v. *Elder*, 84 Ark. 277.

As the bill of exceptions does not show that plaintiff introduced in evidence any of the disputed deeds, he wholly failed to make out a case, and no error of the court in its instructions nor misconduct of counsel in the argument could be prejudicial. The judgment must necessarily, under the evidence set forth in the bill of exceptions, have been in favor of defendant, for the evidence does not show that the plaintiff had any title to the land.

Judgment affirmed.

OSBORNE *v.* BOARD OF IMPROVEMENT OF PAVING DISTRICT NO. 5 OF FORT SMITH.

Opinion delivered April 25, 1910.

1. JUDGE—DISQUALIFYING INTEREST.—The interest which disqualifies a judge is not the kind of interest which one feels in public proceedings or public measures; it must be a pecuniary or property interest or one affecting his individual rights; and the liability of pecuniary gain or relief must occur upon the event of the suit, and not result remotely in the future from the general operation of laws and government upon the status fixed by the decision. (Page 565.)
2. SAME—WHEN NOT DISQUALIFIED.—A chancellor is not disqualified, in a suit by an improvement district to enforce an assessment for paving property within such district, by reason of the fact that he resides and owns property within the territorial limits of the district, if the street upon which he owns property has already been paved and the assessments thereon have been paid. (Page 566.)
3. IMPROVEMENT DISTRICT—VALIDITY OF ASSESSMENT—BURDEN OF PROOF.—The burden is upon one who seeks to avoid the lien of an assessment for an improvement to show that the assessment was not properly levied. (Page 566.)
4. SAME—CONCLUSIVENESS OF ASSESSMENTS.—The questions of the benefit to particular property to be derived from a particular improvement, and the correctness of the assessments levied thereon, are concluded, except for fraud or demonstrable mistake, by the action of the city council in establishing the district and of the assessor in assessing each piece of property, unless set aside in a proceeding instituted within thirty days after publication of the ordinance levying the assessments. (Page 566.)

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

T. S. Osborne and *James Brizzolara,* for appellant.

The action of the council in including property and assessing it is only *prima facie* evidence that it is included and benefited. 52 Ark. 107; 84 Ark. 257. The council's findings are only conclusive when the statute makes them so. 2 Dill. Mun. Corp. 800; 117 U. S. 683. A law must be interpreted in favor of the citizen when burdens not known to the common law are imposed. 71 Ark. 556. The same territory cannot legally be made part of two levee districts and subjected to levee taxes in both. 37 La. Ann. 538; 1 Cooley, Tax. 394; 19 Mo. 179; Kirby's Dig., § 5683. Property must be affected or benefited, or it is not legally in the district. 70 Ark. 451; 84 Ark. 390.

Youmans & Youmans, for appellee.

The objection to the introduction of the ordinances on the ground that they were incompetent, irrelevant, and immaterial amounts to a claim that the ordinances were not properly published. The burden of proof is on the party making such claim. 53 Ark. 368; 56 Ark. 370; 68 Ark. 376. The action of the city council in including the four old districts in No. 5 was not void. 84 Ark. 257; 52 Ark. 107.

McCULLOCH, C. J. The Board of Improvement of Paving District No. 5 of Fort Smith, an improvement district organized for the purposes which its name indicates, instituted this suit in the chancery court of Sebastian County, Fort Smith District, against defendants Osborne and certain other owners of real property in said district, to enforce payment of special assessments levied on the property. The complaint is in conformity with the special provisions of the statute respecting such suits. Kirby's Dig., § 5691 *et seq.* The defendants answered, and on hearing the cause the court rendered a final decree for enforcement of the assessments, from which decree defendants have appealed.

The statute provides that if an appeal be taken from a decree in a suit of this kind the "transcript shall be filed in the office of the clerk of the Supreme Court within twenty days after the rendering of the decree appealed from," and that "no appeal shall be prosecuted from any decree after the expiration of the twenty days herein granted for filing the transcript in the clerk's office of the Supreme Court." Kirby's Dig., § § 5706-5709).

The appeal in this case was taken as soon as the decree was rendered, but the transcript was not filed within twenty days thereafter. The defendants filed an affidavit, which is incorporated in the transcript, tending to show that the delay in filing the transcript in this court was caused by counsel for plaintiff withdrawing from the office of the clerk of the lower court some of the documentary evidence on which the case was tried.

Inasmuch as the case is to be affirmed on other grounds, we will not attempt to decide how far the above quoted statute is applicable, or whether this court possesses the power to ex-

tend the time for filing transcripts in such cases, or whether the defendants have in proper manner shown sufficient excuse. We pretermit a discussion of those questions. The case of *Boles* v. *Kelley,* 90 Ark. 29, is decisive of most of the questions raised, and we will not discuss the questions so decided.

The defendants filed a paper suggesting the disqualification of the chancellor, the Hon. J. V. Bourland, on the ground of interest in the controversy, alleging that he resided within the territorial limits of said district and owned real property therein, "affected in value by reason of the proposed improvement in said paving district." The chancellor overruled the suggestion or motion, and declined to certify his disqualification. In overruling the suggestion, the chancellor stated that "his property was located on 14th Street, that said street was paved, and that the assessments thereon had been paid."

It does not appear that the chancellor had any interest in the result of the litigation, other than the general interest which any other citizen and property owner in the district had. In fact, the suggestion of disqualification seems to be based on the alleged fact that the chancellor's real property in the district was "affected in value by reason of the proposed improvement," which is at most only a remote interest and not a direct one.

The case of *Foreman* v. *Marianna,* 43 Ark. 324, was a proceeding to annex territory to the town, and the objection was made that the county judge was disqualified because he was a resident and taxpayer of the town. This court held that this was no disqualification, and in disposing of the case said: "The 'interest' which disqualifies a judge, under the Constitution, is not the kind of interest which one feels in public proceedings or public measures. It must be a pecuniary or property interest, or one affecting his individual rights; and the liability of pecuniary gain or relief to the judge must occur upon the event of the suit, not result remotely in the future from the general operation of laws and government upon the status fixed by the decision."

"The interest which will disqualify a judge," says Mr. Work in his treatise on Courts, p. 396, "must be direct and immediate, and not contingent and remote."

We are of the opinion that nothing is shown in this record which discloses the fact that the chancellor has such a direct interest in the result of the suit as would disqualify him.

It is insisted that the proof shows that the owners of a majority in value of the real property in the district did not sign the petition for improvement, and that the assessment was therefore void. This contention is based on the fact that the owners of property in old districts embraced in the new one signed the petition, and that when their property is eliminated from the count the petition does not contain a majority. *Boles* v. *Kelley, supra;* is conclusive of this question against the contention of defendants. The burden of proof was on the defendants to show that the assessments were not properly levied. *Board of Improvement Dist.* v. *Offenhauser,* 84 Ark. 257.

The questions of the benefit to particular property to be derived from the improvement, and the correctness of the assessments levied thereon, are concluded, except for fraud or demonstrable mistake, by the action of the city council in establishing the district and of the assessor in assessing each piece of property, unless set aside in the manner provided by statute in a proceeding instituted within thirty days after the publication of the city council levying the assessments. *Board of Imp. Dist.* v. *Offenhauser, supra; Kirst* v. *Street Imp. Dist.,* 86 Ark. 1.

Defendants urge many reasons why the assessments are unjust, but they all go back to the questions which are concluded by the decisions of the court above referred to. We find no error in the proceedings, and the decree is therefore affirmed.

TAYLOR *v.* GRANT LUMBER COMPANY.

Opinion delivered April 25, 1910.

1. NEW TRIALS—DISCRETION OF TRIAL COURTS.—Trial courts are vested with a large discretion in the matter of granting new trials, especially

upon the weight of evidence, and such discretion will not be interfered with unless it be made to appear that it was improvidently exercised. (Page 568.)

2. MASTER AND SERVANT—INJURIES NOT IN COURSE OF EMPLOYMENT.—Where an employee of a lumber company volunteered to go on a logging train to doctor a sick mule, which was not in the course of his employment, and was injured by the company's negligence, he will not be entitled to recover. (Page 569.)

Appeal from Jefferson Circuit Court; *Antonio B. Grace*, Judge; affirmed.

Austin & Danaher, for appellant.

The Fellow Servant Act applies to logging roads. 69 L. R. A. 887; 61 *Id.* 249. Deceased being in defendant's employ at the request of its servant foreman, he was not a trespasser, and was entitled to the same protection as other employees. 1 Hurl. & N. 773; L. R. 2 Ex. 30; 11 Ex. 832; 6 Jur. (U. S.) 53; 69 Pa. 210; 48 Miss. 112; 43 O. St. 224; 58 Ark. 318. The foreman had authority to make such requests. 17 Colo. 564; 31 Am. St. 340; 12 Am. St. 422; 119 Ind. 455; 24 Am. St. 322; 19 *Id.* 180; 34 *Id.* 283; 36 Am. R. 382; 58 Ark. 175. A servant does not assume the risk of the negligence of fellow servants. 122 Fed. 193; 196 U. S. 51; 178 Mass. 251; 101 Am. St. 660.

Taylor & Jones and *Daniel Taylor,* for appellee.

The court's discretion in granting a new trial will not be disturbed, unless manifestly abused. 34 Ark. 632; 93 S. W. 18; 46 S. W. 202; 79 S. W. 803; 86 S. W. 379; 93 S. W. 871; 81 S. W. 907; 105 S. W. 1061; 105 S. W. 1098; 83 S. W. 297; 74 S. W. 976; 71 S. W. 425; 72 S. W. 20; 76 S. W. 502; 85 S. W. 357; 78 S. W. 312; 41 S. W. 215; 91 S. W. 1031; 108 N. W. 824; 108 N. W. 839; 99 S. W. 722; 47 Mo. 50.

BATTLE, J. Rosetta Taylor, as administratrix of James M. Taylor, deceased, brought an action against Grant Lumber Company, and recovered a judgment against it. The defendant moved for a new trial, which the court granted. From this order granting a new trial the plaintiff has appealed, she stipulating that judgment absolute may be rendered in this court.

In *Catlett* v. *Railway Co.*, 57 Ark. 461, 466, Chief Justice COCKRILL, delivering the opinion of the court, said: "The Constitution provides that 'judges shall not charge juries with regard to matters of fact, but shall declare the law.' Art. 7, § 23. This provision shears the judge of a part of his magisterial functions, but it confers no new power upon the jury. It was the jury's province before this provision was ordained to pass only upon questions of fact about which there was some real conflict in the testimony, or where more than one inference could reasonably be drawn from the evidence. The Constitution has not altered their province. It commands the judge to permit them to arrive at their conclusion without any suggestion from him as to his opinion about the facts. As * * * expressed in *Sharp* v. *State*, 51 Ark. 155, 'the manifest object of this prohibition was to give the parties to the trial the full benefit of the judgment of the jury as to facts, unbiased and unaffected by the opinion of judges.' If there is no evidence to sustain an issue of fact, the judge only declares the law when he tells the jury so."

The trial judge still has control of the verdict of the jury after and during the term it is rendered. Because of his training and experience in the weighing of testimony, and of the application of legal rules to the same, and of his equal opportunities with the jury to weigh the evidence and judge of the credibility of witnesses, he is vested with the power to set aside their verdicts on account of errors committed by them, whereby they have failed, in their verdict, to do justice and enforce the right of the case, under the testimony and the instructions of the court. This is a necessary counterbalance to protect litigants against the failure of the administration of the law and justice on account of the inexperience of jurors.

In *Catlett* v. *Railway Co.*, *supra*, Chief Justice COCKRILL further said: "In *Richardson* v. *State*, 47 Ark. 567, Judge SMITH says: 'It is the duty of the trial court to set aside a verdict which is clearly against the weight of the evidence,' and that injunction cannot be too often repeated; for, as he further explains, when the question of fact reaches us, we do not undertake to revise the discretion of the circuit judge in that respect, but inquire merely whether there is a failure of proof on a

material point. That is the marked distinction between the duty resting upon the trial and the appellate courts. To ascertain whether there is a failure of proof or whether the evidence is legally sufficient to warrant a verdict, the test is as follows: After drawing all the inferences most favorable to the verdict that the evidence will reasonably warrant, is it sufficient in law to sustain the verdict?"

In that case the court further held: "In jury trials where the evidence is not legally sufficient to sustain a verdict for plaintiff, it is the duty of the court to so declare the law. If the whole case appears to have been developed, a verdict for the defendant should be directed; if it is probable that the missing link in the evidence can be supplied, plaintiff should be permitted to take a nonsuit."

As said by the Supreme Court of Missouri in *Baughman* v. *Fulton,* 41 Southwestern Reporter, 215: "Trial courts have large discretion in the matter of granting new trials, especially upon the weight of the evidence; and this court will not interfere with such discretion unless it be made to appear that it was improvidently exercised." See cases cited.

In the case before us the preponderance of the evidence adduced in the trial in it tended to prove the following facts: The defendant, Grant Lumber Company, was a corporation organized under the laws of Arkansas, and engaged in a lumber and railroad business. On the third day of October, 1907, James M. Taylor, the intestate of plaintiff, was employed by it to serve in the capacity of mill foreman. He was not employed to aid in operating the railroad; he had nothing to do with that. John Lites was the manager of its business. On the third day of October, 1907, at night, he (Lites) received news that a mule of the company was sick at a logging camp at the end of the railroad about two or three miles distant from the mill. He ordered a train, consisting of a locomotive and two or three log cars, made ready to take him to the camp to see the mule. On the way to the train he passed the house of plaintiff's intestate. He asked Lites where he was going, and he replied that he was going out to the end of the railroad to "doctor" a sick mule. He (Taylor) then remarked to his wife, "Well, it is a company mule, and a company matter, and I am supposed to

go," and he went without invitation, order or direction, and was diligent in preparing for the trip; carried a lantern to the train, and a bottle to drench the mule. Volunteers were not lacking. Five or more, including Taylor, left on the train to assist others in doctoring one sick mule. It seems to have been a matter of pleasure. The train backed out with two or three log cars in front. It was suggested that some one ride on the front end and carry a lantern for the benefit of the engineer, and the deceased, James M. Taylor, volunteered, and took a lantern and went to the front end of the train, and sat down on a "bunk" on which logs were carried. This was an extremely dangerous place to ride. The train continued to move backwards until within a short distance of the camp, the place of destination, when it struck a log and the forward car was thrown from the track and Taylor from the car. One of his legs was crushed by the train from the knee down to the foot, from the effects of which he died in a short time. He was not injured in the course of his employment or in the discharge of any duty to the company, but while acting outside of the same and as a volunteer. The plaintiff was not entitled to recover anything. *Railroad Company* v. *Dial,* 58 Ark. 318.

In pursuance of the stipulation, final judgment is rendered here; and the action is dismissed.

LONG v. STATE.

Opinion delivered April 25, 1910.

GAMING—SUFFICIENCY OF EVIDENCE.—A conviction of gaming will be sustained by evidence that defendants and three others were seen playing cards, and that one of the players was seen to pass something across the table which the witness took to be a bill, as it is a matter of common knowledge that all forms of paper money are commonly called "bills."

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

George W. Dodd, for appellant.

Proof of participating in the game is not sufficient; the

State must show participation in the wager. 114 S. W. 920. There is no proof of any joint betting. 9 Ark. 193.

Hal L. Norwood, Attorney General, and *W. H. Rector,* Assistant, for appellee.

The proof was sufficient to authorize the verdict. 3 Ark. 66. It is for the jury to determine whether persons holding cards were playing a game of cards. 59 Ala. 89; 83 Ga. 575; 10 Tex. 545.

HART, J. The defendants, Ed Long, Miles O'Malley and one Treadway, were jointly indicted for the offense of gaming. Long and O'Malley were tried together. The jury returned a verdict of guilty, and the defendant Long has duly prosecuted an appeal from the judgment rendered.

Aaron Hill was the only witness in the case, and his testimony, after stating that he was acquainted with the parties, is as follows:

"Q. State to the jury whether or not about the first day of October, 1908, or within one year next before the 19th day of January, 1909, in the Greenwood District of Sebastian County, you saw the defendants, Miles O'Malley and Ed Long, bet any money or other valuable things on a game of cards? A. I cannot say whether I did or not. Q. State whether you saw them playing cards. If so, what transpired? A. Somewhere along about that time I went into a room of a certain house, and saw defendants, Ed Long and Miles O'Malley, and one Treadway and two other fellows whom I did not know, and whom I do not now know, playing cards. They were all five playing. I saw one of them pass something across the table which I took to be a bill. It was folded up, and I could not see any figures on it, but it looked like a bill. I do not remember which one it was [that] passed it across the table, but I believe Miles O'Malley is the one that got it. Cross Examination: Q. Can you state what kind of a game they were playing? A. No, I do not know. I was not there very long. Q. Do you know for what purpose the bill, if it was a bill, was passed from one to the other? A. I do not; I cannot say."

We do not agree with the contention of counsel for defendant that the evidence did not warrant the verdict. In reaching a conclusion upon a given state of facts, the members of

the jury necessarily apply the experience and knowledge used in the ordinary affairs of life. It is a matter of common knowledge that all forms of paper money are commonly called "bills," and we think that the jury, from the state of facts in evidence in this case, might legitimately infer that the witness was speaking of some form of paper currency, but on account of the manner in which the bill was folded he was unable to testify of what denomination it was. Of course, it is possible that it might have been a bill of account presented by one of the players to the other for payment; but the jury had a right to use their common sense, and might have inferred, as their verdict shows they did infer, that the bill referred to by the witness represented money used by the players in betting on the game of cards. This is the natural impression that would have been made upon the minds of reasonable men by the use of the word "bill" in the connection in which it was spoken.

The defendant, Ed Long, was one of the players in the game, and the jury were warranted under the facts and circumstances adduced in evidence in finding him guilty.

The judgment will be affirmed.

KOONS v. MARKLE.

Opinion delivered April 25, 1910.

1. APPEAL AND ERROR—DECREE PRO CONFESSO.—Upon a defendant's appeal from a decree rendered by default the only question is whether the allegations of the complaint are sufficient to authorize the relief granted by the decree. (Page 574.)
2. EQUITY—WHEN EXHIBITS CONTROL AVERMENTS OF PLEADING.—Where a bill in equity for specific performance of a sale of land alleges that the contract is contained in exhibits to the complaint, the averments of such exhibits will control the allegations of the complaint; and where the exhibits show that no contract of sale was entered into, a judgment by default on the complaint will be reversed. (Page 574.)

Appeal from Craighead Chancery Court; *Edward D. Robertson,* Chancellor; reversed.

STATEMENT BY THE COURT.

This suit was instituted by the appellee, Minor M. Markle, in the Craighead Chancery Court for the Western District, against the appellant, J. A. Koons.

The appellee in his complaint alleges that the appellant was the owner of the southwest quarter of the northeast quarter and the southeast quarter of the northwest quarter of section 8, township 13 north, range 3 east; and that on or about the 25th day of July, 1909, the appellant, Koons, contracted and agreed to sell and convey to the appellee the said land at and for the consideration of $700, the conveyance to be made by deed with covenants of warranty; and that the said contract was evidenced and ratified by certain correspondence between appellant and appellee; and that the copies of said correspondence were attached as exhibits to the complaint. The appellee says further in his complaint that he had agreed and contracted to sell the said lands to other parties; says that he had tendered to the appellant the said $700, and demanded deed conveying to him the said lands; and that the said appellant failed, neglected and refused to excute the said deed and convey the land.

The prayer of the complaint was for specific performance of the alleged contract. The exhibits referred to in the complaint are certain letters written by Koons to Markle and the replies thereto. Service of summons was duly had upon appellant. Appellant failed to answer, but made default.

When the cause was reached upon the call of the calendar, the court found the issues in favor of appellee, and a decree was entered in accordance with the prayer of the complaint. The case is here on appeal.

Basil Baker, for appellant.

No contract to convey was made. 76 Ark. 261; 56 Am. Rep. 371.

Charles D. Frierson, for appellee.

The only question is, does the complaint sustain the decree? It does. 107 S. W. 179; 44 Ark. 56; 41 Ark. 42; 82 Ark. 455. It is not necessary for plaintiff to file with his complaint papers which are mere instruments of evidence. 22 Ark. 10; 107 S. W. 179; 56 Ark. 37; 38 Ark. 128; 32 Ark. 131; 37 Ark.

542; 34 Ark. 534; 33 Ark. 593; *Id.* 543; 53 Ark. 479; 35 Ark. 470. If such papers are filed, they must, in determining the sufficiency of the pleadings, be disregarded. 152 Ind. 197; 52 N. E. 991; 149 Ind. 363; 48 N. E. 642; 149 Ind. 554; 49 N. E. 455; 140 Ind. 158; 39 N. E. 443. The objection to the failure to file a copy of the deed with the complaint cannot be reached by demurrer. 27 Ark. 369; 32 Ark. 450; 31 Ark. 534; 33 Ark. 593; 37 Ark. 542.

HART, J., (after stating the facts). "The only question for the consideration of the Supreme Court, upon a defendant's appeal from a default decree duly rendered against him, is, whether the allegations of the complaint are sufficient to authorize the relief granted by the decree." *Benton* v. *Holliday,* 44 Ark. 56; *American Freehold Land & Mortgage Co.* v. *McManus,* 68 Ark. 263.

The complaint alleges that appellant contracted and agreed to sell and convey "to appellee certain lands for a consideration of $700, which contract and agreement is evidenced and ratified by certain correspondence between the parties hereto, copies of which are attached as exhibits and asked to be made parts hereof." Thus it will be seen that the complaint alleges that whatever contract was had between the parties was contained in the exhibits, which were made a part of the complaint and became a part of the record. Hence the exhibits, being the alleged contract, were the foundation of the action, and, according to the well established rule in equity, will control the averments of the complaint. *Beavers* v. *Baucum,* 33 Ark. 722; *Buckner* v. *Davis,* 29 Ark. 444; *American Freehold Land & Mortgage Co.* v. *McManus, supra.*

We have not set out the exhibits, as they are somewhat voluminous. It is sufficient to say that we have carefully considered them, and that they do not show that an agreement for the sale of the land in question was entered into between the parties to the suit, but on the contrary negative the idea that such contract was made. The letters of appellee were merely offers to purchase on his part; and the letters of appellant show that he merely considered the offer, but they do not show that such offer to purchase was ever accepted by him. Therefore, the allegations of the complaint do not establish a contract between the parties for the purchase or sale of the land

in question, and do not authorize the relief granted by the court.

The decree will be reversed, and the cause remanded with directions to grant appellee leave to amend his complaint so as to entitle him to the relief prayed for, if he is advised that he can do so; or in default thereof that the complaint be dismissed for want of equity.

WILLIAM BROOKS MEDICINE COMPANY v. JEFFRIES.

Opinion delivered April 25, 1910.

EVIDENCE—CONTRADICTING WRITTEN CONTRACT.—In a suit upon a written order for the sale of goods, defendant may prove that the writing does not contain all of the contract, which was written by plaintiff's salesman, and part of which, by mistake or fraud of such salesman, was not transmitted to plaintiff.

Appeal from Franklin Circuit Court; *Jeptha H. Evans,* Judge; affirmed.

U. L. Meade and *G. W. Barham,* for appellant.

He who relies upon a contract has the burden of showing that the minds of the parties met in making it. 38 Mich. 159; 1 Mont. 363; 3 Pa. 573. Delivery is an essential element in the execution of a written contract. 5 Col. App. 303; 117 Ill. 493; 52 N. Y. 570; 113 N. C. 442; 75 Va. 309. The parol evidence tending to impeach the contract sued on was erroneously admitted. 4 Ark. 179; 5 Ark. 672; 13 Ark. 593; 16 Ark. 511; 20 Ark. 293; 31 Ark. 411. Defendant will not be heard to say that he did not know what the contract contained. 71 Ark. 185; 86 Ark. 538; 88 Ark. 213. Each litigant has a right to have his theory of the case submitted to the jury. 14 Ark. 430; 31 Ark. 684; 9 Ark. 212; 13 Ark. 317; 6 Ark. 156.

W. W. Cotton, for appellee.

A verdict on conflicting evidence will not be disturbed on appeal because it seems to be against the preponderance of the evidence. 73 Ark. 377; 67 Ark. 531; 76 Ark. 326.

HART, J. Wm. Brooks Medicine Company, of which Wm. Brooks was sole proprietor, sued I. F. Jeffries before a justice of the peace in Franklin County for a balance alleged to be due on account. The plaintiff recovered judgment for $76.50, and the defendant appealed to the circuit court. The case was there tried before a jury, which returned a verdict for plaintiff for $8.35. The court rendered judgment upon the verdict, and the plaintiff has appealed to this court.

The plaintiff was engaged in selling drugs, and one of his traveling salesmen solicited and procured a written order from the defendant for a bill of drugs.

The plaintiff introduced in evidence the written order for the goods, signed by the defendant, which showed the sale to be unconditional. Brooks testified that this constituted the sole contract between the parties, and that the sum of $80.70 was due and unpaid.

The defendant, Jeffries, testified that the sale was on commission, and that all goods unsold by a certain date were to be returned to the plaintiff, and further stated:

"Mr. Inscor (the salesman of plaintiff) said: 'I will put it on commission, and come around November 1 and take up all the medicine you don't sell.' He said that he would come and take it up himself. I says: 'It is some trouble to take it back to Mulberry eight or ten miles,' and he said: 'I will come back myself and take it out of your house.' I said: 'If that is all right with Mr. Brooks, I will take the order.' We made out the order then and there, and there were some parties present in the office there. He wrote the order up—I called him Doctor—and I says: 'Doctor, you will write on the back of this order a statement to Brooks, so he will understand,' and he did, as I thought. He wrote on the back of some sheet, but he must have turned two sheets, the sheets were very thin.

"Q. Was that the effect of that agreement? A. He wrote to Brooks to send the medicine out. Q. Just proceed and tell what that written agreement or contract was on the back. A. He wrote Brooks a little note, and asked him to send it out, that it was all right, and that the order was on commission, and signed his name. The reason he did that, he said, was because he would not be there; that he was going on to sell medicine, and would not be at home. He told me his office was

in Memphis. He wrote and told Brooks to send the medicine out."

The principal ground of reversal urged by counsel for plaintiff is that the evidence does not support the verdict.

Brooks testified that no contract was sent to the plaintiff except the written order, which is admitted to be unconditional. The defendant, however, testified that the written order as introduced in evidence does not contain the contract as executed by him. He testified that there was a clause in the contract which provided that the sale was on commission, and that all goods unsold by the 1st of the following November should be returned to plaintiff, and that this was written on the back of one of the order sheets.

The absence of the clause from the back of the order sheet is not explained by direct testimony; but the defendant testified that the sheets were thin, and Dr. Inscor may have turned over two sheets by mistake. Inscor was not introduced as a witness, and the reason for not doing so was unexplained. The testimony shows that he was anxious to make a sale. The jury may have inferred, as suggested by defendant, that Inscor turned over two sheets when he wrote the clause in question on the back and sent the order in without discovering his mistake; or they may have found that he did this designedly; for they were the exclusive judges of the weight to be given to the evidence. By their verdict they have said that the minds of the parties never met on the same form of contract. Hence the testimony adduced by the defendant did not tend to vary or contradict the written contract, but tended to show that no written contract was entered into of the kind introduced in evidence by the plaintiff as the basis of his action. *Main* v. *Oliver,* 88 Ark. 383; *Barton-Parker Manufacturing Co.* v. *Taylor,* 78 Ark. 586.

Counsel for plaintiff, in their brief, have not argued any objections to the instructions of the court, hence we need not discuss them. They urge upon us that the court should have instructed the jury that the burden of proof was upon defendant to establish the contract as contended for by him. No such instruction was asked by the plaintiff, and the question is therefore not presented for our consideration.

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

HOME FIRE INSURANCE COMPANY, OF MCALESTER, OKLAHOMA, v. STANCELL.

Opinion delivered April 25, 1910.

1. INSURANCE—PAYMENT OF PREMIUM—AUTHORITY OF AGENT.—An insurance agent authorized to make terms of insurance, to issue policies by countersigning and delivering same, and to collect the premiums therefor, is authorized to accept the promissory note of a third party in lieu of the payment of a premium. (Page 580.)
2. SAME—SUFFICIENCY OF PAYMENT.—Where an agent having authority to do so accepted the notes of a third party in lieu of a premium, such payment was binding on the insurance company, notwithstanding the notes stipulated that the insurance policy should be void as long as the notes remained partly due and unpaid, if such stipulation was not contained in the policy. (Page 581.)
3. SAME—FORFEITURE FOR NONPAYMENT OF PREMIUM—WAIVER.—An insurance company will be held to have waived a forfeiture on account of failure of the insured to pay the premium notes where its conduct led the insured to believe that such notes would be presented to the insured for payment, and it failed to present them. (Page 582.)
4. SAME—DAMAGES AND ATTORNEY'S FEES.—Acts 1905, p. 307, providing for 12 per cent. damages and for an attorney's fee to be allowed against fire, life, health or accident insurance companies where they fail to pay their losses within the time specified in the policy, has no application to an action against a cyclone insurance company for a loss caused by cyclone. (Page 582.)
5. SAME—EFFECT OF AGREED STATEMENT.—An agreed statement, in a suit against a cyclone insurance company, that if no defense was made to the suit the recovery would be for certain named amounts for the loss, damages and attorney's fees will not be held to preclude the court from determining whether the insurance company was liable for the damages and attorney's fees. (Page 583.)

Appeal from Cleburne Circuit Court; *Garner Fraser*, Special Judge; reversed in part.

Walter D. Jacoway, for appellant.

When a policy of insurance stipulates that it should be void during the time the policy note or any part of it should remain unpaid, after becoming due, the insurer is relieved from liability during the continuance of such default. 74 Ark. 507; 85 Ark. 337; 75 Ark. 25. The burden of proof is on the insured to show a waiver of forfeiture by the insurer. 67 Ark. 584; 13 Ency. Ev. 539, 1020. And the proof must be clear and convincing. 13 Ency. Ev. 1020, and 29 Ency. Ev. 1105.

U. S. Bratton, for appellee.

If agreed to by the parties, payment may be made by check or note. 133 N. C. 179; 9 How. 390; 46 Atl. 1005; 59 Neb. 451; 81 N. W. 312; 165 N. Y. 608. A draft on a third person, if accepted and received by the insurer, constitutes payment of the premium. When the insurer is to look to a third person for the payment of the premium, it will be treated, so far as the insured is concerned, as fully paid. 72 Miss. 333. The findings of the court are as conclusive as the verdict of a jury. 56 Ark. 621; 57 Ark. 93; *Id.* 483; 90 Ark. 372; *Id.* 375; *Id.* 494; *Id.* 512; 88 Ark. 587; 84 Ark. 359.

FRAUENTHAL, J. This was an action instituted by Mrs. E. M. Stancell, the plaintiff below, to recover upon a policy of insurance, by the terms of which the defendant insured the plaintiff's house against loss by cyclone. In its answer the defendant pleaded that notes had been executed for the premium of the insurance, which were not paid at maturity, and that thereby the policy was avoided.

The cause was tried by the court sitting as a jury, who made a finding of fact and of law in favor of plaintiff; and a judgment was entered accordingly. From this judgment the defendant prosecutes this appeal.

The defendant is a foreign insurance company, and W. L. Burt was its agent at Heber, Ark., and issued the policy of insurance on the property situated at that place. This agent was authorized to make terms of insurance, to issue such policies as are involved in this case by countersigning and delivering same, and to collect the premiums given therefor. He solicited the insurance of the property from plaintiff; and, after they agreed upon the amount of the policy and the premium, he wrote the policy at his office, and returned to plaintiff's house to deliver same to her. He also brought three notes, which he had drafted for the premium, and which he had expected her to execute. When he arrived at the plaintiff's house, he found that she was not there, but found her husband, A. C. Stancell. He told Mr. Stancell that he had the policy duly executed, and wanted the plaintiff to sign the notes. Mr. Stancell told him that he would sign the notes himself if he would accept him. The agent testified that he then agreed to accept the notes of A. C. Stancell, and that the notes were then signed by A. C.

Stancell, and that he "accepted them in payment of the premium." The notes were dated October 10, 1908, and were due respectively on the 16th day of November and December, 1908, and January 16, 1909.

In the notes it was stated that they were given "for premium on my insurance applied for," and if not paid at maturity the contract for insurance shall be null and void, so long as the notes or any part of same remained due and unpaid. The policy was issued to and insured Mrs. E. M. Stancell; and it does not appear from the testimony that there was any provision in the policy that same should be avoided by the failure to pay the notes, nor that the plaintiff was in any way a party to said notes. At the time of the execution of said notes and continuously to the time of the trial of the case A. C. Stancell was perfectly solvent, but the plaintiff was not. The notes were forwarded by the agent to the defendant, and when the first note became due it notified A. C. Stancell by mail of its maturity, and asked that payment be sent to it at its home office at McAlester, Okla., at which place the notes stated that they were payable. Thereupon A. C. Stancell wrote to defendant that it was his understanding that the notes were to be paid to the agent at Heber, and that he did not care to send payment to the home office; and that, if defendant would not send the notes to its agent at Heber to be there paid, it could cancel the policy. Thereupon the defendant sent said first note to its agent at Heber with direction to collect, which he did. The defendant did not send the other two notes to its agent, and on this account they were not paid at the time of the loss, which occurred on April 29, 1909.

It is claimed by plaintiff that the premium for the policy was paid when the defendant's agent took and accepted the notes of a solvent third party in payment of such premium. And under the testimony adduced in this case we think this position is correct. The payment of the premium is ordinarily a condition necessary to the operation of a policy of insurance, and usually a provision to that effect is made in the policy. But a valid payment of the premium may be made by property or note or the obligation of another as well as by money; and if something other is accepted in lieu of money, the sole question to be determined is whether or not the same was accepted as

actual payment of the premium. Certainly, the company could make such agreement for the payment of the premium, and we think its agent had such authority under the evidence in this case. In the case of *American Employers' Liability Ins. Co.* v. *Fordyce,* 62 Ark. 562, this court quotes with approval the following from *Miss. Valley Ins. Co.* v. *Neyland,* 9 Bush 430: "A general agent of an insurance company whose business it is to solicit applications for insurance and receive first premiums has the right to waive the condition requiring payment in money and to accept the promissory note of the applicant or of a third party in lieu thereof, or to undertake to make payment to the company himself; and when the cash payment is actually waived in either of these modes, the contract binds the company, notwithstanding the recital in the policy that it is not binding until the first premium is paid in cash." Even if it had been shown in this case that the policy contained a provision avoiding it on the failure to pay the premium or the notes given therefor, the agent waived such provision by accepting as actual payment of the premium the notes of A. C. Stancell. This agent was authorized to make contracts of insurance, and to issue policies by countersigning and delivering same, and to collect the premiums. The general power thus given him also gave him authority to accept the notes of another in full payment of the premium, if it was done in good faith. This action by the agent bound the company. *Mutual Life Ins. Co.* v. *Abbey,* 76 Ark. 328; *German-American Ins. Co.* v. *Humphrey,* 62 Ark. 348; *Phoenix Ins. Co.* v. *Public Parks Amusement Co.,* 63 Ark. 187; *Miller* v. *Life Ins. Co.,* 12 Wall. 285; 16 Am. & Eng. Ency. Law, 858.

The agent testified that A. C. Stancell was perfectly solvent, and that he accepted his notes in actual payment of the premium of the policy. This then became a payment of such premium, and the policy could not thereafter be avoided because the notes were not paid. The stipulations in the notes that "my insurance" should be null and void as long as the notes remained past due and unpaid would not have that effect. The notes were executed by A. C. Stancell, and the contract therein was only his contract; it was not the contract of the plaintiff. It is not shown that the policy, which was the only contract into which she entered, contained any provision avoiding it

upon the nonpayment of these notes. The provision to that effect in the notes of a third party were therefore nugatory. 2 May on Insurance, § § 345, 345e; *Dwelling House Ins. Co.* v. *Hardie,* 37 Kan. 674; *Union Central Life Ins. Co.* v. *Taggart,* 55 Minn. 95; 16 Am. & Eng. Ency. Law 865.

Furthermore, we are of opinion that the defendant waived its right, if it had any, to declare a fortfeiture of the policy by reason of a failure to pay the notes under the circumstances of this case. When the first note matured, the maker of the three notes wrote to defendant that he understood that the notes were to be sent to its agent, Burt, at Heber, to be collected by said agent at said place; and, in effect, asking that the notes should be sent to the agent at Heber to be by him presented for payment and collected. The defendant, in effect, by its conduct agreed to this; and in conformity with such agreement sent the first note to its agent at Heber for presentation for payment and collection; and it was promptly paid. By this conduct it led the maker of the notes to believe that it would send the other notes to the same place before payment thereof would be demanded or expected, and before any forfeiture of the policy would be insisted on. This it failed to do, and thereby it misled the maker. Refusal of payment of the notes was never made; on the contrary, the testimony shows that they would have been promptly paid at maturity if they had been presented at Heber, as the maker had a right to expect would be done on account of the actions and conduct of defendant.

"Forfeitures are so odious in law that they will be enforced only where it is by the clearest evidence shown that such was the intention of the parties. If the practice and conduct of the company and its course of dealing leads the insured to believe that by conforming to that course no forfeiture will be insisted on, the company will not be allowed to set up such forfeiture against one in whom their conduct has induced such belief." 2 May on Ins. § 361.

The circuit court rendered a judgment in favor of the plaintiff for the amount of the loss and also for twelve per cent. damages upon the amount of such loss and attorney's fees. These amounts for damages and attorney's fees were allowed under the provisions of the act of the General Assembly approved March 29, 1905 (Acts 1905, p. 307). But the provis-

ions of that act only apply in cases where the loss occurs and a fire, life, health or accident insurance company is liable therefor. It does not provide for the allowance of such damages and attorney's fees in case where the loss is caused by a cyclone, and a cyclone insurance company is liable therefor. The act is highly penal, and it should not be held to apply to any loss or company that is not therein expressly named. It therefore should not be held to apply to cases where the loss is caused by cyclone, and a cyclone insurance company is liable therefor.

It is urged by counsel for plaintiff that the court did not err in making these allowances, because in the agreed statement of facts it was provided that if no defense was made to the suit the recovery would be had for certain named amounts for the loss, damages and attorney's fees. But we think that the parties intended by said agreed statement of facts only to provide the amount that should be recovered on each item sued for in the event that the court should determine that the plaintiff was under the law entitled to recover such items.

We are therefore of the opinion that the court erred in allowing the amounts of said damages and attorney's fees, but that in all other respects the judgment is correct.

So much of the judgment as allows recovery for damages and attorney's fees is reversed, and the cause of action as to those items is dismissed; in all other respects the judgment is affirmed.

BATTLE and HART, JJ., dissent.

FIRST NATIONAL BANK OF WALDRON *v.* WHISENHUNT.

Opinion delivered April 25, 1910.

1. SCHOOL DISTRICTS—POWERS.—A school district is a *quasi* public corporation, and can exercise no powers beyond those expressly conferred by statute, or which arise therefrom by necessary implication. (Page 585.)
2. SAME—POWERS OF OFFICERS.—All persons who deal with school officers are presumed to have full knowledge of the extent of their powers. (Page 585.)
3. SAME—AUTHORITY TO BUY MAPS AND CHARTS.—Under Kirby's Digest, § 7620, providing that school directors may expend annually out of the common school fund not more than twenty-five dollars for maps,

charts, etc., provided they meet the approval of the State Superintendent in price and merit, and that the expenditure be authorized by a majority of the qualified electors at the previous annual school meeting, a purchase of charts, made without the approval of the electors at the annual school meeting, is invalid. (Page 586.)

4. SAME—UNAUTHORIZED CONTRACT—RATIFICATION.—A contract for the purchase of educational charts made by the directors of a school district, which is invalid because beyond the scope of their powers, cannot be ratified or enforced because the charts were received by and are still in the possession of the school district. (Page 586.)
5. SAME—SCHOOL WARRANTS—INNOCENT HOLDER.—There can be no innocent holder of a school warrant issued without power or contrary to law. (Page 587.)
6. SAME—INVALID WARRANTS—LIABILITY OF DIRECTORS.—Where school directors signed their names to invalid school warrants, for the purpose of binding the district merely, they will not be personally liable on the contract if the other contracting party had equal means of knowledge as to their authority. (Page 587.)

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

Appellant, *pro se.*

A contract for employment of a school teacher made at a meeting of two directors, of which the third had no notice, will be binding on the district if acquiesced in and ratified by the entire school board. 81 Ark. 143. Fraud must be proved, when relied on, and the burden is on the pleader. 63 Ark. 22. The acceptance and use of the charts by the school board was a ratification of the contract of purchase. 67 Ark. 236.

A. A. McDonald, for appellees.

The electors of the district never authorized the purchase of said charts. No two of the directors were together to make a contract. Therefore, none was made, and the district is not bound. 52 Ark. 511; 64 Ark. 489. The first of these notes was barred by the statute of limitations. 52 Ark. 454; 56 Ark. 68. There can be no innocent purchaser of paper issued by a municipal corporation. 32 Ark. 634. The contract was made in violation of section 7620, Kirby's Digest, and plaintiff cannot recover.

FRAUENTHAL, J. This was an action instituted by appellant against School District No. 33 of Scott County and its three directors on two warrants or orders of said school dis-

trict. On December 10, 1902, W. W. Tutwiler made a contract with two of the directors, by which he sold to the school district charts for $85. For the purchase money thereof three warrants of the school district were executed, one for $35 and the other two for $25 each. The warrant for $35 was paid immediately, and the two other warrants are involved in this suit. These two warrants stated on their face the consideration thereof, and were made payable on August 1, 1903 and 1904, respectively. Some time after the execution of the warrants the charts were received by and were in the possession and use of the school district at the time of the institution of this suit. The warrants were sold and transferred to appellant some time prior to August 1, 1903. It appears from the testimony that the electors of said school district did not authorize the expenditure for said charts at the annual election previous to the alleged purchase thereof nor at any election thereafter; and it also appears from the testimony that no attempt was ever made to secure the approval of the State Superintendent as to the price and merit of said charts. The cause was tried by the court sitting as a jury, who made a finding and rendered judgment in favor of appellees.

A school district is by the statutes of this State made a body corporate; but it is intended as an agency in the administration of public functions. It is a *quasi* public corporation, and can exercise no powers beyond those expressly conferred by statute, or which arise therefrom by necessary implication. The powers and duties of the directors of a school district are derived only from legislative authority, and they can exercise no power that is not thus expressly or by necessary implication granted by statute. A contract entered into by the directors, therefore, which is beyond the powers conferred on them by statute to make is null and void. *Parsel* v. *Barnes*, 25 Ark. 261; Throop on Public Officers, § § 21, 576; 25 Am. & Eng. Ency. Law, 56; 28 Cyc. 279; 1 Dillon on Municipal Corporations, § 25; *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 34. And all persons who deal with the school officers are presumed to have full knowledge of the extent of the powers of these officers to make the particular contract. Throop on Public Officers, § 551.

By section 7620 of Kirby's Digest it is provided that the directors of a school district may expend annually out of the common school fund not more than twenty-five dollars for maps, charts, etc.; but it is there provided further that, before such expenditure can be made, the maps, charts, etc., must meet the approval of the State Superintendent in price and merit, and the expenditure must also be authorized by a majority of the electors of the school district at the annual election previous thereto. This statute is an express limitation on the powers of the directors to purchase charts. They had no power, therefore, to purchase these articles until authorized to do so by the electors of the district in the manner provided by the above statute; and the burden was on the plaintiff to establish the fact that they were so authorized. *School District* v. *Perkins,* 21 Kan. 389. The evidence in this case tends to show that the directors were not authorized by the electors to purchase the charts; and the contract therefor was therefore made without the power to do so, and was invalid. *School District* v. *Perkins, supra; Western Pub. House* v. *School Dist.,* 94 Mich. 262; *Johnson* v. *School District,* 67 Mo. 319; *Clark* v. *School Directors,* 78 Ill. 474; *Taylor* v. *District Tp.,* 25 Iowa 451; *Honaker* v. *Board of Education,* 24 S. E. 545.

It is urged by appellant that the contract has been ratified by the receipt and use of the charts by the school district. But where a contract made by the directors of a school district is invalid because it was beyond the scope of their powers, it cannot be ratified by acceptance. The statute expressly provides that such contract can only be authorized by the electors at a meeting regularly called and by a vote cast at an election. This was a necessary condition to be observed before there could be any power to make such a contract, and it could not therefore be ratified except by the observance of those conditions that were essential to the making of a valid contract in the beginning, if it could be ratified in any event. In the case of *Thomas* v. *Railroad Company,* 101 U. S. 71, it is said: "The broad doctrine is established that a contract not within the scope of the powers conferred on the corporation cannot be made valid by the assent of every one of the shareholders, nor can it by any partial performance become the foundation of a right of action." *Marsh* v. *Fulton County,* 10 Wall. 676.

In the case of *Taylor* v. *District Tp.*, 25 Iowa 451, in speaking of the ratification by a school district of an unauthorized contract, the court says: "The electors composing the corporate body act by and through specific agencies and in the mode prescribed by law. They cannot, as individuals, when not convened at the times and places contemplated by law, vote to raise a tax or authorize the making of a contract. * * * The law contemplates action by them in their aggregate capacity when duly and properly assembled, and not the action of each elector on the streets, at his store or shop. * * * To illustrate, the assent of a majority of the electors, when not convened to levy a tax, would not authorize its levy. Neither would their subsequent assent in the same manner ratify or make it valid. For, if so, an act originally without validity could by a like illegal or unauthorized act be made valid. And, as the electors could not thus be held as ratifying their own act, certainly they could not as to an act of the board where there was want of power."

And in that case it was further said: "Neither the use of the maps in the school nor the failure to object * * * would amount to a ratification." *Johnson* v. *School District,* 67 Mo. 319; *Clark* v. *School Directors,* 78 Ill. 474; 25 Am. & Ency. 48.

In the case at bar the school directors were without power to enter into a contract for the purchase of the charts, and by statute were, in effect, prohibited from doing so. Such a contract was not only unauthorized, but was contrary to law, and therefore void. Such a contract therefore could not be ratified or enforced because the charts were received by and are still in the possession of the school district.

It is urged by appellant that it is a *bona fide* purchaser of the warants for value and before maturity. Waiving the question as to whether or not the warrants could have been made payable at any time other than on demand, the orders or warrants of a school district are not negotiable instruments, in the sense of the law merchant. Therefore, there can be no innocent holder of a school warrant issued without power or contrary to law. *Lindsey* v. *Rottaken,* 32 Ark. 619; *Mayor* v. *Ray,* 19 Wall. 468; *Wall* v. *Monroe County,* 103 U. S. 74; *Ouachita County* v. *Walcott,* 103 U. S. 559; 28 Cyc. 1570.

The appellant is not entitled to hold the directors personally liable on these warrants. These warrants upon their

face show that they are the obligations solely of the school district; and the evidence shows that the directors did not intend to assume any personal liability in issuing them. The contract was made solely in the name of the district, and was only for its use and benefit. The directors were only acting therefore as public agents, and, according to the intent of all the parties to the contract, with the purpose of expressly binding the district. They did not incur personal liability by signing their names thereto as directors. *Slone* v. *Berlin,* 88 Iowa 205; *Goodwin* v. *Common School District,* 23 S. W. 964, 29 Cyc. 1446; Throop on Public Officers, § 774. Nor are the directors personally liable because the contract was beyond their authority. The evidence shows that they acted in good faith and without any act or word of misrepresentation on their part. On the other hand, they made the contract at earnest solicitation of the other party and with his full knowledge that no vote had been cast by the electors authorizing the purchase of the charts. The payee of the warrants and the appellant had all the means of knowledge as to the authority of the directors to make the contract that was possessed by the directors. Neither was deceived or misled into the making of the contract or the purchase of the warrants. "An officer who in good faith and under misapprehension makes a contract in behalf of the municipality which is invalid for want of authority to make it will not be held personally liable on the contract where the other contracting party has equal means of knowledge as to his authority." 28 Cyc. 469; 23 Am. & Eng. Enc. Law, 380-381.

The judgment is affirmed.

PATTISON v. SMITH.

Opinion delivered April 25, 1910.

1. LEVEES—CONCLUSIVENESS OF TAX SALE.—Where the land of a nonresident was proceeded against for levee taxes, and was sold under a decree which recited that published notice was given as required by the statute, such recital is conclusive upon a collateral proceeding. (Page 591.)

2. SAME—DECREE ENFORCING LIEN—COLLATERAL ATTACK.—Under Acts 1895, p. 89, providing that suits to enforce the lien of the St. Francis Levee

District on lands for levee taxes shall be *in rem,* and that "it shall be immaterial that the ownership of said lands may be incorrectly alleged," a decree enforcing such lien is not subject to collateral attack because the nonresident owner of a delinquent tract of land was not named as a party defendant to the suit. (Page 592.)

3. SAME—DECREE ENFORCING TAX LIEN—IMPEACHMENT.—A decree based upon constructive service of process, enforcing the lien of the St. Francis Levee District for taxes alleged to be due on land is conclusive upon all persons who have or claim any interest in the land, and cannot be impeached collaterally by showing the actual payment of the taxes for which the land was condemned. (Page 592.)

4. JUDGMENTS—IMPEACHMENT FOR FRAUD.—A judgment or decree cannot be impeached for fraudulent acts or testimony, the truth of which was or might have been in issue in the proceeding which resulted in the judgment assailed, but must be impeached by proof of a fraud practiced in the procurement of the judgment itself. (Page 593.)

Appeal from St. Francis Circuit Court; *Hance N. Hutton,* Judge; affirmed.

Calvin Perkins and *John Gatling,* for appellant.

In determining whether or not a deed sufficiently describes land, it will be considered in connection with the plats of the government survey. 73 Ark. 221; 40 Ark. 237; 68 Ark. 554. The act of April 2, 1895 (p. 91), contains no limitation upon the right to attack a decree that is void for want of jurisdiction. 83 Ark. 544. If the decrees were not void on their face, plaintiff has the right to attack them in equity for fraud or mistake. 70 Ark. 157.

Norton & Hughes, for appellees.

The motion to transfer to equity was properly denied. 72 S. W. 992; 71 Ark. 222. There is no room for either to have an equitable title. 56 Ark. 391. The case was properly kept in the law court. 65 S. W. 337; 55 S. W. 548; 32 S. W. 599. Appellant's non-residence does not invest her with privileges that a citizen could not have. 21 Wall. 503; 40 Fed. 774; 47 Fed. 782.

FRAUENTHAL, J. This was an action of ejectment instituted by appellant to recover a tract of land in St. Francis County, Arkansas. The appellant claimed title to the land by mesne conveyances back to one who in 1838 had purchased the land and obtained a patent therefor from the United States. The

appellees claimed title thereto under a deed executed by a commissioner of the St. Francis Chancery Court in pursuance of a decree of said court subjecting said land to sale for the nonpayment of levee taxes. The appellees objected to the patent and certain deeds upon which appellant founds her title, upon the ground that the description of the land in said patent and deeds is so imperfect as to render them ineffective to convey the land. We will, however, first determine whether or not the commissioner's deed and decree under which appellees claim title to the land are valid; for, if they are, they would be effective against the title asserted by appellant, even if the conveyances under which she claims are operative and valid.

The decree condemning the land to be sold for the nonpayment of levee taxes was rendered on December 15, 1897, at a regular term of the St. Francis Chancery Court. The suit upon which the decree is based was brought under and by virtue of the provisions of the act of the Legislature approved April 2, 1895, amendatory of the act of the Legislature of February 15, 1893, creating the St. Francis Levee District. Acts 1893, p. 24; Acts 1895, p. 88. These acts of the Legislature make the lands situated in said St. Francis Levee District subject to levee taxes, and provide that the payment thereof shall be enforced against the lands by suit, and that "said suit shall be conducted in accordance with the practice and proceedings of chancery courts in this State." The land involved in this litigation was situated in said St. Francis Levee District, and was subject to the payment of levee taxes. At the time of the institution of the suit for the enforcement of said levee taxes and up to the bringing of this ejectment suit the appellant, who claims to have been the owner of the land during all that time, was a nonresident of the State, and had no actual knowledge of said suit or the proceedings thereunder. It is provided by said acts of the Legislature that notice of the pendency of an action for the enforcement of the collection of levee taxes shall be given to nonresident owners by publication thereof in some newspaper published in the county in which the suit is pending for four weeks prior to the day of the term of court on which final judgment may be entered for the sale of the land. The act further provides that "said proceedings and judgment shall be in the nature of proceedings *in rem,* and it shall

be immaterial that the ownership of said lands may be incorrectly alleged in said proceedings; and said judgment may be enforced wholly against said land and not against any other property or estate of said defendant. All or any part of said delinquent lands for each of said counties may be included in one suit for each county, instituted for the collection of said delinquent taxes, etc., as aforesaid, and all delinquent owners of said lands, including those unknown as aforesaid, may be included in said one suit as defendants." The act further provides: "At any time within three years after the rendition of the final decree of the chancery court herein provided for, the owner of the lands may file his petition in the court rendering the decree alleging the payment of the taxes on said lands for the year for which they were sold, and upon the establishment of that fact the court shall vacate and set aside said decree."

The land herein was proceeded against in said suit as being owned by a nonresident, and was noted in the complaint as owned by the Memphis Land & Timber Company. The appellant, A. H. Pattison, who claims that she was then the owner of the land, was not in name made a party to said suit, but as above stated she was a nonresident. Notice of the pendency of the suit against said land was made and published in the manner and for the time prescribed, and the decree recites that such notice was given as required by the statute. It also finds that the levee taxes on said land for the years of 1895 and 1896 were due and unpaid, and renders judgment for the amount thereof against said land and orders the sale thereof.

It is conceded that the sale of said land under said decree and the confirmation thereof was made in manner prescribed by law. But it is urged that the decree and sale thereunder are void for the reason that appellant had paid the levee taxes on said land for the said years of 1895 and 1896, and because the land was owned by appellant, who was not named as a party defendant in said suit enforcing said taxes.

The St. Francis Chancery Court acquired jurisdiction over the subject-matter of enforcing the payment of levee taxes, which were alleged to be due and unpaid upon the land involved in this suit, by virtue of the said acts of the Legislature, and that jurisdiction became complete when it gave the notice of the

pendency of the suit in the manner provided by the act. The land was owned by a nonresident, and the chancery court found, and its decree recites, that published notice was given as required by the statute. This finding and recital of the decree is conclusive upon a collateral proceeding. *McLain* v. *Duncan,* 57 Ark. 49; *McConnell* v. *Day,* 61 Ark. 464; *Porter* v. *Dooley,* 66 Ark. 1; *Porter* v. *Tallman,* 68 Ark. 211; *Palmer* v. *Ozark Land Co.,* 74 Ark. 253.

The act provides that "it shall be immaterial that the ownership of said lands may be incorrectly alleged in said proceedings," and that the suit and decree shall be in the nature of proceedings *in rem.* It does not require that the true owner be named as a party to the suit; but only provides that the notice of the pendency of the suit as to the land, if it shall belong to a nonresident, shall be published for the time and in the manner therein named. The land involved in this suit was owned by a nonresident, and notice of the pendency of the suit was published as required by the statute. This was sufficient, and gave the court complete jurisdiction; and its decree is not subject to collateral attack because the appellant who may have been the owner of the land was not named as a party defendant to that suit. This very question was decided by this court and to that effect in the case of *Ballard* v. *Hunter,* 74 Ark. 174. That case was taken to the Supreme Court of the United States and by that court affirmed. *Ballard* v. *Hunter,* 204 U. S. 241.

The St. Francis Chancery Court by virtue of said suit and notice acquired jurisdiction over the land involved in this action and the matter of enforcing the levee taxes against it which were alleged to be unpaid. In order to give it jurisdiction, it was not necessary that the taxes on the land should actually have been unpaid. The question as to whether or not the taxes on the land were delinquent was but an issue in the tax suit upon which the court passed. The essential steps to give it jurisdiction to pass upon that question had been taken. Its jurisdiction was as complete and effective as if it had secured personal service of process upon the owner of the land. And "a judgment rendered upon constructive service of process, the requirements of the statute having been complied with, is as much protected against collateral attack as one rendered upon personal service of process." The determination of every issue by the court,

having thus acquired jurisdiction in a proceeding *in rem,* is conclusive upon all persons who have or claim any right or interest in the subject-matter. The question as to the payment or nonpayment of the taxes is one of the very issues that the court passed on, and when it made its finding on that question it became conclusive upon collateral impeachment. In the case of *McCarter* v. *Neil,* 50 Ark. 188, this principle was enforced. A decree had been rendered upon constructive service of process subjecting certain land to the payment of taxes under what is known as the "overdue tax law." The decree was attacked by the owner of the land upon the ground that the taxes on the land for the very year for which it was sold under the decree had been actually paid. In that case this court said: "Such being the essential nature of tax suit provided for by the overdue tax law, the jurisdiction of the court as to a particular tract was not affected by the fact that the taxes upon that tract had previously been paid. And, since the objection does not go to the jurisdiction, the decree of the court condemning the land to sale is, so long as it stands unreversed and not vacated or set aside, conclusive upon the point that taxes were due."

The same ruling has been made several times by this court in cases where decrees for the enforcement of taxes have been attempted to be impeached collaterally by endeavoring to show the actual payment of the taxes for which the lands were condemned. *Williamson* v. *Mimms,* 49 Ark. 336; *Doyle* v. *Martin,* 55 Ark. 37; *Burcham* v. *Terry,* 55 Ark. 398; *Jefferson Land Co.* v. *Grace,* 57 Ark. 423.

In one of her pleadings the appellant alleged that the above decree was obtained by fraud, and asked that this cause be transferred to the chancery court for the purpose of setting aside said decree on the ground that it was obtained by fraud. But the only allegation of fraud, made in the pleading, was that the decree was founded upon the nonpayment of the levee taxes, and that the same were not actually delinquent but had been paid. It was therefore, in effect, an impeachment of the decree relative to a question of fact upon which the court had made a finding; and not such an allegation of fraud practiced upon the court in the procurement of the decree for which the decree could be set aside. As is said in the case of *Bank of Pine Bluff* v. *Levi,* 90 Ark. 166: "Such a decree is in effect the

judgment of a superior court, which may be set aside on appeal, but the validity of which cannot be attacked except on account of fraud. But the fraud which entitles a party to impeach a judgment must be a fraud extrinsic of the matter tried in the cause. It must not consist of any false or fraudulent act or testimony the truth of which was or might have been in issue in the proceeding before the court which resulted in the judgment that is thus assailed. It must be a fraud practiced upon the court in the procurement of the judgment." The court did not err in refusing to transfer the cause to the chancery court.

We are therefore of the opinion that the decree made in the suit for the enforcement of the levee taxes upon the land involved in this litigation is valid, and that the sale made thereunder is effective. It follows that the decree of the lower court upon the whole case is correct.

The decree is affirmed.

QUEEN OF ARKANSAS INSURANCE COMPANY v. PENDOLA.

Opinion delivered March 21, 1910.

FIRE INSURANCE—CHANGE OF POSSESSION OF PROPERTY INSURED.—Where a policy insuring personal property against loss by fire stipulated that the policy shall be void if any change takes place in its possession, the policy is avoided by a lease of the property, together with a change of possession, executed without the insurer's consent.

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

J. W. & M. House, for appellant.

Appellant is not liable because of repeated changes in the possession of the property insured, contrary to the terms of the policy, such changes being without appellant's knowledge and consent. An insurance company does not waive any forfeiture of anything of which it had no knowledge. 67 Ark. 588; 3 Cooley's Brief on Ins. 2467. The stipulation against changes in possession of the insured property was to guard against just such occurrences as happened in this case, *i. e.*, the property of the tenant in possession was saved, but the insured property

was left to burn. 69 Ark. 295; 58 N. E. 314; 36 Am. St. Rep. 905.

J. W. Blackwood, for appellee.

A change of tenants does not vitiate the policy where the property continues, as in this case, to be used for the same general purposes, *i. e.*, hotel purposes. 72 N. Y. 118; 18 Hun (N. Y.) 525; 58 Pa. 419; 8 R. I. 282; 1 Fed. 398; 2 Fed. 431; 2 Rob. (La.) 270; 114 Ia. 153.

BATTLE, J. This was an action by Tony Pendola against Queen of Arkansas Insurance Company on a policy of insurance of certain personal property against fire. In the policy was contained a stipulation in words as follows:

"If the property, or any part thereof, shall be sold or conveyed; or if the property now is, or shall become, incumbered by mortgage or otherwise; or if any change takes place in the title, use, occupation or possession thereof whatever, either by the death of the assured or otherwise; or if the interest of the assured in said property, or any part thereof, now is or shall become any other or less than perfect legal and equitable title and ownership, free from liens whatever, then and in each such case said policy shall be and become absolutely null and void."

Among the defenses pleaded by the defendant, it answered substantially as follows:

"That, prior to the burning of the property covered by insurance, the plaintiff conveyed and sold said property to Joe Cascio, who took possession of same without the knowledge and consent of the defendant company, and the policy thereby became null and void. That afterward Joe Cascio rented said property to Frank Mars, who took possession of same and continued to occupy the hotel for some weeks, in which the property was located, without the knowledge and consent of the defendant, and by reason thereof the policy became null and void.

"That prior to the alleged loss the said Frank Mars rented said property to one Claire Pearl Newton, and turned the possession and occupancy over to her, and she continued to occupy the hotel, and remained in possession of the property covered by insurance to the date of the fire, and that by reason of change

in occupancy, title and possession the policy became absolutely null and void."

The hotel in which the property insured was located at the time the policy was executed belonged to Joe Cascio. The defendant received a letter from plaintiff, informing it that he had sold the property to Cascio. Thereafter Cascio hired and delivered it to Frank Mars, and he held it for a short time, and then hired and delivered it to Claire Pearl Newton, and she held it until it was destroyed by fire. Defendant had no notice of the hire or change of the possession of the property from Cascio to Mars, or from Mars to Newton until after the fire.

The hotel in which the property insured and used was destroyed by fire on the 27th day of July, 1905. Some of the furniture in the hotel was saved, but all the property insured was consumed by fire. The reason given for not saving it was that there was not time to save all.

The plaintiff recovered judgment, and the defendant appealed.

The transfer of the property insured from Cascio to Mars and from Mars to Newton, without the consent of the defendant, avoided the policy. *Planters' Mutual Ins. Association of Arkansas* v. *Dewberry,* 69 Ark. 295.

An insurance company has the right to determine what property it will insure, and to make its liability for such insurance dependent on the occupant. This is a matter of contract. The insured has the right to determine what insurance he will accept; and when he enters into a contract with the insurance company in which the property insured is specified, and the insurance is made to depend upon the change of occupancy, he is bound by the contract, and he cannot change the occupancy of the property contrary to the terms of the policy and hold the insurer liable. He cannot change the contract. This is necessary for the protection of the insurer.

The transfer by plaintiff of the possession of property to Cascio by permission of the defendant did not authorize the transfer or change of possession to other persons. Cascio was the owner of the hotel in which the property insured was used, and was personally interested in protecting the property against fire. In so doing he was protecting his own. This may have been the inducement to permit the change to him. If it had

known of the subsequent changes, there was no such inducement to consent to them. The consent to the change of possession from one to another does not authorize subsequent changes. This would impair the protection such a stipulation was designed to secure, in depriving the insurer of the security it has in deciding in whose hands the property shall stand insured, for it is well known that the security of property depends much upon the character of the occupant. We are speaking now of changes of care, custody and control, and not of those changes which substitutes one servant for another, and does not affect the actual control of and interest in the property. Further than this it is unnecessary to go.

In *Hartford Fire Insurancee Co.* v. *Ross,* 23 Ind. 179, the court, in speaking upon this subject, said: "The object of the condition in the policy of insurance is evident. Each party to the contract is interested in knowing with whom the engagement is made. The insured looks to the reputation for responsibility, promptness and fairness of the corporation. The insurer looks, with an interest as earnest, to the integrity and business capacity of the insured—to the motive prompting the insurance. To them the contract is peculiarly a personal one; and the condition of the contract is that the persons with whom they enter into it shall remain the same. When the instrument was executed, they depended upon a certain amount of caution, skill and forethought in the care of the property, and they perhaps relied upon the moral honesty of some one or all of the insured to resist, in the future, any temptation to permit the destruction of the property, should it prove an unprofitable investment. Any change of interest may prove destructive of the prime motive for the contract. The introduction of a new partner may also introduce a dangerous element; the retirement of one member of the firm, or of one owner in the property, may withdraw also the personal integrity or the skilful care that induced the insurance."

In *Germania Fire Insurance Co.* v. *Home Insurance Co.,* 144 N. Y. 195, 199, the court said:

"We think it perfectly clear on principle that the sale of an interest in the insured property by Verdier Brown and the formation of a copartnership between the two rendered the policy void.

"The contract of insurance is peculiarly personal in its nature, and the success of the business of underwriting depends laregly upon what is known as the moral hazard.

"It is a well-established principle of the common law that every man has the right to determine with whom he will enter into contract obligations.

"An insurance company is induced to issue or withhold its policy after carefully scrutinizing the character of the applicant for insurance.

"It is of the utmost importance to the company to ascertain who is to be vested with the title and possession of the property sought to be insured.

"It would be a harsh and indefensible rule that required the underwriter, who had insured an individual on a stock of goods in a store, to continue the insurance after the insured had taken in two partners, and formed a firm wherein each partner was vested with an undivided one-third interest in the property covered by the policy, without having been afforded the opportunity to examine into the moral and business characters of two strangers to the original contract."

The undisputed evidence in the case shows that the possession of the property was changed without the consent of the defendant, or its knowledge until after the fire, and that the policy is void according to its own terms.

The judgment of the court is reversed and the action is dismissed.

McCULLOCH, C. J., (dissenting). Plaintiff testified that he informed the defendant by letter of the fact that he had rented the property to Cascio, and that thereafter the company accepted payment of premium notes without objections to the change of possession. The company is therefore estopped to claim a forfeiture on account of that change, and the policy should be treated as one on property owned by plaintiff in the possession of Cascio, his bailee. When personal property is insured in the possession of a bailee of the assured, a change of possession from one bailee to another of the same kind is not such a change in the "use, occupation or possession" as avoids the policy. *Smith* v. *Phoenix Ins. Co.*, 91 Cal. 323; *Farmers' Fire Ins. Co.* v. *Baker*, 94 Md. 545; *Thompson* v. *Phoenix Ins. Co.*, 136 U. S. 287.

The Indiana case relied on in the opinion of the majority was one where the *interest* of the assured in the property had been changed by the retirement of one partner from the firm. That presents an altogether different question from the one in this case. The Dewberry case (*Planters' Mut. Ins. Assoc.* v. *Dewberry,* 69 Ark. 295) was also different in that there was an entire change in the character of the occupancy from that of the owner as a dwelling place to that of a tenant. Here the change was only from one bailee to another.

It seems to me that the conclusion of the majority entirely ignores and fails to give any force to our statute which provides that "substantial compliance with the terms, conditions and warranties of such policy, upon the part of the assured, * * * shall be deemed sufficient and entitle the plaintiff to recover in any such action." Kirby's Dig., § 4375a.

I cannot imagine a state of case to which this statute would more fitly apply than to the present one where there has been merely a change of possession from one bailee to another, no increase of risk being shown. If this statute had been in force at the time the loss occurred in the Dewberry case, it should have changed the result in that case.

FRAUENTHAL, J., concurs in the dissent.

SOUDAN PLANTING COMPANY *v.* STEVENSON.

Opinion delivered April 18, 1910.

1. TENDER—KEEPING GOOD.—An undertaking to deliver so many bales of cotton on a certain date is not discharged by a tender of the required number of bales on the day specified if the party making the tender subsequently converted the bales to its own use. (Page 609.)
2. ARBITRATION—WHEN CONDITION OF RECOVERY.—Where a contract stipulated that if the parties failed to agree as to the amount of damages caused by its nonperformance they each should select an arbitrator, and the decision of such arbitrators should be final, the award of such arbitrators is a condition precedent, unless waived or prevented by one or both of the parties before an action under it can be brought for damages. (Page 610.)
3. SAME—WHEN CONDITION NOT WAIVED.—Where the parties to a contract agreed that the award of arbitrators should determine the dam-

ages for its breach, the necessity of procuring such award before suing for an alleged breach was not waived where plaintiff suggested to defendant that the question of damages should be taken up and settled, and defendant replied that there had been no damages incurred. (Page 611.)

4. RECOUPMENT—LIMITATION.—The right to recoup damages in an action *ex contractu* is not barred, though an independent action to enforce it would be barred, but survives as long as the plaintiff's right of action exists. (Page 612.)

5. CONTINUANCE—ALLOWING TIME FOR ARBITRATION.—Where the defendant in an action *ex contractu* is entitled to recoup whatever damages may be awarded by arbitrators to be selected by the parties, though his right to recover such damages in a separate action against the estate of the plaintiff's testator is barred, the cause will be suspended for a reasonable time to enable defendant to have the damages arbitrated. (Page 612.)

Appeal from Lee Chancery Court; *Edward D. Robertson*, Chancellor; reversed in part.

Lem Bank and *Norton & Hughes*, for appellant.

The tenders of cotton made in 1906 were sufficient, and interest should not be allowed. 34 Vt. 201; 39 Vt. 51. In making a tender of something other than money it is not necessary to keep it good. 12 Am. Dec. 696; 2 Kent, 508. In an action for purchase money the defendant may recoup for breaches of covenant. 134 Fed. 1. That defendant knew the timber contract was outstanding detracts nothing from the force of the covenants. 33 Ark. 503; 84 Ark. 415. When the agreement to arbitrate is collateral, resort may be had to the courts in the first instance. 137 U. S. 370; 70 N. W. 761.

H. F. Roleson, for appellee.

Defendant is estopped to dispute the tender to the amount of the cotton tendered. 40 N. W. 84; 27 N. W. 916; 61 Am. Dec. 141. There was no provision postponing the right of action until the finding of the arbitrators. 56 Cal. 307; 36 Am. Rep. 54; 50 N. W. 450; 9 Pet. 319; 34 Am. Dec. 74; 29 Am. Rep. 591; 100 Mass. 117; 19 Kan. 135.

BATTLE, J. J. E. Stevenson and Ebinezer Rodgers, as executors of H. P. Rodgers, deceased, instituted a suit in the Lee Chancery Court, against the Soudan Planting Company, and alleged in their complaint that their testator, H. P. Rodgers, on the first day of November, 1902, entered into a contract with

Lem Banks and one Henry Banks, since deceased, to sell to them certain lands in Lee County, known as the Soudan and Westwood plantations, and that they, in consideration thereof, agreed to deliver to H. P. Rodgers 3,500 bales of cotton, of an average weight of 500 pounds, in installments as follows: 116 bales on the 15th day of October, 116 bales on the 15th day of November, and 118 bales on the 15th day of December, of each year, beginning with the year 1903 and continuing until the 3,500 bales have been delivered; or, if the purchasers could not prepare the cotton for delivery by such dates because of the scarcity of pickers or from other unavoidable circumstances, then as soon thereafter as possible. They further alleged that the 3,500 bales of cotton were to be grown on the land sold, and delivered in the town of Marianna, in Lee County, in this State; that Lem and Henry Banks, being nonresidents of the State of Arkansas, after the contract of sale was entered into, organized the defendant corporation, the Soudan Planting Company, with a capital stock of $10,000, for the purpose of holding the title to the land and operating the plantation and the store connected therewith; that on the 30th day of January, 1903, their testator, H. P. Rodgers, executed a deed to the defendant, Soudan Planting Company, conveying to it the lands sold, and put it in possession of the same.

"Plaintiffs admitted that the deliveries were made for the first two years—1903 and 1904; but on the 15th day of October, 1905, it (appellant) offered to deliver to the plaintiffs 116 bales of the commonest and lowest grade of cotton it could purchase in the market at Marianna, Arkansas, and as a condition of such delivery required the plaintiffs to accept the same as an absolute compliance with their obligation to deliver the cotton mentioned in the contract; and, although the plaintiffs offered and agreed to take such proffered cotton at what it might amount to as a part performance of the contract of defendant, it refused to so surrender it, and so made no delivery at all. They further alleged that on the 15th day of November, 1905, the defendant again tendered a lot of the cheapest and lowest grade cotton it could purchase in the market at Marianna, which plaintiffs refused to accept, except for what it might amount to, and that the defendant permitted them to take it on such terms. And that on the 15th day of December, 1905, the defendant

again offered to deliver to the plaintiffs a lot of the commonest and cheapest cotton it could purchase in the market at Marianna, and that plaintiffs accepted the same upon condition that it was only to be a valid payment to the extent that it would comply with the defendant's contract. Plaintiffs allege that such cotton was worth one cent less per pound than the average cotton on the market at the time, and was not in full compliance with the contract of the defendant, and that the difference between the value of the two deliveries of November 15 and December 15, 1905, and the value of average cotton, would amount to the sum of eleven hundred and seventy ($1,170) dollars. Plaintiffs further state that for the year 1906 the defendant failed and refused to deliver the cotton provided for in the contract, and refused to pay the money value thereof. That the market value of the average grade of cotton in the Marianna market on the 15th day of October, 1906, was ten and fifteen-sixteenth cents, and that the market price for average cotton on the 15th day of November, 1906, was ten and nine-sixteenth cents, and that the average grade of cotton in said market on the 15th day of December, 1906, was worth ten and three-sixteenth cents per pound. That the value of said deliveries not made in 1906 amounted in all to the sum of twenty-four thousand five hundred and fifteen and fifty-six one-hundredths ($24,515.56) dollars; that plaintiffs should have interest on said sum and on the difference between the value of the cotton delivered November 15 and December 15, 1905, and that which should have been delivered."

Plaintiffs asked for judgment against the defendant for the $25,685.56, with interest on the various items thereof from the time the same were due respectively; and that the judgment be declared a lien on the lands.

The defendant answered, and denied the allegations of the complaint as to the cotton tendered by it, and alleged that the same was average cotton of the Marianna market at the time tendered; and denied the allegations as to value of average cotton of the Marianna market on October 15, 1906, on November 15, 1906, and on December 15, 1906.

"As matter of cross complaint, the defendant says that at the time of this purchase of the Soudan and Westwood plantations, the seller, H. P. Rodgers, represented that an outstand-

ing timber contract, granting G. A. Goerke the right to cut and remove timber from said land, contained a clause by which the said Goerke, upon notice, could be required within twelve months thereafter to take the timber from as much as 320 acres of land in any given year, and, failing, that his right to take timber from land as to which he had had notice should cease. The said seller further represented that this clause in said contract with G. A. Goerke would be available to the Soudan Planting Company, and by giving the notice it would carry out its plans for adding to the quantity of cleared land each year without being hampered by Goerke's rights in the timber. That it was the purpose of this defendant to largely increase the area of cleared land on the plantations, and that this clause was material. Thereafter it was found that said clause had, by mistake, been omitted from the contract with G. A. Goerke, and thereupon the seller of the plantations, H. P. Rodgers, and H. and L. Banks, for the Soudan Planting Company, entered into the following agreement:

" 'This agreement, between H. P. Rodgers and H. and L. Banks, acting for the Soudan Planting Company, and as themselves as prospective stockholders in said company,

" 'Witnesseth, That whereas heretofore H. P. Rodgers executed a contract of sale of his Soudan and Westwood places, in Lee County, Arkansas, containing about 6,000 acres, and at that time stated that the timber contract between him and G. A. Goerke contained a clause that allowed said Rodgers and his assigns to give notice and take land from said Goerke for the purpose of clearing it for cultivation, and upon inspection the said contract as written did not contain this clause. Now, then, in order that the purchasers may take said property in the same condition that it was represented to them to be by H. P. Rodgers, said Rodgers hereby agrees and obligates himself, his heirs and personal representatives, to at once take such necessary steps as are required to reform said contract with G. A. Goerke, so that said contract with Goerke, dated April 5, 1902, shall contain the following clause: It is expressly understood and agreed that by giving twelve months' notice to G. A. Goerke, or his assigns, H. P. Rodgers, or his assigns, may enter upon any lands embraced in this contract, not exceeding 320 acres during any one year, and cut out and deaden

the timber preparatory to cultivation. G. A. Goerke agrees for himself and his assigns that he will take the timber from the land above mentioned within the time of said twelve months, and, after the expiration of said twelve months, then H. P. Rodgers, or his assigns, may cut and deaden timber, and the right of G. A. Goerke and his assigns to the timber on that part of the land terminates.

"'H. P. Rodgers obligates himself to have said contract reformed so as to show the change above named within two years from this date. And, in case he should not have said contract reformed within that time, then said H. P. Rodgers agrees to pay to the Soudan Planting Company the amount of damage that said company may subsequently sustain by reason of not getting to clear said land on Westwood and Soudan places at the rate of 200 acres per year. If the president of the Soudan Planting Company and H. P. Rodgers cannot agree on the amount of said damage, then they shall each select a man who is disinterested to act as arbitrator, and the decision of these two men shall be final; but, if these two men cannot agree, they shall select a third disinterested party, and a decision of a majority of these arbitrators, towit, any two of them, shall be final, and H. P. Rodgers agrees to at once pay the amount of said damages assessed against him to the Soudan Planting Company.

"'H. P. Rodgers,
"'H. and L. Banks,
"'Per Lem Banks,
"'Soudan Planting Company,
"'Per Lem Banks.

"'This January 1, 1903.'"

The cross bill further alleges that H. P. Rodgers was not successful in his efforts to have said contract reformed (*Goerke* v. *Rodgers,* 75 Ark. 72), and hence became liable to defendant for such damages as it has sustained by being prevented from clearing as much as 200 acres every year for the years 1904, 1905, 1906, 1907 and 1908. That this defendant was desirous of taking in as much as 200 acres for each of said years, and had the labor on the plantations with which to do it after crops were laid by. That the right of G. A. Goerke to take timber expires December 31, 1908, and not until

after that time can this defendant begin the development and improvement of its said property, and by this hindrance defendant is damaged in the sum of ten thousand ($10,000) dollars, for which it prays judgment against the plaintiffs by way of counterclaim.

The plaintiffs answered the cross bill, admitting the contract of sale and purchase, and admitting the failure of H. P. Rodgers to have the Goerke contract reformed. Plaintiffs deny that the defendant has been prevented from clearing any lands that it would otherwise have cleared by reason of the failure to have said contract reformed, and they deny that the defendant has been damaged in any sum whatever. And, further answering the cross complaint, plaintiffs state that, under the terms of said contract between Rodgers and the Soudan Planting Company, it was agreed that, if the amount of damages could not be agreed upon, then the said Rodgers and the president of said Planting Company should each select a disinterested arbitrator, and that these two should select a third, and that their decision should be final and conclusive of the amount of said damages; that the plaintiffs have at all times been ready and willing to arbitrate said matter, but that there has never been any demand made upon them to arbitrate the same. And for further answer, the plaintiffs state the cause of action mentioned in the cross complaint does not arise out of the contract sued on herein, and is not connected with the subject of this action, and that the said counterclaim is based upon unliquidated damages.

The defendant, the Soudan Planting Company, filed an amendment to its cross complaint. In this amendment it sets up the covenants of warranty in the deed made to it by H. P. Rodgers, and for a breach of covenant it alleges the outstanding timber contract in Goerke. It alleges that the value of the timber sold Goerke by Rodgers was $30,000, which is three-tenths of the value of the entire property, and that defendant should recoup in the sum of $30,000.

As a further breach, it alleges that, by reason of the Goerke timber contract, it was never given the entire possession of the property purchased.

The plaintiffs answered the amendment to the cross complaint. In this answer they admit the warranty, but say that

the Soudan Planting Company and H. and L. Banks, when they bought the property, knew that the timber contract was outstanding.

"Plaintiffs further state that, after the deed was executed to the Soudan Planting Company, H. P. Rodgers assigned and transferred to it the notes received from G. A. Goerke under his contract, and that the Soudan Planting Company subsequently collected them, and that for this reason the Soudan Planting Company is estopped to sue upon the warranty. Plaintiffs deny that there is a breach of warranty in any respect, and for further answer they say that the deed of warranty was executed in January, 1903, and if there was a breach of the covenants that the right of action therefor is barred by the five-year statute of limitations."

The agreement to sell lands and other property and for other purposes, entered into by and between H. P. Rodgers, of the first part, and Henry Banks and Lem Banks, of the second part, on the first day of November, 1902, was adduced and read as evidence in the hearing of this cause. Among other things it was stipulated in the agreement as follows: "As there are timber contracts in force on the lands, it is understood and agreed that the timber cut and banked off sections 3 and 4, 2 N., 4 E., up to January 1, 1903, and the note for timber due January 1, 1903, are to go to the party of the first part, and all other timber, and the remaining notes, are to go to the parties of the second part, and the first party is duly to assign said notes; the notes assigned being three (3), and due January 1, 1904, 1905 and 1906, and each for one thousand and sixty ($1,060) dollars."

The deed executed by Rodgers, the testator, on the 30th day of January, 1903, to the defendant, Soudan Planting Company, in pursuance of his agreement to sell, contains the following covenants with the defendant: "And the said H. P. Rodgers and his wife, Alice E. Rodgers, do jointly and severally covenant for themselves, their representatives, with the said Soudan Planting Company, its successors and assigns, that H. P. Rodgers is lawfully seized in fee simple of the land hereinbefore described; that said land is free from all incumbrances whatsoever, except State and county taxes for the year 1902, which are assumed by the party of the second part; that they, the

parties of the first part, have a good right to sell and convey said land; and that they will, and their executors and administrators shall, forever warrant and defend the title thereto to the said Soudan Planting Company, its successors and assigns, against all lawful claims whatsover."

The grantor, H. P. Rodgers, retained a lien on the lands to secure the delivery of the cotton which the Soudan Planting Company agreed to deliver in payment for the same.

A stipulation of the parties as to the facts was read as evidence in the hearing of this cause, which in part is as follows: "In this case it is agreed that the contract between the Soudan Planting Company and H. P. Rodgers regarding the timber contract with G. A. Goerke was entered into on the 1st day of January, 1903, a few days before the execution of a deed from H. P. Rodgers to the Soudan Planting Company, which was on the — day of January, 1903. It is further agreed that Henry Banks and Lem Banks, the officers of the Soudan Planting Company, knew and were advised of the said timber contract at the time of the execution of the deed from H. P. Rodgers to the Soudan Planting Company, and the said deed was prepared by the said Lem Banks, at the suggestion of H. P. Rodgers, and submitted to H. P. Rodgers, who made some changes, after which it was recopied, and it was prepared by Lem Banks, as the attorney of H. P. Rodgers. It is further agreed that, immediately after the execution of the deed from H. P. Rodgers to the Soudan Planting Company, he transferred, without further considerations than those mentioned in said deed, the notes of Goerke and the Cottonwood Lumber Company for the purchase of timber of said land, and the Soudan Planting Company accepted the same, and afterwards collected all of said notes as they became due."

H. P. Rodgers died in June, 1905, leaving a last will and testament. The plaintiffs are his executors. Henry Banks has also departed this life.

The 350 bales of cotton due and owing H. P. Rodgers on the sale of lands for each of the years 1903 and 1904 have been paid, and the cotton due and payable on the 15th days of November and December of 1905, have been paid to his executors. The 116 bales due on the 15th day of October, 1905, and the 350 bales due in the year 1906 have not been paid. Cotton was

tendered to the executors of Rodgers as the amount due on the 15th of October and in the year 1906, but they refused to accept it as such, but offered to receive it as so much paid. The cotton tendered, except a small part, was of the average cotton sold in the Marianna market. After the refusal to accept it the defendant sold it and converted the proceeds to its own use. No other tender was made.

No effort was made to secure an arbitration of the damages which the Soudan Planting Company sustained by reason of the failure of Rodgers to have the contract between him and G. A. Goerke reformed as he agreed to do. Lem Banks, the president of the Planting Company, testified as follows:

"I cannot say that a distinct, specific offer of arbitration has been made, but I can say, however, that to either the executors or their counsel (it was suggested that) the question of damages under this bond should be taken up and settled, and the reply was that they did not think there had been any damage. After that I considered that there was no occasion for other settlement.'

A decree in this cause was rendered on the 28th day of January, 1909. By this decree the plaintiff's suit was dismissed as to Lem Banks.

"The court found that the defendant, the Soudan Planting Company, was required to deliver to the plaintiffs the amount of 350 bales of cotton per annum; that on the 15th day of October, 1905, the 15th day of October, 1906, the 15th day of November, 1906, and the 15th day of December, 1906, its offers of deliveries of cotton were not in compliance and conformity with the same, and were not absolute and unconditional tenders. The court found further that the 116 bales conditionally tendered on the 15th day of October, 1905, were of the value of six thousand and seventeen ($6,017) dollars, and were sufficient in value to comply with the contract; and that on the 15th day of October, 1906, the 116 bales of cotton then due, and which were conditionally offered, were of the value of sixty-two hundred and sixty-four ($6,264) dollars; that on the 15th day of November, 1906, a total of 118 bales of cotton which were conditionally offered—six thousand and eighty-eight and eighty-hundredths ($6,088.80) dollars, that on the 15th day of December, 1906, the value of the 116 bales of cotton condition-

ally offered, and that should have been delivered, was six thousand and sixty-one ($6,061) dollars.

"The court further found that the offers of cotton were not unconditional, and were not legal tenders, and that the plaintiffs are entitled to interest at the rate of six per cent. (6 per cent.) per annum upon each of the amounts aforesaid. The court further found that the agreement between H. P. Rodgers and the Soudan Planting Company with regard to the damages for failing to reform the Goerke contract contemplates that such matter should be submitted to arbitration, and that there has been no offer to arbitrate made by the Soudan Planting Company, and it is therefore decreed that the cross complaint to such items be (dismissed). The court further found that, by reason of the acceptance by the Soudan Planting Company of payment of the Goerke notes given for the timber, it is estopped to sue upon the warranty, and further found that the right of action upon the warranty is barred by the five years statute of limitations."

And the court rendered a decree in accordance with its findings. The defendant appealed.

Appellant complains because the court found that it should pay to plaintiffs the value of the cotton tendered. They were entitled to recover the amount of cotton due them of the value of the average cotton in the Marianna market at the time it should have been delivered. *Soudan Planting Company* v. *Stevenson,* 83 Ark. 163. The defendant admitted that the cotton tendered was of such value. The evidence as to the market value of such cotton in Marianna at the time it was due is conflicting. According to the weight of it, as we understand it, the amount of the cotton due appellees, according to its market value at such time and place, was worth fully as much as the judgment they recovered for the same. The tender made was no bar to such judgment; for it (appellant) sold the cotton, and converted the proceeds to its own use and made no other tender, and the tender made was no longer available and ceased to be of any effect.

Appellant, in its cross complaint, sought to recover damages incurred by the failure of Rodgers to have the Goerke contract reformed according to agreement. But was it not precluded, by its agreement, from suing for them before an offer or effort

to arbitrate was made? In *Hamilton* v. *Home Insurance Co.*, 137 U. S. 370, 385, Mr. Justice GRAY, speaking for the court, said: "A provision, in a contract for the payment of money upon a contingency, that the amount to be paid shall be submitted to arbitrators, whose award shall be final as to that amount but shall not determine the general question of liability, is undoubtedly valid. If the contract further provides that no action upon it shall be maintained until after such an award, then, as was adjudged in *Hamilton* v. *Liverpool, London & Globe Ins. Co.* (136 U. S. 242), above cited, and in many cases therein referred to, the award is a condition precedent to the right of action. But when no such condition is expressed in the contract, or necessarily to be implied from its terms, it is equally well settled that the agreement for submitting the amount to arbitration is collateral and independent; and that a breach of this agreement, while it will support a separate action, cannot be pleaded in bar to an action on the principal contract." See authorities cited.

In the contract before us it is stipulated as follows: "H. P. Rodgers obligates himself to have said contract reformed so as to show the change above named within two years from this date. And, in case he should not have said contract reformed within that time, then said H. P. Rodgers agrees to pay to the Soudan Planting Company the amount of damage that said company may subsequently sustain by reason of not getting to clear said land on Westwood and Soudan places at the rate of 200 acres per year. If the president of the Soudan Planting Company and H. P. Rodgers cannot agree on the amount of said damage, then they shall each select a man who is disinterested to act as arbitrator, and the decision of these two men shall be final; but if these two men cannot agree they shall select a third disinterested party, and a decision of a majority of these arbitrators, towit, any two of them, shall be final, and H. P. Rodgers agrees to at once pay the amount of said damages assessed against him to the Soudan Planting Company."

Under this contract it is the absolute duty of the parties to select arbitrators when they disagree as to the damages mentioned. The arbitrators, when selected, determine only one question, and that is the amount of the damages, and their decision is final. Rodgers agreed to carry it into effect by pay-

ing the damages thereby assessed against him at once. Such an award, when rendered, is the limit of his liability for such damages, and is a condition precedent which must be rendered, unless waived or prevented by one or both of the parties, before an action can be brought against him for the damages. *Holmes* v. *Richet,* 56 Cal. 307.

Appellant has made no offer or effort to arbitrate the damages in question. The suggestion to the appellees that the question of damages should be taken up and settled was no offer to arbitrate, and the reply that they did not think that there has been any damages was not a refusal to arbitrate. The arbitration was agreed upon for the purpose of settling disagreements of the parties as to such damages.

In appellant's cross complaint it is alleged that H. P. Rodgers executed a deed to the Soudan Planting Company on the 30th day of January, 1903, and thereby conveyed to it (the grantee) the lands mentioned in appellee's complaint in this suit, and known as the Westwood and Soudan plantations, and covenanted with it (appellant) that the lands were free from all incumbrances, and alleged that the same were incumbered by a written contract made and entered into by H. P. Rodgers and G. A. Goerke on the fifth day of April, 1902, in and by which Rodgers sold and conveyed to Goerke the principal part of the timber on the lands, and allowed him until the 31st day of December, 1906, to cut and remove the same, and granted to him certain roadways for that purpose. The facts are: In the contract made on the second day of November, 1902, by Rodgers, of the first part, and H. and L. Banks, who represented the Soudan Planting Company, of the second part, the party of the first part agreed to sell the lands which afterwards, to-wit, on the 30th day of January, 1903, were conveyed by him to the said company, and the parties referred to the contract with Goerke for the sale of timber and stipulated as follows: "As there are timber contracts in force on said lands, it is understood and agreed that the timber cut and banked off sections three and four, 2 N., 4 E., up to January 1, 1903, is to go to the party of the first part (Rodgers), and all other timber and the remaining notes are to go to the party of the second part, and the first party is duly to assign said notes; the notes assigned being three, and due January 1, 1904, 1905 and 1906,

and each for $1,060." After this, on the first day of January, 1903, the agreement to have the contract with Goerke reformed, and to pay damages upon failure to do so, was made. After the deed to the Soudan Planting Company was executed, Rodgers transferred to the company, without further considerations than those mentioned in the deed, the notes of Goerke for the purchase of the timber on the land, and the company accepted them and afterwards collected them as they became due. All these facts prove that the timber notes of Goerke were assigned to the company, and the agreement to reform the contract with Goerke was made and accepted as an entire satisfaction of the warranty deed, so far as it was affected by the timber contract. What other purpose could they subserve? We see none. Having such purpose and effect, the timber contract of Goerke was not an incumbrance, within the meaning of the covenants in the deed. The company is not entitled to a double compensation on account of the same.

The time for probating claims against the estate of Rodgers has passed. Unless the Soudan Planting Company can recoup the damages sustained by it on account of the failure to reform the contract with Goerke against the amount the appellees are entitled to recover, it may lose the same. To prevent such consequences, so much of the decree of the chancery court as dismissed that part of appellant's cross complaint that is based on a claim for damages on account of the failure to reform the contract with Goerke is set aside, and the proceedings in the cause are suspended for a reasonable time to be fixed by the court for the arbitration of such damages according to the agreement of the parties and the law in such cases, or until the appellees shall refuse or fail to do so within such reasonable time, in which event the court shall ascertain the damages, if any, in the manner prescribed by law. (As to the right to recoup these damages against the plaintiff's claim, although the right to recover them in a separate action is barred, see *Williams* v. *Neeley*, 134 Fed. 1, 12; *Beecher* v. *Baldwin* (Conn.), 12 Atl. 401, 404). In other respects the decree is affirmed. The cause is remanded with directions to the court to recoup such damages as the appellant may recover, as aforesaid, against the payment of appellees, and for proceedings consistent with this opinion.

A. R. BOWDRE & COMPANY v. PITTS.

Opinion delivered April 25, 1910.

1. HOMESTEAD—WIFE'S JOINDER IN HUSBAND'S DEED.—Where a married woman released her dower and homestead interest in her husband's conveyance of his homestead, and acknowledged same, though she was not named in the granting clause of the deed, she will be held to have joined in the execution of such deed, within the requirements of Kirby's Digest, § 3901. *Gantt* v. *Hildreth,* 90 Ark. 113, followed. (Page 614.)
2. LIMITATION OF ACTIONS—MORTGAGES—SUSPENSION BY DEATH.—Upon the death of the maker of a note and mortgage before the statutory period of limitation of five years has expired, that statute ceases to run, and the statute of nonclaims does not commence to run until letters of administration are issued on the estate. (Page 614.)
3. SAME—MORTGAGE—ADVERSE POSSESSION.—A suit to foreclose a mortgage executed by a deceased mortgagor is not barred by reason of the possession of the land by the widow and heirs of the mortgagor for more than seven years, if there is no showing that their possession was adverse to the mortgagee. (Page 614.)
4. SAME—PART PAYMENT.—A payment on a debt secured by a mortgage of land, made by the widow of the mortgagor in possession thereof, is an acknowledgment of holding under the mortgage, not in hostility to it. (Page 615.)

Appeal from Conway Chancery Court; *Jeremiah G. Wallace,* Chancellor; reversed.

Sellers & Sellers, for appellant.

Death of the maker of a note stops the statute of limitation until an administrator is appointed. 73 Ark. 45. There is no adverse possession shown. 56 Ark. 485; 70 Ark. 53; 43 Ark. 469; *Id.* 504; 56 Ark. Curative acts are not violative of the rights of heirs. 44 Ark. 365.

McCULLOCH, C. J. Andy Robertson owned a tract of land in Conway County, Arkansas, which constituted his homestead, and on March 24, 1899, he executed to Riley Parker a mortgage on said land to secure the payment of a promissory note of the same date, executed to Parker for $215.10, due November 1, 1899, with interest at the rate of ten per cent. per annum from date until paid. Mollie Robertson, wife of the said Andy, joined in the execution of said mortgage, and acknowledged same.

Andy Robertson died intestate on June 3, 1900, leaving surviving him his widow, the said Mollie Robertson, and several children, all of whom were under minority save one. There has been no administration on his estate. Mollie Robertson died on August 27, 1907.

Parker assigned to appellant, A. R. Bowdre & Company (a domestic corporation), the note secured by said mortgage, and in March, 1908, appellant instituted this action in the chancery court of Conway County against said children and heirs at law of Andy Robertson, deceased, to foreclose said mortgage. There is a credit of $9 on the note, which was paid by Andy Robertson to Parker on March 28, 1899, and also a credit of $25, which was paid by Mollie Robertson to appellant on April 17, 1903. Nothing else has been paid on the note.

A guardian was appointed by the court to defend for the infant defendants, and an answer was duly filed, in which it was denied that Mollie Robertson joined in the execution of said mortgage, or acknowledged same. The statute of limitation was also pleaded in bar of appellant's right to foreclose the mortgage. The chancery court sustained the plea of limitation, and dismissed the complaint for want of equity.

The wife, Mollie Robertson, joined in the execution of the mortgage, and acknowledged the execution of the same, in the same manner and form as was done by the wife in the case of *Gantt* v. *Hildreth,* 90 Ark. 113, and the decision in that case rules this on that point.

The statute provides that "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." (Act March 25, 1889, § 1; Kirby's Dig., § 5399). The right of action in the case accrued November 1, 1899, and would have been barred November 1, 1904, but for the death of the mortgage debtor on June 3, 1900. The general statute of limitation then ceased to run against the debt and was succeeded by the two-year statute of nonclaims, which did not begin to run before administration on the estate of the decedent. There has been no administration, so the statute of nonclaims has not commenced running. *Ross* v. *Frick Co.,* 73 Ark. 45; *McGill* v. *Hughes,* 84 Ark. 238.

The general statute of limitation of seven years did not bar the debt after the death of the debtor, for the reason that there is no evidence that the occupancy of the land by the widow and heirs was adverse to the rights of the mortgagee. The payment made by the widow within that period, while occupying the land, operated as an acknowledgment that the holding was not hostile to the rights of appellant. *Goodman* v. *Pareira,* 70 Ark. 49.

The action to foreclose the mortgage was therefore not barred, and the chancellor erred in dismissing the complaint. Reversed and remanded with directions to enter a decree foreclosing the mortgage.

McDILL v. MEYER.

Opinion delivered May 2, 1910.

1. DEEDS—REPUGNANCY BETWEEN GRANTING AND HABENDUM CLAUSES.—There is no repugnancy between the granting and habendum clauses in a deed wherein the granting clause contained no words of inheritance and the habendum clause provided that if the grantee died without children the title to the property should revert to the grantor, but that otherwise it should go to the grantee's children. (Page 617.)
2. SAME—ESTATE CONVEYED.—Kirby's Digest, § 733, providing that "all deeds shall be construed to convey a complete estate of inheritance in fee simple, unless expressly limited by appropriate words in such deed," has no application where appropriate words are used in the deed expressly limiting the grant. (Page 617.)
3. SAME—CONSTRUCTION TO GIVE EFFECT.—In the construction of deeds it is the duty of the courts to harmonize the different clauses so as to give effect, if possible, to the language of each clause, and therefore the habendum clause will be rejected only where there is an irreconcilable repugnance between it and the granting clause. (Page 618.)
4. SAME—FUNCTION OF HABENDUM CLAUSE.—While the habendum clause in a deed is void if it is repugnant to the estate granted, yet where no estate is mentioned in the granting clause, then the habendum becomes efficient to declare the grantor's intention, and will rebut any implication which would otherwise arise from the omission in this respect in the granting clause. (Page 618.)

Appeal from Jefferson Circuit Court; *Antonio B. Greec,* Judge; reversed.

Caldwell & Brockman and *Carmichael, Brooks & Powers,* for appellant.

The deed created an estate tail at common law. 67 Ark. 517; 9 N. J. L. 10; Tied. Real Prop., § 39; Kent, Com., vol. 4, pp. 11, 12, 13, 14; 51 Ark. 61, 71; 44 Ark. 458; 58 Ark. 303. Where an estate was granted to "A for life, remainder to the heirs of his body," the rule would not operate; but if granted to "A for life, remainder to his heirs," the rule would operate, and A would take a fee simple. 58 Ark. 303.

Crawford & Hooker, for appellee.

A grant should be taken most strongly against him who made it. 15 Ark. 695. The deed conveys a fee simple. 82 Ark. 209. When an estate is once granted, no subsequent clause, even in the same deed, can nullify it. 83 Me. 562; 11 Bac. Ab. 665; Shep. Touch. 79; 2 Ves. Sen. 74; 55 Wis. 96; 122 S. W. 1003; 78 Ark. 230; 15 Ark. 695; 60 Ia. 442. The word "heirs" is not necessary to create a fee simple. Kirby's Dig., § 733; 58 Ark. 309. Deeds must be construed according to their legal effect, and often against the clear intention of the grantor. 82 Ark. 213; 81 Ark. 480; 58 Ark. 311; 2 Fearne on Rem. 216-220.

McCULLOCH, C. J. Appellants sued to recover possession of a tract of land in Jefferson County, Arkansas, claiming title thereto under the following deed, they being the surviving children of Matthew F. McDill, deceased:

"Know all men by these presents that I, Cornelia F. McDonald, of the county of Lincoln, State of Arkansas, have this day bargained, given, aliened and conveyed, and for and in consideration of the sum of one dollar ($1) cash in hand paid, the receipt of which is hereby acknowledged, and the further consideration of my love and affection for him as my son, do by these presents bargain, sell, alien, convey and give to Matthew F. McDill the following tract or parcel of land described as follows, towit: (Here follows description of the land).

"To have and to hold to the said Matthew F. McDill, his heirs, etc., under the following restrictions and reservations, towit:

"First. The use of the gin house which is situated on the land herein granted is reserved to be used in common by my-

self and by all my children in common with the said Matthew F. McDill, and said gin house shall be used by me for common ginning for persons in the neighborhood whenever I shall elect to do so, the profits thereof coming to me, or to such person or persons as I shall designate, and the repairs done as needed on said gin house shall be borne by myself and the members of my family using the same and by the said Matthew F. McDill in fair and just proportion.

"Second. In case the said Matthew F. McDill shall die without children lawfully begotten, then the title to the property herein granted shall revert to me, the said C. F. McDonald, to my heirs, etc.; otherwise to his lawful children.

"Third. Together with the land herein granted is also granted, given and conveyed by me, the said C. F. McDonald, to him, the said Matthew F. McDill, the rights and privileges to cut and have from any other lands now belonging to me all such timber as he may need for buildings, fences or firewood purposes on the land herein granted."

Appellees contend that the deed in question conveyed title in fee simple to Matthew F. McDill, and they assert title in themselves under a deed executed by him. The circuit court decided in favor of appellees. Did title pass in fee simple under said deed to McDill?

It is insisted by appellee that, by the granting clause of the deed, the conveyance was in fee simple, and that the reservations and limitations contained in the habendum were repugnant to the grant, and therefore void. The case of *Carl Lee* v. *Ellsberry*, 82 Ark. 209, is relied on to sustain that contention. In that case the language of the granting clause of the deed was "convey, sell, give and bequeath to said Georgina Ellsberry, and unto her heirs and assigns forever, the following lands." The court held that these words constituted a grant in fee simple, and that the repugnant limitation in the habendum was void. In the present case the granting clause of the deed contains no express words of grant in fee simple. No words of inheritance were employed, and the conveyance was not expressly stated to be in fee simple.

At common law, a fee could not by deed be granted without words of inheritance; but, by force of our statute (Kirby's Dig., § 733), "all deeds shall be construed to convey a com-

plete estate of inheritance in fee simple, unless expressly limited by appropriate words in such deed." This statute does not, however, apply where appropriate words are used in the deed expressly limiting the grant. The habendum is the appropriate place in the deed for such limitation, but it may appear anywhere in the deed. It is only where limitations or reservations in the habendum or subsequent parts of a deed are repugnant to the granting clause that they are held to be void. *Fletcher* v. *Lyon,* 93 Ark. 5; *Riggin* v. *Love,* 72 Ill. 553. The office of the habendum clause of a deed is to explain or define the extent of the grant, and is rejected only where there is a clear and irreconcilable repugnance between the estate granted and that limited in the habendum. 3 Washburn on Real Property (6 ed.), § § 1258, 1260. In the construction of deeds it is the duty of a court to harmonize the different clauses so as to give effect, if possible, to the language of each clause. *Whetstone* v. *Hunt,* 78 Ark. 230.

Mr. Washburn gives the following illustration of a qualification of the words of grant by the habendum without there being such repugnancy as to render the limitation void: "A deed to A and his heirs of lands, to have and to hold (habendum) to the heirs of his body, limits and qualifies the estate otherwise a fee-simple, and reduces it to an estate tail, defining in effect in the second clause what was meant by 'heirs' in the first." 1 Washburn, Real Property (6 ed.), § 194.

Riggin v. *Love, supra,* is precisely in point, and it appears therefrom that there is a statute in Illinois, substantially the same as ours, declaring that "all deeds will be construed to convey an estate in fee simple unless expressly limited by appropriate words in the deed." The court, in construing a deed similar to the one now in suit, said: "We concede that the habendum cannot perform the office of divesting the estate already vested by the deed, and that it is void if it be repugnant to the estate granted. But where no estate is mentioned in the granting clause, then the habendum becomes efficient to declare the intention, and it will rebut any implication which would otherwise arise from the omission in this respect in the granting clause. 4 Kent's Com. (8 ed.) 523; 2 Washb. on Real Estate (2 ed.) 689. The statute to which reference is made excepts, by its terms, cases in which a less estate than a fee is limited by express

words; and, since it does not enjoin that this limitation shall only appear in the granting clause, it is obviously unimportant to the present question. The granting clause in this deed merely describes the property conveyed, and does not pretend to define the nature or character of the estate granted. If it were followed by no language assuming to supply what is thus omitted, it would result, by legal implication, under the statute relating to conveyances, that the estate conveyed was a fee; but the habendum follows for the express purpose of describing what estate in the property is conveyed. It does not contradict the language of the granting clause, but simply supplies what is omitted therefrom, and removes all necessity for resorting to implication to ascertain the intention of the parties."

The language of the deed does not bring it within the rule in Shelley's case, so as to convey an estate in fee simple to Matthew F. McDill. He took only an estate for life. Nor can the third clause of the deed, granting the privilege of cutting timber on any other lands owned by the grantor, be construed to enlarge the estate granted in the land.

It is unnecessary for us to decide whether the limitation in the second clause of the habendum created an estate tail at common law which, by force of our statute, was effective as conveying a life estate with remainder over in fee simple to the "persons to whom the estate tail would first pass according to the course of the common law;" or whether the deed conveyed a contingent remainder to the children of Matthew F. McDill who survived at the time of his death. The result is the same. For in either event, on the death of Matthew F. McDill, title in fee simple vested in his children, who are the plaintiffs in this action.

We are therefore of the opinion that the title to the land is in appellants, and that the circuit court erred in deciding otherwise. The judgment is therefore reversed, and the cause remanded with directions to proceed in accordance with the law herein announced.

APPENDIX

I.

OPINIONS NOT REPORTED.

Bush *v.* Wheeler; appeal from Garland Chancery Court; Alphonso Curl, Chancellor; affirmed, February 28, 1910; *per* Battle, J.

Lewallen *v.* Gurdon & F. S. Ry. Co.; appeal from Pike Circuit Court; James S. Steel, Judge; affirmed, February 14, 1910; *per* McCulloch, C. J.

Richards *v.* Sutter; appeal from Pulaski Chancery Court; James H. Harrod, Special Chancellor; affirmed, February 21, 1910; *per* Wood, J.

Trigg *v.* Trigg; appeal from Jefferson Chancery Court; John M. Elliott, Chancellor; affirmed, March 28, 1910; *per* Battle, J.

Vaughan *v.* Calloway; appeal from Ouachita Chancery Court; J. M. Barker, Chancellor; affirmed, March 28, 1910; *per* McCulloch, C. J.

Jones *v.* Southern Cooperage Co.; appeal from Lawrence Circuit Court, Eastern District; Charles Coffin, Judge; affirmed, April 11, 1910; *per* Wood, J.

McKnight *v.* Witherington; appeal from Calhoun Chancery Court; J. M. Barker, Chancellor; affirmed, April 11, 1910; *per* Wood, J.

Wilcox *v.* Hebert; appeal from Sebastian Circuit Court, Fort Smith District; Daniel Hon, Judge; affirmed, March 28, 1910; *per* McCulloch, C. J.

Mammoth Vein Coal Co. *v.* Johnson; appeal from Sebastian Circuit Court; Daniel Hon, Judge; affirmed, April 25, 1910; *per* Battle, J.

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CASES DISPOSED OF ORALLY.

James Land *v.* State; Cleveland Circuit Court; H. W. Wells, Judge; affirmed for noncompliance with rule 9, February 28, 1910; *per curiam.*

Chicago, Rock Island & Pacific Railway Company *v.* James S. Hollingsworth; Calhoun Circuit Court; George W. Hays, Judge; settled and appeal dismissed, March 7, 1910; *per curiam.*

Dixon Sloan *v.* J. T. Daniel; Bradley Circuit Court; Henry W. Wells, Judge; appeal dismissed for noncompliance with rule 9, March 21, 1910; *per curiam.*

Arkansas Central Railroad Company *v.* J. B. Branch, as next friend of Will Workman; Franklin Circuit Court, Charleston District; Jeptha H. Evans, Judge; judgment rendered in accordance with stipulations filed, March 28, 1910; *per curiam.*

Henry Brown *v.* State; Sebastian Circuit Court; Daniel Hon, Judge; affirmed on motion of Attorney General, April 4, 1910; *per curiam.*

Charles Stanfield *et al. v.* S. J. Bell; Lincoln Chancery Court; John M. Elliott, Chancellor; appeal dismissed on appellants' motion, April 11, 1910; *per curiam.*

W. B. Otto & Co. *v.* J. G. Richardson *et al.;* Lawrence Circuit Court; Charles Coffin, Judge; settled and appeal dismissed by consent, April 11, 1910; *per curiam.*

Irene B. Rider *et al. v.* J. S. Leonard, administrator; Garland Chancery Court; Alphonso Curl, Chancellor; appeal dismissed for noncompliance with rule 9, April 18, 1910; *per curiam.*

Texarkana Water Corporation *v.* L. A. Byrne; Miller Chancery Court; James D. Shaver, Chancellor; apeal dismissed on appellant's motion, April 18, 1910; *per curiam.*

Chicago, Rock Island & Pacific Railway Company *v.* W. D. Perry; Saline Circuit Court; W. H. Evans, Judge; settled and appeal dismissed on appellant's motion, April 25, 1910; *per curiam.*

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